

FOUCAULT'S PERHAPS: MADNESS, SUFFERING AND THE INTERRUPTION OF LEGAL PERSONALITY IN FOUCAULT, SUPIOT AND HEGEL

Johan van der Walt*

Abstract

In his work *Homo Juridicus*, Alain Supiot considers the construction of legal personality by force and virtue of law a precondition for human liberty. Michel Foucault views this same construction of legal personality – the construction of the subject through strategies of power, he calls it – as a "construction" of liberty that is considerably less free than it is made out to be by the Enlightenment law reform projects proposed by Cesare Beccaria's and other prominent 18th century law reformers. Foucault's scepticism vis-à-vis Beccaria and others evidently also implies a critical stance vis-à-vis contemporary humanist understandings of law such as Supiot's. This paper will endeavour to explain what is at stake in the difference between these very different conceptions of legal personality by relating it to the problematics of subjectivity that came to the fore in the thinking of Hegel and the German Idealists.

I. Introduction

According to Alain Supiot, human life is conditioned by two births. The first birth concerns the commencement of physical or biological human life, but this birth, claims Supiot, does not yet bring into existence a complete human being. Complete human existence only begins after the second birth – the birth into law that starts with the subjection of the physical and natural body of the human individual to the laws of language. The infant – the one without language – becomes human by acquiring language, and language is acquired through subjection to the laws of the language of the mother. The mother, claims Supiot, is therefore the first and most formidable legislator that compels the infant to replace or supplement its exclusively biological existence for the sake of entering human existence (Supiot 2005: vii-viii, 7 – 8).

The acquisition of language is but the first step of the entry into the law-conditioned existence that completes the human being. According to Supiot, the human being becomes a person, and thus a human being in the full sense of the word, through the recognition and safeguarding of the person that the law affords every human individual. In other words, the human individual becomes fully human by virtue of legal rules and enforceable interdicts that recognize and safeguard the person. For Supiot, the human person is therefore essentially a *legal person*, an instantiation of *homo juridicus*. Law conditions and completes the human status of the human individual.

Supiot's legal anthropology is unhistorical. He does not ask questions about the epochal development of law that traversed many phases before something like a general – let alone "universal" – recognition of legal personality became a plausible notion, albeit a plausible notion burdened by many inconsistencies and contradictions. The awareness that all major systems of law have for millennia only recognized the human status of some human beings and for all practical purposes continue to do so today (see Gündoğdu 2015) does not seem

to bother Supiot's conception of the human person as essentially an instance of *homo juridicus*.

Michel Foucault proposes a very different view of *homo juridicus*. Foucault is well-known for unmasking the humanist notion of "the human" as a contingent historical construction. Showing up the historical contingency of all humanistic conceptions of human existence is the centre-piece of his scholarly legacy. He not only pointed out the "recentness" of the claim that law recognizes the human person as normatively entitled to universally valid standards of legal protection (*on peut être sûr que l'homme [européen] ... est une invention récente* – Foucault 1966: 398). He also questioned the substance of this claim fundamentally, hence his dismissal of this claim with a supercilious "perhaps." The legal reforms of the eighteenth century were widely considered to render the law more human, observed Foucault. Perhaps they also did that, he conceded in passing. But their real aim, he stressed, was very definitely to pursue a new strategy. Here is the key statement from *Surveiller et punir* at issue here:

The attenuation of the severity of punishment in the course of the last centuries is a phenomenon that is well known among historians of law. But it has for a long time predominantly been taken as a quantitative phenomenon: "less cruelty, less suffering, more moderation, more respect, more humanity." In fact, these modifications are accompanied by a shift in the very goal of the penal process. Diminishing of its intensity? Perhaps [*Peut-être*]. Change of goal, certainly [*à coup sûr*]. (Foucault 1975: 23 – 24, my translation)

This essay engages with the dismissive "perhaps" that Foucault inserted into this passage (*pp* for "perhaps passage" from now on). It is important to note the tenor and status of this brief *perhaps*, this *peut-être* that also in the French text stands isolated between sentences. It comes across as a brief interjection to which Foucault paid no or little attention. This *perhaps*, wotedly or not, is nevertheless a pivotal point on which a deep enigma in Foucault's can be argued to turn. It is also the critical point where Foucault's and Supiot's very different readings of *homo juridicus* take leave of one another. But they take leave of one another, I shall argue, only to sustain one another. Supiot and Foucault evidently put forward two contradicting conceptions of *homo juridicus*. One should nevertheless not "choose" between them, because choosing the one *homo juridicus* at the expense of the other necessarily destroys the precondition that sustains the "chosen" one.

