



The concept of subjective right and the Anthropocene

Linxin He

C-EENRG *Working Papers, 2017-1*

January 2017

Please cite this paper as:

He, L., 2017. "The concept of subjective right and the Anthropocene". C-EENRG Working Papers, 2017-1. pp.1-24. Cambridge Centre for Environment, Energy and Natural Resource Governance, University of Cambridge.

The **Cambridge Centre for Environment, Energy and Natural Resource Governance (C-EENRG)** was established in 2014 within the Department of Land Economy in order to conduct integrative research on the governance of environmental transitions, such as the climate-driven transition from a carbon-intensive inefficient energy matrix to a decarbonised and efficient one, or the water/population-driven transformation of food production systems. The role of law and governance in such transitions is of particular importance. C-EENRG approaches law as a technology to bring, guide and/or manage environment-driven societal transformations. Whereas other research groups within the University of Cambridge cover questions relating to the environment, energy and natural resources from a natural science, engineering, conservation and policy perspective, until 2014 there was no centre concentrating on the law and governance aspects of environmental transitions. C-EENRG was established to fill this gap in the policy research cycle, in line with University's strategic research initiatives on energy, conservation, global food security and public policy.

The **C-EENRG Working Papers** provide a platform to convey research aiming to support the effective governance of such environmental transitions. The series hosts research across disciplines, including law, economics, policy, and modelling, and welcomes research on a wide range of environmental topics across the food-energy-water-land nexus.

SCIENTIFIC COMMITTEE

Dr Pierre Bocquillon	<i>Political science</i>
Dr Leslie-Anne Duvic-Paoli	<i>Law</i>
Dr Markus Gehring	<i>Law</i>
Dr Emma Lees	<i>Law</i>
Professor Jorge Viñuales	<i>Law</i>
Professor Andreas Kontoleon	<i>Economics</i>
Dr Shaun Larcom	<i>Economics</i>
Dr Aiora Zabala	<i>Economics</i>
Dr Jean-Francois Mercure	<i>Modelling</i>
Dr Pablo Salas	<i>Modelling</i>

Send your enquiries regarding the C-EENRG Working Papers to the editor:

Dr Pablo **Salas**, pas80@cam.ac.uk

GUIDELINES FOR AUTHORS

Submit your manuscript in *.odt, *.doc, *.docx, or *.rtf format, together with a *.pdf version. It should contain title, abstract, keywords, and contact details for the lead author. Email your file to the editor. The manuscript will be processed and sent to two reviewers. The editor will process the reviewers' feedback and request the scientific committee to adopt a final decision about the publication of the manuscript.

DISCLAIMER

The opinions expressed in this working paper do not necessarily reflect the position of C-EENRG, the Department of Land Economy, or the University of Cambridge as a whole.

C-EENRG, 2017, <http://www.ceenrg.landecon.cam.ac.uk/>

Contents

1. INTRODUCTION	5
2. THE 'MAKING' OF THE CONCEPT OF SUBJECTIVE RIGHT	7
2.1. On the origins of the concept of subjective right.....	8
2.1.1. The theological origins of the concept.....	8
2.1.2. The heritage of the Enlightenment.....	10
2.2. On the evolution of the concept of subjective right	12
2.2.1. Will-Theory vs. Interest-Theory	12
2.2.2. A new paradigm: the relational theory?.....	15
3. SOME APPLICATIONS OF THE CONCEPT OF SUBJECTIVE RIGHT	18
3.1. The prevailing use of the liberal and abstract concept of subjective right	18
3.1.1. The division between generations of human rights.....	18
3.1.2. The ongoing confusion between private and public laws	20
3.2. A reflexive adaptation of the concept	21
3.2.1. A trip to ancient China	21
3.2.2. Reassessing the concept of subjective right.....	23

Linxin He

Researcher at the Collège de France.

Paris, France.

linxin.he@college-de-france.fr

The concept of subjective right and the Anthropocene

Linxin He¹

1. INTRODUCTION

The category of ‘right’ has become undoubtedly one of the basic concepts of modern legal history. Frequently studied by theorists of human rights or fundamental rights, it has also played a foundational role regarding contemporary political communities². Legally speaking, the concept of ‘right’ is also very often described as ‘subjective right’, which is a more continental legal category (*droit subjectif* or *subjectives Recht*), because ‘law’ and ‘right’ are usually expressed with the same word in these languages. It would be possible to use the Hohfeldian category of ‘claim right’ to clarify the sense of ‘subjective right’ in the English language, but still the translation is not completely exact, since a Hohfeldian ‘liberty’ can also be a subjective right. So what is a right? Since it is not our main purpose here to propose another conceptual understanding, the more appropriate question might be: what is the *meaning* of subjective right vis-à-vis the Anthropocene?

Indeed, the subjective right and the Anthropocene seem to have appeared simultaneously in history: most researchers working on the issue today agree that the Anthropocene started with the industrial revolution³. A similar starting point

¹ The author would like to thank Ms. Leslie-Anne Duvic-Paoli and Ms. Zoe Adams for their kind remarks about this article and the English language. The usual disclaimer applies.

² For example, R. Tuck wrote already in his *Natural Rights Theories* (Cambridge University Press, 1979, p. 1), that ‘the language of human rights plays an increasingly important part in normal political debate (...)’.

³ See the debates and results presented by Ch. Bonneuil and J.-B. Fressoz, *L'événement Anthropocène*, Paris, Seuil, p. 28.

has also been attributed to the concept of subjective right⁴. If these assertions are true, it would be hard to deny that they interact with each other. But how? In order to explain our choice of method or perspective, it may be helpful to make some general remarks concerning the framework of this analysis, namely a correlational, conceptual and historical study.

The relationship between the Anthropocene and subjective right (and even other legal categories in this research project) constitutes the focus of this study, since the general research agenda consists in “understand[ing] the role of law in prompting, sustaining and potentially managing the Anthropocene”⁵. But how should we identify these communication channels between a geological phenomenon and the product of human society which is law? If the relationship between intellectual property rights and the public encouragement of innovation is quite easy to establish, it is far more difficult to say that intellectual property law has caused or promoted the capitalist way of applying modern technologies⁶. After all, people do not necessarily search for new ideas because they would be later protected against piracy. Therefore, the claim of causation could not be made with certainty here. It is then beneath the causal level that we will find an adequate account of the relationship between the objects of our study, at least for the moment. Thus, the analysis would be more about the possibility of ‘imputing’ human domination to a certain conception of law, i.e. a cultural understanding of law. In Max Weber’s terms for example, “we can only proceed by investigating whether and at what points certain correlations between forms of religious belief and practical ethics can be worked out. At the same time we shall as far as possible clarify the manner and the general direction in which, by virtue of those relationships, the religious movements have influenced the development of material culture.”⁷

So what would be the relevant “correlation”, or interaction, for our study? An interesting approach lies in the relation between law and nature⁸, which is more salient as regards the concept of subjective right. ‘Natural’ rights have indeed been (if they are not still!) an important staging post in the history of right. But how

⁴ C. Colliot-Thélène, *La démocratie sans démos*, Paris, Presses universitaires de France, 2011, especially chapter 1.

⁵ J. E. Viñuales, ‘Law and the Anthropocene’ (2016), *C-EENRG Working Paper 2016-5*, p. 2.

⁶ For a more detailed discussion, see P. H. Rubin and T. Klumpp, ‘Property Rights and Capitalism’, in Dennis C. Mueller (ed.), *The Oxford Handbook of Capitalism*, Oxford University Press, 2012, p. 204.

⁷ M. Weber, *The Protestant Ethic and the Spirit of Capitalism*, translated by T. Parsons, London and New York, Routledge, p. 49. Unfortunately it is not possible for us to open a discussion on the cultural and correlational approach of Weber. Let us just note that this is the precondition for a causal analysis.

⁸ J. E. Viñuales, *op. cit.*, note 5, p. 9.

‘natural’ are these rights? It is obvious that this concept of nature has very little in common with the geological concept of nature as it appears in normal discourse. Nevertheless, the positivist theory of law has in fact allowed us to treat nature as an object. If the Anthropocene sees the progressive erosion of the place of nature in the geological transformation, would it be possible to describe also a ‘denaturalisation’ process in law, especially regarding the concept of right? This question invites us necessarily to investigate the historical evolution of subjective right.

From the historical point of view, it seems that ancient Rome and China did not possess a concept of subjective right. The French legal philosopher, Michel Villey, attributed the origin of this idea to William of Ockham. However, in the modern capitalist society, this concept had become a more abstract and individualistic one, before a more relational conception started recently to emerge. Taking traditional Chinese law as a mirror, this paper argues that the evolution of subjective right may be inherent to the progress of the capitalist society itself. Thus, it reflects and strengthens successively the legal personality of a given epoch. While this personality has changed from an abstract and autonomous individual to a socialized and welfare-dependant person, the subjective right has also undergone the same transformation from a pure ‘will’ and/or ‘interest’ model to a ‘relational’ and ‘justificatory’ one. After a historical survey of subjective right (II), the paper examines some contemporary applications of this concept in order to better evaluate its role in the Anthropocene (III).

2. THE ‘MAKING’ OF THE CONCEPT OF SUBJECTIVE RIGHT

Debates on the chronology of subjective rights are important from a strict historical point of view, but this section will concentrate on categorizing the different conceptions. Separating the founding elements – or origins (2.1) of subjective rights from its contemporary evolution (2.2) allows us to emphasize the process of denaturalisation at work.

2.1. On the origins of the concept of subjective right

For a long time, scholars did not pay much attention to the medieval roots of this concept (2.1.1) and therefore focused mostly on human rights (2.1.2). These two sources can be seen as two important and distinct founding moments of the concept of subjective right, although we should not deny all genealogical links between these two origins.

2.1.1. *The theological origins of the concept*

When we speak of theological origins, we are not saying that a religion is particularly apt to create the concept, or representative of its application⁹. As we shall see, internal disputes in the Catholic Church actually brought the concept into being. In fact, the increasing interest of scholars in medieval discussions of ‘rights’ (or *ius* and *dominium*)¹⁰ is mainly oriented towards the specific question of ‘poverty’ of the Franciscan order, thanks in particular to the innovative thesis of the French legal historian and philosopher Michel Villey¹¹. According to Villey, the concept of subjective right first appeared in western legal history in the defence of the Friars Minor by William of Ockham against a papal reproach. To sum up this now famous episode, we could state the central question in the following way: As poverty (*paupertas*) is opposed to wealth (*divitia*) and therefore also to power (*potestas*)¹², is it possible for a *poor* Franciscan brother to use things such as food or water for his living?

Before the dispute between the Pope John XXII and Ockham, the traditional Franciscan answer was given by Bonaventura, recognized by the Pope Nicholas III and developed by Scotus¹³. It consisted in dividing the possessive relationship into

⁹ For a similar opinion explaining the importance of the variety of theological ideas, see S. E. Stumpf, ‘Contribution de la théologie à la philosophie du droit. La définition et l’interprétation du droit’, *Archives de philosophie du droit*, n°5 (1960), pp. 1-26.

¹⁰ For some recent examples, see J. Varkemaa, *Conrad Summenhart’s Theory of Individual Rights*, Brill, 2011, p.1; M.-F. Renoux-Zagamé, ‘Retour sur les origines théologiques de la propriété’, *Droits*, n°58 (2013/2), p. 51.

¹¹ M. Villey, ‘La genèse du droit subjectif chez Guillaume d’Occam’, *Archives de philosophie du droit*, n°9 (1964), p. 97 ; see also M. Villey, *La formation de la pensée juridique moderne*, Paris, Presses universitaires de France, 2013, p. 241, where the author explained the difficulties he encountered to defend this opinion.

¹² A. S. Brett, *Liberty, Right and Nature. Individual Rights in Later Scholastic Thought*, Cambridge University Press, 1997, p. 12.