Taken together, Foucault's and Supiot's respective conceptions of the legal conditions of personhood underline the irreducible two-sidedness of the legal person and the split on which this two-sidedness pivots. This, then, is the angle that this essay takes on the "interruption of legal personality" interrogated by the essays in this volume. The "interruption of the legal person," I shall argue, concerns the constitutive split between two *homines juridici* that precariously parade as one *homo juridicus*. The interminable precariousness of this parade, I shall also argue, is the function of the doubled or twofold contingency that results from its double-sidedness. I shall explain this twofold contingency of *homo juridicus* with recourse to the "perhaps" in *pp* in four sections. Section II begins by construing this perhaps as a "double-sided perhaps". Section III turns to a comparison of Supiot's and Foucault's respective conceptions of *homo juridicus* for purposes of marking the coordinates of an interrupted legal person. Section IV ties the "interruption of the legal person" to the "double-sided perhaps" expounded in section II. Section V relates the "interruption of the legal person" to the interruption of subjectivity already contemplated by

Hegel. Section VI concludes the argument by underlining the inevitability of the interruption of the legal person and the subject, and stresses the need to sustain both *homines juridici* that step out of this interruption, however out of step they are destined to remain. Their parade is not a charade. It is nothing less than the constitutive concern of the politics of personhood.

II. Foucault's double-sided perhaps

The supercilious character of the “perhaps” in *pp* can hardly be missed. It quite evidently communicates Foucault's view that it is not even necessary to interrogate the Enlightenment ideals of law and universal human rights further. One would nevertheless miss something significant about *pp* were one to reduce it to the element of superciliousness that may well be part of it. One would miss the way in which the “perhaps” in *pp* affects and even unsettles the “certainly” or “*sûr*” that follows in its wake. And once one realises that the “perhaps” in *pp* unsettles and even undoes the “certainly” that follows so short on its heels, one also begins to realise that the “perhaps” in *pp* actually alerts one to the much deeper problematic that comes to the fore in Foucault's whole oeuvre. That is why we will take this “perhaps” as much more than a supercilious dismissal of the humanist and Enlightenment narrative of 18th century law reforms. We shall construe it as a critical joint on Foucault's whole oeuvre hinges.

The counter-narrative that Foucault invoked in response to the humanist narratives of Enlightenment legal and social theorists is well-known. Instead of – or at least in addition to – making the law more human, these narratives gave birth to an incessantly surveilled person (see Foucault 1975: 201 – 208) that is constantly measured against the yardstick of the “healthy human being” produced by the social or human sciences (see Foucault 1966, especially 355 – 398). This constant surveillance and measurement of the human person *created* the human person, it did not impose itself on a person “already there.” It effectively fashioned the healthy human being for purposes of rendering stable and secure a society that is ultimately concerned with nothing but rendering itself stable and secure. To put this all in the nutshell of *pp*: The humanist narratives of 18th century law reforms have *perhaps* (*peut-être*) given rise to more humane law, but it *certainly* (*sûr*) also promoted a system of surveillance and normalising practices that belie the ideals of the freedom and dignity of the person.

One might think at first glance that the “perhaps” in *pp* only conditions the phrases that precede it. One may think that the “perhaps” only casts doubt on the humanist narrative invoked in the first half of the passage, and not on that which follows. It does not affect the “*sûr*” inserted into the last line of the passage. The inevitable double-sidedness of the “perhaps” in the passage must nevertheless not be ignored. If the Enlightenment ideals *perhaps* gave rise to legal systems that promoted legal dignity and freedom, it also could only *perhaps* have given rise to systems of de-humanising and liberty-depriving surveillance and normalisation. The effect of the “perhaps” cannot be restricted to only one side of the set of options of concern. It cuts both ways. If a possible state of affairs is subject to a “perhaps”, its opposite is logically subject to the same “perhaps.” One must therefore conclude that Foucault's counter-narrative about the normalisation that fashions the human

subject is as much subject to the perhaps to which he expressly subjected the humanist narrative in the first part of the passage.

Subjecting Foucault's counter-narrative to the counter-side of the "perhaps" that he attached to the humanist narrative about eighteenth century law reforms undoubtedly unsettles this counter-narrative. But it also does something else. By unsettling his counter-narrative, the "perhaps" creates an opening in Foucault's own thinking for the very thought that motivates his counter-narrative, but does not sit well with it. Foucault's genealogical enterprise is not exactly a gay science. It is not a merry explication of the wondrous ways of power in the world and of the neat and comfortable space power creates for human existence. It contemplates, at least in its wings, a person that somehow resists power or experience resistance to it, as I shall show presently. It is fair to suppose that his whole scholarly engagement is ultimately motivated by a regard for this person who escapes from – however narrowly – the relentless reach of his genealogical method. This person, however, cannot exist outside the reach of his genealogies unless their reach is subject to a limit. It should be clear from what we have said thus far that Foucault's whole genealogical method prevents him from invoking something like "true human nature" that experiences itself constrained, betrayed, or alienated by current constructions of humanity and current conceptions of the dignity and freedom of the person. To put it in terms that are reminiscent of a famous phrase of Jacques Derrida: There is *no person* outside the constructions of personality, let alone a "true person" (see Derrida, 1967 227: "There is nothing outside the text" – *il n'y a pas de hors-texte*). Foucault put it like this in a key passage from the lecture "Truth and Juridical Forms":