¹³ R. Tuck, *op. cit.*, note 2, p. 20.

five degrees: *proprietas*, *possessio*, *usufructus*, *ius utendi*, and *simplex usus facti*¹⁴. A poor man can ‘use simply’ a material object without having any *dominium* over the thing. Obviously, this radical vision worried the Papacy at least, since John XXII, a lawyer himself by education, condemned this opinion in his bull ‘*Quia vir reprobus*’ (1329) which denied the distinction mentioned above. For John, the use of a thing could not be separated from a certain legal property right of this thing. Otherwise the use of lots of things, in particular consumable things, would be absurd; moreover, this kind of use would be unjust. Villey saw in this argumentation a perfect example of the ‘objective right’ in traditional Roman law (in the sense of the ‘right thing’; *jus* should be understood as *id quod justum est*). In order to refute this opinion, William of Ockham was obliged to deny the classical sense of ‘right’ and to link it with power (*potestas*). In his *Opus nonaginta dierum* (1332), he argued that the right of an owner (*ius*) should not be confused with the license of using something (*licentia*). The difference lies in the power of the owner over his possession: ‘right differs from license in so far as the one who gives another the license to use his clothes has the power to call it back when he wants’¹⁵. The Friar Minor, as the Christ himself, did not give up their licence to drink or to eat, conferred by the divine law, but renounced their power to claim them.

After decades of debates over the plausibility of this interpretation¹⁶, it is today well received by most legal historians. The nuance that we could add to it is perhaps the fact that the description of right (*ius*) as a power can also be found in the works of many medieval jurists, even earlier than Ockham¹⁷. But in my opinion, this *potestas* may be also understood as the revival of the same notion already existing in Roman law. In fact, Roman lawyers used also *patria potestas* to designate the right of a father regarding his children¹⁸. It is true that the father detains different rights including the right of correction; nevertheless, the power here in question seems to describe rather another kind of relationship which is characterized

¹⁴ Ibid, which mentions the Bull ‘*Exiit qui seminat*’ of the Pope Nicholas III in 1279.

¹⁵ “jus differt a licentia qua quis dat alicui licentiam utendi veste sua cum potestate revocandi quandoque placuerit”, quoted by M. Villey, *La formation de la pensée juridique moderne*, *op. cit.*, note 11, p. 257.

¹⁶ R. Tuck, *op. cit.*, note 2, p. 19, especially note 40 of this page; E. L. Fortin, ‘On the Presumed Medieval Origin of Individual Rights’, *Communio*, n°26 (1999), p. 55.

¹⁷ R. Tuck, *op. cit.*, note 2, p. 13, where the author quotes specifically lawyers at the law school of Bologna (Azo, Accursius, etc.).

¹⁸ Corpus Juris 6, 61, quoted by J. Gaudemet and E. Chevreau, *Droit privé romain*, Paris, Montchrestien, 2009, p. 345.

also by the numerous obligations that a father should respect at home¹⁹. It is a sort of mutual respect (or piety) which is required between father and children. The classical Chinese law is comparable with the Roman one to a certain extent and we shall consider this question in detail later. (see 3.2.1)

However subtle the distinctions may be, we can see clearly a movement from the objective *natural* order, towards individual claims based on his power. But these claims are still based on a rational understanding of the world, or *natural* reason which is shared by all human beings²⁰. Thus, subjective rights are still closely related to the natural order. This relationship changed again when right began to be understood as freedom. The modern natural rights theories are the best examples of such conceptual changes.

2.1.2. *The heritage of the Enlightenment*

Indeed, the second theoretical source of the concept of subjective right lies in the theories of Human Rights²¹. We could try to trace the genealogy of Human Rights through the works of Hobbes, Locke, Rousseau, Kant, etc. But this approach would definitely introduce long discussions of political philosophy²², which are not directly relevant for our study. It will suffice to note that if Hobbes still talked about natural right (*ius naturale*), it is no longer understood as a power constrained by a general natural order, but the natural liberty deduced from the only natural law of self-preservation, which is itself known through an imagined state of nature. As he put it, “[t]he right of nature, which writers commonly call *ius naturale*, is the liberty each man hath to use his own power as he will himself for the preservation of his own nature; that is to say, of his own life; and consequently, of doing anything which, in his own judgement and reason, he shall conceive to be the aptest means thereunto.”²³.

If we come back to a more legal approach, the subjective rights as human rights are almost separated from the question of the relationship between the subject

¹⁹ J. Gaudemet and E. Chevreau, *op. cit.*, p. 77.

²⁰ J. Coleman, ‘Guillaume d’Occam et la notion de sujet’, *Archives de Philosophie du droit*, n°34 (1989), p. 25.

²¹ H. Coing, ‘Signification de la notion de droit subjectif’, *Archives de philosophie du droit*, n°9 (1964), p. 1.

²² See for example, F. Tinland, ‘La notion de sujet de droit dans la philosophie politique de Th. Hobbes, J. Locke et J.-J. Rousseau’, *Archives de philosophie du droit*, n°34 (1989), p. 51; M. Thomann, ‘Christian Wolff et le droit subjectif’, *Archives de philosophie du droit*, n°9 (1964), p. 153. The above mentioned book of Pr. R. Tuck (see n. 4) gives also a detailed analysis of the evolution of right theories caused by Hobbes.

²³ Hobbes, *Leviathan*, Oxford University Press, 1996, p. 86.

and another person or a thing (*ius ad personam* or *ius ad rem*). They are used to legitimate the existence of a state and the submission (precisely the other sense of *subjectus*) of private persons to it. As Condorcet put it, ‘a declaration of the rights adopted by the people, this exposition of conditions to which every citizen is subjected when entering the national association of rights he recognises in others, this limit posited by the general will to the actions of social authorities, this covenant, that every one of these authorities promises to maintain regarding the individuals, is also a strong shield for the defence of the liberty, for the maintenance of equality, and at the meantime an assured guide for the direction of citizens in their claims.’²⁴ Therefore, we can say that subjective rights were conceived in a public law context and intimately related to the free actions of individuals. We know how French legal scholars have during a long time called Human Rights ‘libertés publiques’ (public liberties)²⁵, and similarly in Germany, but to a less important extent, where Human Rights are often called ‘Abwehrrechte’ (defensive rights)²⁶. However, the context of public law in this evolution either should not be overstated. In fact, as soon as the state stops from interfering in domains of individual autonomy, a private sphere of liberty comes into being, where individual ‘powers’ dominate. As Ch. Mencke once pointed out, the paradox of subjective rights is that the subject itself can be understood either as a member willing to participate in the society, or as a pure private person²⁷. In the latter case, the subjective rights would be created mostly, if not totally, by individual will. (see 2.2.1.) In any case, this ambiguity emphasises again the importance of interpretation in the evolution of the concept.

²⁴ Condorcet, *Projet de déclaration des droits*, see the anthology F. Worms, *Droits de l’homme et philosophie*, Paris, CNRS Editions, 2009, p. 93 : ‘Une déclaration des droits adoptée par le peuple, cette exposition des conditions auxquelles chaque citoyen se soumet à entrer dans l’association nationale des droits qu’il reconnaît dans tous les autres, cette limite posée par la volonté générale aux entreprises des autorités sociales, ce pacte, que chacune d’elles s’engage à maintenir à l’égard des individus, est encore un puissant bouclier pour la défense de la liberté, pour le maintien de l’égalité, et en même temps un guide sûr pour diriger les citoyens dans leurs réclamations.’

²⁵ L. Favoreu et al., *Droit des libertés fondamentales*, Paris, Dalloz, 2016, p. 49: ‘Le terme de « libertés publiques », propre à la terminologie juridique française, désigne aussi une forme de consécration juridique des droits de l’homme.’ ; also, p. 50: ‘Par liberté, (...) on souhaite mettre en lumière avant tout une faculté d’agir et une sphère d’autonomie, ce qui semble orienter prioritairement sur certains droits de l’homme.’

²⁶ M. Kloepfer, *Verfassungsrecht II. Grundrechte*, Munich, C. H. Beck, 2010, p. 29: ‘Die klassisch-liberale Funktion der Grundrechte ist die Eingriffsabwehrenden: Die Freiheit des Bürgers ist die Freiheit vom Staat.’

²⁷ Ch. Mencke, ‘Droits subjectifs et dignité humaine. En guise d’introduction’, *Trivium*, 2009, n°3, available at <http://trivium.revues.org/3309> .

To sum up these two founding sources of the contemporary concept of subjective right, it is important to note how its meaning is changing. Remaining always a kind of ‘natural right’, the subjective right has been transformed from a power, or more precisely a justified claim, to a liberty based on analyses of the ‘state of nature’. It has also restricted its domain from a very general (and mostly private) context to public (or even constitutional) law. One of the consequences of these conceptual modifications is the impoverishment of the sense of ‘nature’ in law. If a pure objectivist legal system is entirely the mirror of nature, where humans are only waiting for their just retribution (*summ*), a subjectivist legal system recognises a special legal status to persons. However, whereas Ockham’s type of subjective right still acknowledges their foundation in traditional natural law, human rights law sees no nature other than the state of nature, which is in fact the negation of all realistic apprehension of the nature. From then on, the subjective right could become a powerful tool for the organization of legal relations in the individualist capitalist society.

2.2. On the evolution of the concept of subjective right

Based on these foundations and influenced by the philosophical and social context affirming the power of the human being in the face of nature²⁸, the concept of subjective right concentrates on the subject and *its own* characteristics, rather than *its place* in the legal world. This explains why scholars first developed theories about will and interest (2.2.1), before preferring today a more relational model (2.2.2).

2.2.1. Will-Theory vs. Interest-Theory

The overwhelming conception of subjective right as human right has had consequences in the private law sphere. The denaturalisation of the concept of right left a vacuum for the foundation of rights in the private sphere. In any case, nature could no more be taken as a reference. A telling example is the French Civil Code of 1804, whose article 544 provides that ‘[o]wnership is the right to enjoy and dispose of things in the most absolute manner, provided they are not used in a way prohibited by statutes or regulations²⁹’. Even if we note that it is immediately

²⁸ Ch. Bonneuil and J.-B. Fressoz, *op. cit.*, note 3, p. 20.

²⁹ The text hasn’t changed since 1804: ‘La propriété est le droit de jouir et disposer des choses de la manière la plus absolue, pourvu qu’on n’en fasse pas un usage prohibé par les lois ou par les règlements.’ For a study on this question, see M. Xifaras, *La propriété : étude de philosophie du droit*, Paris, Presses universitaires de France, 2004.

restricted by the Code itself (article 545) to public interests, this aspect was generally ignored by the lawyers of the 19th century³⁰. In the *Preliminary Discourse of the Civil Code* by Portalis, one of the jurists in charge of the preparation of the Code, we can see clearly the influence of the theories of Enlightenment on the conception of this subjective right. Indeed, Portalis affirmed that the existence of ownership was the consequence of nature itself and that nature was to be understood as the needs of all human beings to eat, to be clothed, etc³¹.

Returning to our investigation on the evolution of the concept of subjective right, the characteristics of this post-revolutionary period would be twofold:

First, a variety of authors has attempted to further complete the denaturalisation process. Three of the 'critiques of human rights', the most famous, may be rapidly recalled here: the utilitarian critique of Bentham, the positivist critique of Comte and the historicist critique of the young Marx. The first critique denounced human rights directly, with the title of the corresponding pamphlet, as *anarchical fallacies*. Bentham rejected the contractarian model of society in the name of utility, and wrote that '[t]here are no such things as natural rights – no such things as rights anterior to the establishment of government – no such things as natural rights opposed to, in contradistinction to, legal: (...) the expression is merely figurative.' Comte used a similar argument, when he pointed out that right itself was a theological-metaphysical concept, which should be no longer tolerated in the positive age of human understanding³². Indeed, it is important to notice that the process of denaturalisation is also profoundly related to the secularisation of the world. Moreover Comte rejected human rights as a whole for their individualistic

³⁰ J. Rochfeld, *Les grandes notions du droit privé*, Paris, Presses universitaires de France, 2013, p. 283: 'le contexte historique, social et politique du 19^e siècle a longtemps conduit à ignorer cette nuance et à asseoir une conception radicale d'individualisme et d'absolutisme autour de la propriété.'