What I intend to show in these lectures is how, in actual fact, the political and economic conditions of existence are not a veil or an obstacle for the subject of knowledge but the means by which subjects of knowledge are formed, and hence are truth relations. There cannot be particular types of subjects of knowledge, orders of truth, or domains of knowledge except on the basis of the political conditions that are the very ground on which the subject, the domains of knowledge, and the relations of truth are formed. (Foucault 2002: 15)

It is on the basis of this same insight or claim that Foucault observed later in this same lecture, contra Marx, that the capitalist economy does not effect an alienation of labour or work (considered by Marx the noble essence of man), but, much more fundamentally, constructs the human individual as a being that works and has to work (Ibid, 86). The question that this passage and the later statement contra Marx raise is this: What, after all, can this talk about un-dignifying and liberty-depriving normalisations of the person or subject be about if the person is *nothing but* the function of normalising practices? How can an entirely constructed and normalised individual be at variance with itself? How can it possess a residue of unconstructed "authentic" selfhood that suffers from this construction and normalisation? If a worker has been exhaustively constructed and normalised as a worker, how can he or she still experience the fate of being a worker as a deprivation of liberty and dignity? The experience of such deprivation necessarily depends on some residue of unconstructed personality that is not reconciled with just being "a worker".

Did Foucault ever acknowledge the possibility of such a residue of unconstructed and non-normalised personhood? He did. He evidently found evidence of such an interruption in a certain madness beyond madness, a *déraison* beyond the normalising pathologies constructed by the human sciences, and in an *idiocy* that resists its own nothingness. He asks

with regard to Goya's idiot: "The idiot who cries and contorts his shoulder in order to escape from the nothingness that imprisons him [*au néant qui l'imprisonne*], is he the birth of the first human and its first step towards freedom, or the final contraction of the last one dying?" (Foucault 1972: 551, my translation). Is this madness or idiocy the interruption that affords Foucault the slender chance – the most precarious "perhaps" – of embarking on the thinking of an impossible outside? (see Foucault 1986). Foucault ultimately leaves this dramatic question unanswered, and thus effectively underlines the uncertainty of any escape from the strategies of power that he discerns in insanity, especially the insanity of the mad poet (Foucault 1972: 555 – 557). But, the singular existence of the exponentially raised derangement – the derangement beyond derangement – of the mad poet did signal for Foucault a shadowy figure that somehow exists independently of all clinical diagnoses that pretend to give measurable or calculable form to it. This is the undeniable signal sent in the last chapters of *Histoire de la folie*. And this shadowy existence also makes fleeting appearances in *Surveiller et punir* where the convicted and punished criminal takes the place of the mad poet in *Histoire de la folie*. Consider the following two passages:

Mably has formulated the principle once and for all: "That punishment, if I can speak like this, strikes the soul rather than the body." This is an important moment. The old partners of the punitive pageant, body and blood, vacate the scene. A new personage appears on stage, masked. This the end of a certain tragedy; and a comedy commences with the silhouettes of shadows, voices without faces and untouchable entities. The apparatus of justice now has to bite on this reality without body. (Foucault 1975: 25, my translation)

In the name of crimes and delicts, one indeed always judges objects defined by the Code, but one also judges – in the same breath – passions, instincts, anomalies, weaknesses, maladjustments, environmental or hereditary effects. One punishes aggressions, but through them aggressive inclinations. One punishes rape, but also the perversions that drive it; one punishes murders, but also the impulses and desires that lead to them. They will say: it is not them – the criminals and their passions – who are judged. If one invokes them, it is only to explain the facts that are to be judged, and to determine to what extent the will of subject is implicated in the crime. This response is inadequate, because it is them, the shadows behind these elements of the criminal case, who are well and truly judged and punished. (Ibid, my translation)

These passages make clear that there is some sort of separation thinkable or perceivable between the construction of the criminal personality and the one that suffers from the consequences of this construction. They invoke a separation that allows the constructed subject to suffer from the process and result of construction. Foucault's genealogies (notwithstanding his denials) ultimately come across, then, as a methodological procedure that allows him to step into the vicinity of something or someone to which or whom the methodological procedure itself refuses to grant independent existence.

Of concern here would appear to be an interruption of construction, an interruption of the construction of criminal personality and an interruption of the legal person as such. And the interruption to which Foucault appears to testify is not only an interruption of Supiot's humanist legal person, the subject figure to whom the law gives adequate personality by affording it a second birth. It is nothing less than an interruption of Foucault's own anti-humanist genealogies of subjectivity. Nothing less than a gap in Foucault's oeuvre – and a self-interruption of this oeuvre – becomes evident when Foucault invokes the shadowy figure that suffers from the genesis of subjectivity.

III. Foucault, Supiot and the legal person – a tale of two *homines juridici*

The tension that existed between Derrida and Foucault regarding the latter's invocation of a madness beyond clinical mental illness should not be denied or underestimated (for a probing discussion, see Jonas 2015). However, that tension may well have been the result of the way in which the two thinkers endeavoured to establish at least some degree of uniqueness and specificity of position within a common space that they all too clearly shared, a common space that allowed them both to consider madness the signal of an "outside" that cannot be assimilated by law or the strategies of power, however ubiquitous and without "outside" the empires of law and power appear to be. For both Foucault and Derrida, the road to the "real man" would seem to pass through the mad man, to use Foucault's expression in this regard – *de l'homme à l'homme vrai le chemin passe par l'homme fou* (Foucault 1972: 544). Seen from this perspective, the following comment of Alain Supiot on Derrida's notion of a "mad justice" (*justice fou*) may well be a sign of how Supiot might assess Foucault's concern with madness:

This (indeed mad) definition of justice, connected to the solitary subjectivity of everyone and aimed at the deconstruction of law, is the philosophical manifestation of the disqualification of social justice by ultra-liberals, who consider justice a sentiment that is incapable of founding a system of law worthy of the name (Supiot 2010: 48, my translation).

Considering this response to Derrida, one may well assume that Supiot would be disinclined to discern the utopian potential in the phenomenon of madness that Foucault explores in the last chapters of *Histoire de la Folie*. From Supiot's perspective, Foucault's whole preoccupation with governmentality, bio-power, normalisation and surveillance evidently comes across as part and parcel of a libertarian and neoliberal-friendly obsession with deregulation (as indeed suggested forcefully by Audier 2015: 509 – 512, 521 – 527), notwithstanding his own frequent use of terminology that can hardly be distinguished from Foucault's, as will be observed presently. His express association of both Derrida and Foucault with "that old undertaking ... to make law 'wither away'" speaks volumes in this regard (see Supiot 2005: xix, fn. 31). Supiot, on the contrary, considers subjection to law the "second birth of the person" (Ibid: vii – viii, 145) without which the person never attains to personhood. He stresses in this regard "the anthropological function of human laws" and the need to recognise "the role of law in constructing individual and collective identities" (Ibid: 73). He views proper regulation as part and parcel of a legal system of interdicts (*interdits*) with which humans say to one another (say among themselves – *inter-dire*) how the human being is to be treated (Ibid: xxiv, 117). Of concern for Supiot is the system of interdicts that prevents everyone from dealing with anyone else in a way that violates, denies or disrespects the dignity of the legal person. The law is for him the system of interdicts that prevents everyone from reducing the human being to mere matter. This reduction was the essence of the big totalitarian ideological movements of the twentieth century and it is also the essence of the total market thinking of our time. According to Supiot, the ultra-liberal market ideology of our time also turns on a materialist reduction of humanity to matter and quantifiable data. It is remarkable, however, how frequently he describes this materialist reduction in terms that are palpably and sometimes expressly Foucauldian (see Supiot 2005: 119 – 121, 135 – 138, 149, 171; 2010: 59 – 74).

One must therefore note the striking resonance between Supiot's legal anthropology and Foucault's discourse analytical genealogies, notwithstanding their "opposite trajectories"

and the opposite trajectories of being human that become evident through them. This resonance has not received significant attention in literature on either Supiot or Foucault (for some unthematized links between them, or at least invocations of both with regard to the same problematic, see Bartl et al 2019, Haroche 2010, Diaz-Bone 2015, Dujarier 2010). However, notwithstanding the vociferous anti-humanist protestations characteristic of Foucault's genealogies and the evidently humanist purport of Supiot's legal anthropology, both ultimately invoke the idea of "something human" that exists beyond normalisation, standardization or quantification. The difference between them concerns the respective roles that they attribute to the law as regards this unquantifiable element of humanity. For Supiot, the law safeguards the human and humanity against quantification. For Foucault, the law is the essential mechanism of quantification. Supiot's position is consistent. Foucault's is not. As we saw, he holds on to his narrative of exhaustive governmental construction and normalisation while also holding on to a residue of unconstructed and non-normalised humanity. Can these contradictory sides of his thinking be reconciled? It can, I shall now argue, when one extrapolates the *perhaps* that he slipped into *pp* and considers it the crucial joint that holds his whole oeuvre together.