³¹ J.-E. M. Portalis, *Discours préliminaire du Premier projet de code civil*, 1801, available at http://classiques.uqac.ca/collection_documents/portalis/discours_1er_code_civil/discours.html : 'L'homme naît avec des besoins ; il faut qu'il puisse se nourrir et se vêtir : il a donc droit aux choses nécessaires à sa subsistance et à son entretien. Voilà l'origine du droit de propriété. (...) Le droit de propriété en soi est donc une institution directe de la nature, et la matière dont il s'exerce est un accessoire, un développement, une conséquence du droit lui-même.'

³² see e.g. A. Comte, *Cours de philosophie positive*, 48: 'L'école métaphysique (...) fait habituellement intervenir, dans ces vaines explications politiques, ses inintelligibles entités, et surtout sa grande entité générale de la *nature*, qui enveloppe aujourd'hui toutes les autres, et qui n'est évidemment qu'une dégénération abstraite du principe théologique', quoted by B. Binoche, *Critiques des droits de l'homme*, Paris, Presses universitaires de France, 1989, p. 69.

basis³³. In this regard, he could be compared with the young Marx who criticized in *On the Jewish Question* the egoistic individual contained in the declaration of rights³⁴.

Secondly, and in a sense parallel to these critiques which examine the philosophical foundation of rights, jurists such as Savigny were more or less doing the same thing, when they tried to identify the essence of subjective right. Savigny is a typical figure, since he formulated one of the historical critique of human rights, which by their universal aspect are against particular and historically developed national law. Moreover, he was not bound by the public law context as mentioned earlier. Therefore, the way was free for Savigny to reconstruct the concept of subjective right, as it was for most of the legal scholars in the 19th century. It is in effect not a coincidence that the two major theories of subjective right were elaborated during this period: the will-theory defended by Savigny, and the interest-theory supported by Jhering. This part of the western legal theory is perhaps too famous to be explained here. It will suffice to say that if Savigny's conception is largely related to the philosophies of Kant and Hegel regarding the importance of will, Jhering criticized precisely this formalism and considers the aim of right as interest. We will devote our attention to how one of the last giants of this century, Georg Jellinek, conciliated these theories and put the concept of subjective right to a higher level.

In his *System der subjektiven öffentlichen Rechte* (System of Subjective Public Rights, first published in 1892)³⁵, Jellinek had to explain the regime of these rights, and was thus obliged to clarify the differences between public and private subjective rights. He was profoundly influenced by his master Jhering, and considered that the aim of right is to protect legal interests³⁶. But he had the great insight to point out that what is really important in the understanding of subjective right consists in the review and classification of human actions. In fact, he invited us to analyse these

³³ B. Binoche, *op. cit.*, p. 71.

³⁴ K. Marx, *Zur Judenfrage, Deutsch Französische Jahrbücher*, Februar 1844, reprinted in K. Marx, F. Engels, *Werke*, Berlin, Dietz Verlag, 1976, p. 364: 'Vor allem konstatiren wir die Thatsache, dass die sogenannten Menschenrechte, die droits de l'homme im Unterschied von den droits du citoyen nichts anderes sind, als die Rechte des Mitglieds der bürgerlichen Gesellschaft, d. h. des egoistischen Menschen, des vom Menschen und vom Gemeinwesen getrennten Menschen'.

³⁵ Curiously, this ground-breaking work doesn't seem to have attracted sufficient attention to be translated into other languages (in French for example), contrary to other major works of Jellinek.

³⁶ G. Jellinek, *System der subjektiven öffentlichen Rechte*, 2. durchgesehene und vermehrte Auflage von 1905, Baden-Baden, Mohr Siebeck, 2011, Allgemeiner Teil, IV, p. 42.

actions through the private-public structural distinction, rather than the definition of subjective right itself. In consequence, Jellinek saw wisely that human actions could be divided into permissions (*Dürfen*) and capacities (*Können*). What is permitted happens among equal individuals, whereas the capacities are defined by the community as a whole. Therefore, it is the particularity of public subjective right to guarantee the capacities of an individual, especially when he faces the state's authorities. In return, private subjective rights can be created, transmitted, extinguished easily by private persons. From this distinction comes the status-theory of Jellinek. Meanwhile, if an action is motivated by a material interest, as Jhering correctly indicated, it must also rely on the power of individual will, in conformity with Savigny. He thus considered that the subjective right is the good, or the interest, which is protected through the recognition of human power of will³⁷. The former is the material element of a subjective right, and the latter, its formal element. Jellinek resolved thus the rivalry between the two theses.

From the point of view of this article, it may be plausible to understand this contribution of Jellinek not only as the maturation of the theory of right itself, but also as the stabilisation of social representations of the post-revolutionary period. In fact, as we have already seen, when exiting the objective natural order, subjective rights were eventually used in a liberal sense, basically against the state, but also among private persons. The theory of Jellinek was the culmination point of this tendency, in so far as it justifies the liberal exercise of subjective will in the private sphere (permissions) and the limitations of state interferences (statuses), all being included in an interest-based approach. However, this accomplishment contains in itself the ingredients for scholars to go beyond this liberal theory of rights as we may see in the relational theory.

2.2.2. A new paradigm: the relational theory?

Despite constant critiques, studies on subjective rights have increased in all western legal cultures³⁸. Some scholars focused on clarifying the legal regime of subjective

³⁷ *Ibid.* p. 44: 'Das subjektive Recht ist daher eine von der Rechtsordnung anerkannte und geschützte auf ein Gut oder Interesse gerichtete menschliche Willensmacht.'