IV. The double-sided "perhaps" in the interruption of the legal person

It seems possible to simply infer from the arguments above that the interruption of legal personality concerns the gap in the "subject" that becomes evident in Supiot's and Foucault's very different assessments of legal personality. For the former, legal personality is the very condition for and completion of human dignity and liberty; for the latter, it is the frustration of a human dignity and liberty that persist in the shadows of legal personality, that is, a dignity and liberty that exist in the shadows of the frustrating termination that endows it with positive existence. This view of the interruption of the legal person – consisting of nothing but an arbitrary juxtaposing of two theories that contradict one another – remains groundless. More argument is required to give it cogency. In this section of this essay I endeavour to find this cogency in the way this interruption of the legal person also features inside Foucault's oeuvre. Of specific concern will be the tension or contradiction in his work highlighted above. It is crucial not to view this contradiction or tension as a negligent contradiction that clouds his work with inconsistency. It should be viewed instead as a constituent paradox of which all the elements – both sides of it, so to speak – are fully dependent on one another. I shall illuminate this paradox now by connecting the two sides of Foucault's thought to the double-sided "perhaps" that he inserted into *pp*.

We saw that Foucault juxtaposes two narratives about personhood in *pp*, the Enlightenment or humanist narrative that he seems to dismiss with a floating "perhaps," and the counter-narrative of governmental construction and normalisation that he presents as a certainty. I have already shown above that Foucault's perhaps cuts both ways. If Bentham's and Beccaria's (and by implication Supiot's) humanist narratives are affected by it, so is Foucault's own project. I shall now argue that Foucault's own project is not only affected by this double-sided perhaps, it is also crucially dependent on it. The double-side perhaps is the indispensable joint that holds the apparently contradictory sides of his theory of personhood together. It explains why the shadowy figure in the margin of his counter-narrative of governmental construction and normalisation does not contradict this counter-narrative, but

necessarily results from it. It results from it because of the way in which the counter-narrative itself remains subject to an irreducible perhaps. The shadowy figure in the margin of Foucault's counter-narrative is a surprising side-effect of a double-sided "perhaps." It is this double-sided "perhaps" that furnishes his entire methodological procedure – the procedure that generally considers legal personality a result of normalisation and disciplinary subject-formation – with a boundary that halts its sweeping effect. It opens up a narrow space – indeed a margin – within which can appear the shadowy figure that is not just an effect of normalisation, but also the signal of an independent existence, the signal of an existence that is independent enough from normalisation to suffer from it.

Why? Why does the "double-sided perhaps" establish a margin within the narrow space of which the shadowy figure invoked in the second and third passages from *Surveiller et Punir* quoted above remains free to dwell? We saw from these passages that the subject constructed by the scene of judgment, conviction and punishment that the system of penal law stages is nevertheless not exhaustively constructed by this scene. There remains a shadowy rest of unconstructed personhood – or of something or someone – that is not fully captured by the penal system, a rest that remains free or independent enough from this system to suffer from it. The "suffering" that Foucault ascribes to this "shadowy rest" is the tell-tale sign that this "rest" is not exhaustively assimilated by the stage of criminal law. Now, what exactly is the connection between the "double sided perhaps" and the shadowy rest of untouched freedom that the legal system cannot capture or accommodate? This question leads one directly to the last syllogism of the argument that I am unpacking here. It goes like this: If Foucault's "perhaps" affords the Enlightenment narrative of legal personhood some chance of occasional and/or partial "success" (as showed above), that partial or occasional success must be considered potential proof of the partial and occasional failure of Foucault's own genealogical method. Strictly speaking, Foucault's method implies a whole sale dismissal of the Enlightenment narrative of personhood. The Enlightenment narrative would be completely delusory if Foucault's genealogical method were fully correct. But, the "perhaps" in *pp* expressly qualifies this whole sale dismissal (irrespective of whether it does so wotedly or unwotedly) and thus limits the reach of the genealogical method; hence the possibility or plausibility of invoking a shadowy figure beyond the reach of the genealogical method, a figure that narrowly sidesteps the exhaustive construction and normalisation that a complete genealogical method would ascribe to it.

The shadowy figure in the margin of Foucault's genealogical method is of course not the autonomous self – endowed with inviolable dignity, integrity, etc. – that the Enlightenment narrative of personality contemplates. The shadowy figure beyond construction and normalisation that Foucault contemplates is much more akin to the romantic hero (or anti-hero) that resists construction and normalisation to the point of sheer derangement and self-destruction. This, in any case, is what the line of thinking pursued towards the end of *Histoire de la folie* suggests, and we will return to this "romantic" element in Foucault's thinking, below. The important point to note here, however, is this: The narrow chance of success that Foucault grants the Enlightenment narrative of autonomous personhood is also crucial for the plausibility of the ghostly romantic hero that he himself seeks to salvage from the relentless sweep of his own genealogical method. Or *vice versa*! The reversal of the argument is even more important from the perspective of the Enlightenment narrative: The remainder of the ghostly romantic hero in the margins of Foucault's genealogical method

constitutes a crucial point of departure for any argument that seeks to limit the sweep of Foucault's genealogical method for the sake of saving from it the possibility of a person who is not just constructed and normalised by the law, but one to whom the law also grants autonomy, dignity and integrity.