³⁸ A major impulse has been the essay of Hohfeld in 1913: W. N. Hohfeld, 'Some Fundamental Legal Conceptions as Applied in Legal Reasoning', 23 *Yale Law Journal* 16 (1913), pp. 16-59; in the French literature, see J. Dabin, *Le droit subjectif*, Paris, Dalloz, 1952, who understands the subjective right as a 'belonging and control' paradigm (*appartenance-maîtrise*); P. Roubier, *Droits subjectifs et situations juridiques*, Paris, Sirey, 1963, who has more

rights, resulting inter alia in the maturation of theories like abuse of right or right of action. However, these scholars did not criticize the traditional foundations of subjective right. On the contrary, some other scholars have endeavoured to search for a more adequate concept of subjective right. Their methodology is usually an analytical one and aims at the logical coherence of the concept. Thus, difficult questions have been raised against the will theory as well as the interest theory.

Regarding the interest-theory, major problems have been the existence of the interest itself and the link between the interest and the legal right of a person. If we take J. Raz's analysis as an example, we see that he criticises writers who consider legal remedies and sanctions as the essence of subjective right³⁹ and considers that '[t]o say that a person has a right is to say that an interest of his is sufficient ground for holding another to be subject to a duty.'⁴⁰ However, in some cases, sanctions seem to be more obvious than the damages which should motivate them⁴¹. Even if it is not difficult to identify the existence of an interest for a person, it is more difficult to decide recognizing a subjective right to this person is a sufficient reason. Typical questions are about persons who have against other persons subjective rights that protect interests of a third party. The subject of the right does not have itself an interest in the performance of the obligation. Parents can have subjective rights which protect the benefits of their children. Scholars who support the interest-theory sometimes make subtle distinctions in order to avoid these problems. Regarding Raz's theory, he himself has to claim that 'the right-holders' interests are only part of the justifying reason for many rights. The interests of others matter too.'⁴² Raz indeed points out that these interests should conserve a certain link with the interests of the right-holder, but this can also show a certain weakness of this legal construction which tries at all costs to find a certain 'interest' in human behaviour. We may have the same impression about liberty-right, which could appear so negative that one can feel difficulties to identify an interest. Thus, some scholars try to improve the will theory.

common characteristics with the will-theory. It would be interesting to analyse the use of 'situation' in Roubier's theory, since it emphasizes also concrete, particular legal relations. However, in the frame of this article, we can't not go further into such kind of discussions.

³⁹ J. Raz, 'Legal Rights', *Oxford Journal of Legal Studies* 4 (1984), pp. 1-21, especially p. 4.

⁴⁰ *Ibid.*, p. 5.

⁴¹ We may think of the right to the protection of privacy, where formal criteria, rather than concrete interests, can be given in order to qualify a breach of privacy.

⁴² J. Raz, 'Rights and Individual Well-being', *Ratio Juris* 5 (1992), p. 127, especially p. 134.

Concerning the will theory, however, the main problem is that some beings, as infants, who do not possess a will, would see their subjective rights denied. This problem has conducted most scholars to abandon the pure will-theory as formulated at the time of Savigny. Hart thus defended a certain mixed and modified will-theory. In his *Essays on Bentham*, he explained that Bentham was correct to consider liberty, claim-right and power as rights. But the benefit or interest-based explanation could not include all these types of rights. Therefore, it is important to ‘substitute for the utilitarian idea of benefit, as a defining feature of a right correlative to obligation, the individual’s legal powers of control, full or partial, over that obligation.’⁴³ The right is thus fundamentally a protection of the individual choice (to use or to waive the power). But Hart added immediately that ‘this theory, centred on the notion of a legally respected individual choice, cannot be taken as exhausting the notion of a legal right: the notion of individual benefit must be brought in, though *not* as the benefit theory brings it in, to supplement the notion of individual choice.’⁴⁴

This is why it is more and more common to combine both theories, as Jellinek has already done. However, if we persist in the methodological choice of these efforts, i.e. to find the most general theory of right which can be applied to all situations, we are probably prone to think that the necessity of combination means insufficient force of explanation. That is perhaps why recently we see some authors presenting a relational theory of subjective right⁴⁵. In brief, we can explain this theory as following: a right can always be understood as a normative constraint on one or several persons. This constraint explains the relation between these persons and the right-holder. There is no need to explain the constraint either by will or by interest of the right-holder (though they may be the justifications); what is important is to justify this relation. In other words, we must understand the *role* of a person in a legal community. Interestingly, we could see a certain revival of the theory of Jellinek: status can indeed be understood as an element of a position or a sort of role. We should examine this point more in detail, within the analysis of some applications of the concept of subjective right.

⁴³ H. L. A. Hart, *Essays on Bentham*, Oxford University Press, 1982, p. 188.

⁴⁴ *Ibid.*, p. 189.

⁴⁵ L. Wenar, ‘The Nature of Claim-Rights’, *Ethics* 123 (2013), p. 202; G. Rainbolt, *The Concept of Rights*, Dordrecht, Springer, 2006; if we choose a more foundational approach, we could also think of modern discourse theories of rights which necessarily justify rights with regards to the relationship between subjects of rights, but let’s stay with the more legal and analytical approach in this paper.

3. SOME APPLICATIONS OF THE CONCEPT OF SUBJECTIVE RIGHT

Our epoch, or the Anthropocene as suggested here, has seen a prevailing use of the liberal and abstract concept of subjective right (3.1). However, its worrying consequences require also a more reflexive re-evaluation of the current application of this very concept. (3.2).

3.1. The prevailing use of the liberal and abstract concept of subjective right

Numerous situations could be examined in this section. I would choose two of them, namely the division between generations of human rights (3.1.1) and the confusion between private and public laws (3.1.2).

3.1.1. *The division between generations of human rights*

First of all, social rights are understood here as fundamental labour and social rights, as enshrined in various legal instruments such as the International Covenant on economic, social and cultural rights, or the Charter of Fundamental Rights of the EU. It is almost a cliché of contemporary legal sciences to consider that social rights are not genuine human rights. The different ‘generations’ of rights do not only relate to a question of epoch, but also refer to a difference in quality, even if social rights were not completely absent in the earliest declarations of rights⁴⁶.