It should be clear now why the "perhaps" in *pp* has received all the attention that it has received above, and why the double-sidedness of this perhaps must be duly recognised. The double-sidedness of this "perhaps" not only affords the Enlightenment narrative of personhood a chance by subjecting the genealogical method to a limit, it also affords plausibility to Foucault's contemplation of the shadowy remains of an authentic romantic hero that remains invisible to the panoptic factories of modern subjectivity. His own thinking of the "outside" is fundamentally dependent on the imposition of a limit on his genealogical method. That is why one can also insist here that the significance attributed to the "perhaps" above, is not just the outcome of an artful exegesis of passage taken randomly from *Surveiller et Punir*. The double-sided "perhaps" that is of concern here happens to go to the heart of Foucault's project. It is in a fundamental sense *Foucault's perhaps*, not just the randomly magnified "perhaps" from a passage into which he may have slipped it without much thought, and not without an element of rhetorical superciliousness. It was stressed from the beginning of this essay that Foucault may well have slipped that "perhaps" into *pp* without giving much thought to it. That does not matter. In fact, the passage as such need not be taken that seriously. Now that it has done its work, it can be discarded. It is not "proof" of anything. I have only relied on it because the choice of words and phrasing exercised in it happens to facilitate an instructive explanation of a pivotal joint in Foucault's thinking. This pivotal joint in his thinking, I shall now show, is also not just some peculiar feature of his thinking that happens to be key to *his* genealogical project. It has been coming a long way. It pertains to the way European philosophers have been thinking at least since Kant, Fichte, Schelling and Hegel.

V. The interruption of the person in German idealism

Giorgio Agamben's essay "What is an apparatus?" takes us to the heart of the apparent link between Foucault's thought and German Idealism. Agamben points out that the French word for "apparatus," *dispositif*, commenced to feature increasingly in Foucault's texts in the mid 1970s. Before this time, the word "positivity" – *positivité* in French – was the more current expression in Foucault's texts for that which he later commenced to call "*dispositif*." "Positivity" is a key term in the philosophy of Hegel, and Foucault must have picked it up through the work of Jean Hyppolite, claims Agamben, given the centrality of this term in Hyppolite's influential *Introduction à la philosophie de l'histoire de Hegel*, and considering the importance of Hyppolite's mentorship on the young Foucault (Agamben 2009: 1 – 8).

In his early essay *Die positivitàt der christliche Religion*, Hegel drew a distinction between natural and positive religions that became a crucial element of the dialectic thinking that he developed in his later works. Natural religion, argued the young Hegel, allows for the expression of a completely spontaneous and immediate relation of human reason with the divine, whereas positive religion casts the relation between human reason and the divine in positivised forms or moulds such as clearly articulated articles of faith and ethical rules. The "positivity of the Christian religion" concerned its suspension of all spontaneous and

immediate relationships with God and their replacement with positivised articles of the Christian faith and the positive ethical rules concomitant to them. A positive set of beliefs, ethical commands and proscriptions would henceforth constitute the Christian community's – and the Christian individual's – only connection with the divine or sacred. It was the task of philosophy, argued the young Hegel, to overcome this "positivisation" of the Christian's relation with the divine. He explained this positivisation in terms of an "objectification" of "subjectivity". It was the task of philosophy to undo the objectivization of the self's relation to the divine, by reinfusing it with the subjectivity (spontaneous expression) that it had lost. Of concern in this objectification of subjectivity, Hyppolite pointed out in his work on Hegel's philosophy of history, is the same tension between subjective reason, and the objective formulations or formats through which reason realises itself (takes positive form) in the different phases of its history. Hippolyte referred to these objective articulations of reason in the course of its historical development as the "*historical element*" of reason (see Agamben 5).

Anyone with some understanding of Hegel's mature metaphysical system can easily see how its key terms – the dialectic between Subjective and Objective Spirit through which Spirit overcomes its own divisions and objectifications in the course of history so as to become Absolute Spirit at the end of history – derive from the concepts of subjectivity and positivity that he developed in his early work on natural and positive religion. Now, it is also very well known that Foucault expressly considered his own work an endeavour to break away from Hegel's dialectic metaphysics of history (see Foucault 2002: 241, 246). It nevertheless remains a good question whether this endeavour succeeded, as he himself acknowledged (see Foucault 1971: 74 – 75, as well as the probing discussions in Allen 1998, Butler 1999: 217 – 231, Jameson 2009: 51 – 52, 120 – 123, Gutting 2010, Künzel 1985, Muldoon 2014, Sembou 2015).

During the same time and even some years before the word "*apparatus*" (*dispositif*) began to replace the word positivity (*positivité*) in the work of Foucault, according to Agamben, several German scholars were also highlighting the enduring significance of these early distinctions between subjectivity and positivity (or objectivization) for Hegel's later work (see for instance Rohrmoser 1961 and Lypp 1978). These scholars, to whom Agamben surprisingly does not refer (he usually refers to everything), emphasised the central role that the terms *Subjektivität* and *Verdinglichung* – subjectivity and reification – played in Hegel's early works, and how it came to determine key elements of the dialectic philosophy of his later work.