The most common argument in this domain is that social rights require a positive act of the state whereas traditional human rights are liberties, i.e. protection against state interferences. Social rights as positive rights (*droits-créances*, *Leistungsrechte*) should then be considered only as legislative programmes and their realisation can only be guaranteed by law. The most quoted cases are for instance ‘right to housing’ or ‘right to minimum subsidies of living’. There could be no claim against a state regarding its social policies. However, this opinion was

⁴⁶ See the French Declaration of Human Rights on 24th June 1793 (the so-called ‘Déclaration montagnarde’) which bore in its article 21 a right to work and to public subsidies.

challenged at least indirectly by the German constitutional court 50 years ago⁴⁷, and for almost 30 years in international human rights law⁴⁸. Scholars and courts have progressively made human dignity and the indivisibility of human rights a strong argument for the effectiveness of social rights⁴⁹. Recent decisions of the German constitutional Court have allowed individuals (German citizens as well as foreigners) to challenge laws providing minimum living benefits⁵⁰. Such a trend conferring a greater role to social rights is not surprising. As mentioned, this evolution is profoundly related to the ambiguity of the ‘subject’ of these rights (see 2.1.2).

From the standpoint of this article, it is worth noting the foundations of these different arguments: the exclusion of social rights as subjective rights is only based on the distinction between liberty and positive action. The confusion between subjective right and liberty, or the liberal conception of subjective right, which characterises the post-revolutionary society, has continued to produce its influence. But, obviously, this concept is no longer adapted to the present situation. Conversely, when arguing that human dignity is the primary foundation of social rights, we are now reconstructing the legal image of human persons, which, due to its status or position, forces the state to act in a certain way (for instance in providing sufficient social benefits). We see then how the relational theory of subjective right may be used in this context to justify legal claims with regards to social rights. The theory of Jellinek himself is producing its effect. As a matter of fact, Jellinek did not exclude rights on positive state actions in his status-theory. Whereas the *status negativus* corresponds to liberties mentioned above, the *status positivus* allows individuals to ask for positive actions from the state. This change can also be observed at a global scale, in the context of the globalization.

⁴⁷ BVerfGE, 7, 198, Lüth, 15 January 1958, although this decision on freedom of opinions clearly declares that the most important effects of the fundamental rights are the defensive effects, it recognizes also some positive effects of fundamental rights conceived as an objective order of values. See also more directly, BVerf GE, 33, 303, Numerus Clausus, 18 July 1972.

⁴⁸ A. Eide, Report on the right to food, n° E/CN.4/Sub2/1987/23, publication of the United Nations, 1989; see also, O. de Schutter, *International Human Rights Law: Cases, Materials, Commentary*, Cambridge University Press, 2014.

⁴⁹ C. Nivard, *La justiciabilité des droits sociaux*, Brussels, Bruylant, 2012, p. 75.

⁵⁰ BVerfGE 125, 175, Hartz IV Gesetz, 9 February 2010; BVerfGE 132, 134, Asylbewerberleistungsgesetz, 18 July 2012.

3.1.2. *The ongoing confusion between private and public laws*

Scholars are increasingly emphasizing the existing confusion, or hybridization, between public and private laws. This phenomenon is best seen in the context of international exchanges, where multinational corporations are relatively free from national constraints⁵¹.

In this domain, the subjective right, either among corporations or between workers and employers, is only conceived in a free contractual model, which is again the archetype in 19th century⁵². This model leads to a neo-feudalist structure of international trade⁵³, where powerful persons take control of weaker ones and benefit from them, without performing the corresponding duties. In this liberalized international market, states cannot hold their traditional sovereign position and are even submitted to competing to build attractive labour markets⁵⁴. Thus, free exercise of will (but in fact only the will of the *potens*) directed by the logic of benefit produces today the ‘total market’ where human beings and natural resources are included in financial markets⁵⁵.

If a public order is more than urgent today, we have to reconsider the difference between states and private actors, as well as between powerful and weak private actors. The liberal concept of subjective right does not pay enough attention to these aspects and is only concerned by an abstract world of will and interest. A more reflexive use of the concept should therefore come into being.

⁵¹ G. Teubner, *Constitutional Fragments: Societal Constitutionalism and Globalization*, translated by G. Norbury, Oxford University Press, 2012, especially the first chapter.

⁵² Whatever our opinion on Corporate Social Responsibility (CSR) may be, one can hardly deny that the global exchange is based legally on free contracts which then degenerate into interdependence. See the next note and also Cl. Camus, *La distinction du droit public et du droit privé et le conflit des lois*, Paris, LGDJ, 2015, p. 145, who quoted for example, R. Hall and Th. Biersteker, *The Emergence of Private Authority in Global Governance*, Cambridge University Press, 2002 ; A. C. Culter, *Private Power and Global Authority*, Cambridge University Press, 2003; H. Schepel, *The Constitution of Private Governance*, Oxford, Hart Publishing, 2005.

⁵³ A. Supiot, ‘The public–private relation in the context of today’s refeudalization’, *International Journal of Constitutional Law* (2013), Vol. 11 No. 1, 129–145.

⁵⁴ Cf. ‘Doing Business’ reports of the World Bank.

⁵⁵ Cf. G. Chichilnisky and G. Heal, ‘Securitizing the biosphere’, in G. Chichilnisky and G. Heal (ed.), *Environmental Markets: Equity and Efficiency*, New York, Columbia University Press, 2000, 169-179, quoted by Ch. Bonneuil and J.-B. Fressoz, *op. cit.*, note 3, p. 41.

3.2. A reflexive adaptation of the concept

In order to accomplish this ‘reflexive’ reassessment (3.2.2), we first take a trip to ancient China (3.2.1).