It took a while before Hegel's insight into the "positivity" of the Christian religion actually moved him to discard religion and turn to philosophy in his search for a reconciliation between subject and object and the overcoming of the hard opposition between spontaneous selfhood and the ever-hardening positivity of life in modern societies. He basically persisted throughout his Bern-Frankfurt period with the idea that the religious subjectivity embodied in Christian love offers the only way out of the fragmented division of subject and object and the resulting positivisation or reification of social relations in the modern age. It is only during his Jena years and notably in his essay on the difference between Schelling's and Fichte's philosophical systems – commonly known as the *Differenzschrift* (see Hegel 1970a) – that philosophy displaced religion and took over from it

the task of reconciling the subject and the object so as to reinfuse reified objective reality with the subjectivity that it lost as a result of the split between the subject and the object (the withdrawal of the subject from the object that that historically conditioned the Modern Age, according to Hegel). It is in the *Differenzschrift* that Hegel articulated his famous statement on the need for philosophy that arises when life has become too weak to overcome its own divisions (see Hegel 1970a: 22). Hegel continued to resort to this philosophical reconciliation of the subject and the object in the years after 1801 (when the *Differenzschrift* was published) and it became the cornerstone of his later works, most notably the *Phänomenologie des Geistes* published in 1807. This philosophical reconciliation never (except perhaps for a section in the *Grundlinien der Philosophie des Rechts* – see Van der Walt 2019: 135 – 167) claimed to actually mend the subject-object split and to eradicate the reification of the object. On the contrary, it proposed a “philosophical” acceptance (in the way one says someone was “philosophical” about a loss) of the split between the subject and the inevitability of reification in the modern world. In other words, Hegel’s mature philosophy pivoted on the insight that subjectivity and reification (or positivity) necessarily go together. The subject becomes the subject by withdrawing from the object and this withdrawal necessarily leaves the object reified (devoid of subjectivity). A key passage in the *Phänomenologie des Geistes* underlines this torn status (*Zerrissenheit*) of “spiritual existence.” Ultimately at stake in this inseparability of subjectivity and reification is the inseparability of the life and death of the subject (see Hegel 1970c: 36). The crucial point to take from this passage, is this: The human person belongs inextricably to both worlds, the world of subjective freedom or autonomy and the world of reified objectivity. As a legal person in particular, the autonomous self also belongs to the institutional positivity of the law and must reconcile itself with the fact that the law protects subjective autonomy, but also frustrates it to the core. Hence also the elegiac statement in the introduction to the *Grundlinien der Philosophie des Rechts* that the consolidation of the modern state and the rule of law, besides being the historical and positive realisation of liberty, is also the sign of life that has grown old and incapable of renewing itself (Hegel 1970b: 28).

This is admittedly a very simplified outline of one of the most complex issues in Hegel’s work, an issue with regard to which he also took different positions over the years, and sometimes also different positions in the same work. The *Grundlinien der Philosophie des Rechts* can certainly be said to contain passages that mend or erase the torn state of subjectivity which the *Differenzschrift*, *Phänomenologie* and even its own preface underline. Space constraints prohibit deeper engagement with this complex Hegelian background here (see Van der Walt 2019 for a more extensive discussion), but at least one more elucidation is necessary before we move on to conclude these reflections. Hegel’s shifting and even contradictory conceptions of the relation between spontaneous selfhood or freedom, on the one hand, and alienated or alienating social and natural environments, on the other, can be traced to the different influences that the other members of the German Idealist movement had on his thinking. The concern with a complete reconciliation between subject and object and the restoration of the unity and totality of existence that is more typical of his early works was predominantly influenced by the romantic pantheism of Schelling. The regard for the inevitably split condition of modern existence and the inevitable divide between the subject and object that is more typical of his later work was predominantly influenced by the Enlightenment concern with subjective autonomy as the moral withdrawal from and overcoming of objective nature that is central to the work of Kant and Fichte (see Rohrmoser

1961: 95 – 96). The insight into this split-condition of modern life on which the shift from Schelling to Kant and Fichte pivoted was also fundamentally informed by his reading of the British political economists. It is through the works of James Steuart, David Ricardo and Adam Smith (and later also the French economist Jean-Baptiste Say) that Hegel came to understand the irredeemably alienated and split condition of modern life (see Ritter 2003: 218; Riedel 1975: 260 – 261). This tension between Romantic concerns with unity and pantheistic immersion, and Enlightenment concerns with autonomous selfhood continues to reverberate in the tensions between Foucault's and Supiot's respective conceptions of *homo juridicus*. In fact, it goes to the heart of the interruption of the legal person, I shall now argue in conclusion.

VI. *Homines Juridici*

The first question that one should ask in view of the problematic of personhood in the thinking of the German Idealists concerns the Hegelian or post-Hegelian status of Foucault's concern with personhood and selfhood. Does Foucault's constellation of a constructed and normalised subject (replete with *positivity* and largely reduced to an *apparatus* of governance) and the shadowy rest of autonomy and liberty (that dwells in the margin of this normalised and constructed subjectivity) break with the German Idealist and especially Hegelian articulation of this problematic, or is it yet another configuration of this idealist articulation of personhood? The second question depends on the outcome of the first. If a case can be made that Foucault broke decisively with the German Idealist problematic, there is no second question. If not, if one accepts that Foucault does not effectively break away from the Hegelian position on selfhood, but just rearticulates it, the second question is whether Foucault is leaning to the romantic or the Enlightenment side of Hegel's position. Is Foucault (quite paradoxically) closer to Schelling, or is he closer to Kant and Fichte? Both the shadowy figure that dwells on the outside of the apparatus of the person constructed by penal law and the exponentially raised madness of the poet that dwells on the outside of the clinic seem to allude to a romantic hero (or anti-hero) that has little in common with the moral autonomy of the subject that Kant and Fichte contemplated. This is nevertheless just a preliminary observation. Neither of these questions can be answered here. They can only be posed for purposes of further reflection.

However, what can be observed with confidence in view of all the reflections above is this: There is enough evidence of a firm perception in the history of modern philosophy and contemporary social and legal theory that human selfhood is burdened by two opposite and mutually contradicting existential concerns, a concern with the construction of a stable institutional and legal environment that guarantees the moral autonomy envisaged by the Enlightenment narrative of personhood, on the one hand, and a concern with a romantic existential freedom that experiences the positivity of all institutional and legal arrangements as reifications of the human being's spontaneous and primordial connectedness with its social and natural environment. This observation (echoes of which are also evident in Esposito 2012) appears to go to the heart of the fundamentally different understandings of law and legal personality that come to the work in the work of Michel Foucault and Alain Supiot outlined above.

The crucial point stressed in the juxta-positioning of Supiot's and Foucault's work above concerns the precariousness and uncertainty of both their respective concerns with the legal protection and construction of personhood. The double-sided perhaps extracted from *pp* tells us that neither their concerns with the person has the luxury of stability and certainty. The law that guarantees personal autonomy in terms of the Enlightenment narrative of moral autonomy remains fragile because of the way it frustrates the existential concern with a primordial and spontaneous unity with the world. The existential concern with an intimate unity with the world that allows for and somehow does not ruin or constrain the spontaneity of selfhood is even more precarious. In fact, the Modern Age has largely subjected this concern to the concern with moral autonomy. Modernity has largely reduced the concern with the spontaneous self to a fictional or poetic concern. It has largely become the concern of the mad poet, as Foucault understood all too well. And whenever this concern with a spontaneous unity between the self and its world became frustrated with the constraints of this poetic reduction or reduction to poetry, whenever it commenced to contemplate non-fictional revivals of a communal politics capable of restoring a primordial bond between the self and its social environment that is untarnished by institutional and normalising representations of the self (note the current world-wide wave of populist resistances to representative and representational democracy), it would inevitably turn into an anti-modern concern with an ancient paradise lost.

The point is nevertheless not to choose between these two precarious narratives and these two sides of the *perhaps*. Neither of them will yield to complete suppression or eradication. The point here is therefore not to select one "perhaps" at the cost of the other. That, we have seen above, is in any case logically impossible. The point is to retain both. And this means that the tensions between Supiot and Foucault's work beckon one to infer from them the fundamentally and interminably interrupted status of legal personality. The legal person exists as an interface between two eventualities, two "perhapses." It exists as neither the one, nor the other, but as both "perhapses." In other words, the legal person should be considered a self-interruption, an interruption of itself and thus of selfhood. It is torn between a concern with the noble dignity of the Enlightenment subject (which according to Kantian ethics must act against its own nature) and Goya's *Idiot* (who acts scandalously in accordance with its own nature). And it is impossible to say which one of these two eventualities grants it superior autonomy and dignity.

There is, however, an observation regarding the specificity of human autonomy and dignity that the interrogation of the interruption of human and legal subjectivity in this essay appears to render less unsayable. If it is true that the comparability of artificial intelligence and human subjectivity has raised one of the most pertinent epistemological and ontological questions of our time; and if it is likewise true that one of the most pertinent legal theoretical questions of our time concerns the attributability of legal subjectivity to artificial intelligence (see Teubner 2018, Chopra & White 2004, 2011) one may well consider the interruption of legal subjectivity outlined in this essay the most obvious and most irreducible obstacle in the way of such comparison and attribution, for it is hardly thinkable that any programmable intelligence can be programmed to be so profoundly at odds with itself as the human subject appears to be.

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* Professor of Philosophy of Law, University of Luxembourg; Professor Extraordinarius, University of the Free State, South Africa. Thanks is due to Claudio Novelli for helpful research assistance in the field of artificial intelligence law.