3.2.1. A trip to ancient China

If we say classical Chinese law did not possess a concept of subjective right, do we mean that it is the same kind of objective law as was existing in ancient Rome? We could examine the Code of Tang Dynasty (618-907 A.D.), the first systematization of Chinese imperial laws which remains a major source of all posterior codifications until the last imperial dynasty. It has also served as a model for Korean and Japanese laws, due to its highly systemic and detailed provisions⁵⁶. The particular domain of our investigation would be the parental right towards children.

This might be a surprising choice since we could also study the problem of debt, ownership, etc. But these domains do not put into light the most characteristic aspect of classical Chinese law, organized according to the order of a kinship where parental relations have a primary place⁵⁷. Moreover, the distance between the right over a thing and the right of a father over his son is not incomparable in Roman law in terms of power⁵⁸.

In effect, the Code of Tang provides in particular that

‘Article 348.1 All cases of sons and grandsons in the male line who violate orders, or who are deficient in support of their elders, are punished by two years of penal servitude. Commentary: This means violations of orders that can be followed or being deficient in support that they are able to provide. (...) It is only when the paternal grandparents and parents accuse them that these acts are punished.’⁵⁹

⁵⁶ W. Johnson, *The T'ang Code* (translation with an introduction), Princeton, Princeton University Press, 1979, vol. 1, General Principles, p. 5.

⁵⁷ Qu Tongzu (瞿同祖), 《中国法律与中国社会》, 北京, 中华书局, 1981; for the English version of the Book, see T'ung-Tsu Ch'ü, *Law and Society in Traditional Chinese Law*, Paris, Mouton, 1961. In particular, the first chapter.

⁵⁸ Cf. C. Summenhart, theologian in the late 15th century, wrote that ‘In the second way right is taken as the same thing as power, as we take it when we say that a father has right over his son and the king over his subjects’ (*Septipertitum Opus*, Tract I, Q. I, sig. Eiv v: ‘Alio modo accipitur ius ut idem est quod potestas quo modo accipitur cum dicimus patrem habere ius in filium / regem in subditos’), quoted by A. Brett, *op. cit.*, note 12, p. 36.

⁵⁹ W. Johnson, *The T'ang Code* (translation with an introduction), Princeton, Princeton University Press, vol. 2, Specific Articles, 1997, p. 399, with our modification of the translation.

This article could be construed recognizing a total domination of parents on their children. If we consider the modern western concept of subjective right as power of will and interest, we could have the impression that this would even be a perfect illustration of subjective right in China: the parent can order their children to do something (i.e. in conformity with the will of parents) and the children are obliged to nourish their parents, which is an obvious material interest of the parents. However, when we consider the way this article is executed⁶⁰, we understand that the traditional Chinese law was not (only) protecting a sort of subjective right of the parents, but also the order of kinship⁶¹, reflected by Confucian values. In a memoir at the beginning of the Tang Dynasty, we can find the record of a famous lawsuit in this domain⁶². An adult was accused by his mother to be offending her and to be neglecting his obligation to provide food. The son was a single child and the father of the family was already dead. The judge who should implement the Code did not ask the mother how the son disobeyed her and how much money he should give her, but told the woman that if she insisted to accuse her son in terms of violation of orders and even of lack of filial piety, the latter could be sentenced to death and she would not have anybody to support her in her life. Although the outcome of this story is significant for the Chinese legal culture, we will stop here⁶³. It is obvious that the parent had a claim and only she could accuse her son; the officer himself could not file a lawsuit without the accusation of the mother. Therefore, it cannot be considered as a criminal case as is often done in studies of classical Chinese law⁶⁴. But this claim and right to start a lawsuit cannot be properly considered as a

⁶⁰ See the comprehensive study on this question by Sun Jiahong (孙家红), 《关于“子孙违犯教令”的历史考察》(A historical study on the ‘violation of parental orders’), 北京, 社会科学文献出版社, 2013.

⁶¹ There is not enough space here to discuss the relationship between this particular article and the lack of filial piety, considered as the seventh of the ten abominations condemned by the Tang Code. It suffices to note that the protection of the familial order can also imply important duties for parents, which is also a specific characteristic of the Chinese law in this period.

⁶² Zhang Zhuo (張鷟), 《朝野僉載》, quoted by Sun Jiahong, *op. cit.*, note 60, p. 58 (the Chinese text is available at: <http://archive.org/stream/pgcommunitytexts26997gut/26997-0.txt>).

⁶³ The judge did not find the child really offending. Instead, the son acknowledged humbly that he was effectively in discord with his mother and thus should accept the punishment. The judge then told the mother to prepare for the judgment, but sent secretly at the same time an agent to follow her. They then discovered that the woman had an affair with another man and the son who knew their relationship was a problem for them. The judge therefore discharged the son and condemned the criminal couple. The case is recorded and transmitted to later generations because of the wisdom of the judge and it also shows how important the human factor is in Chinese legal practice.

⁶⁴ Even if penal law is effectively the major part of this law. See, W. Johnson, *op. cit.*, note 59, vol. 1, introduction.

subjective right either. Because precisely the mother would lose her control on her son and her financial benefits. The law itself requires (or at least admit the possibility of) the condemnation of the disobeying child.

With such a legal system, we see again how difficult it may be to conduct a comparative analysis, when the concept itself is in question. As a matter of fact, this power of parents contains a subjective part when we consider the procedural aspect and the content of the right: the parent can accuse the child for his disobedience regarding the parent's will. However, in terms of legal consequences, we are rather inclined to think there is no (at least direct) protection of the will or the interest of the parent, all being previously determined by the Code itself. How to elaborate then a more adequate concept of subjective right to understand this situation, and above all, to clarify current debates? It seems that we have to change a little our methodology and re-evaluate the theory of Jellinek.

3.2.2. Reassessing the concept of subjective right

Through this detour, it is easier to see that we may not have an abstract, *a priori* concept of subjective right. Rather, each society has and favours *its* conception of legal positions of human beings. In a society dominated by Aristotelian realism and stoic natural law, legal rights of human beings are only considered as the right part of thing that should come back to each one. The 'subjective' aspect of 'right' is rather the 'righteousness' of the person. It is then a virtue. Moreover, the general order of the world dominates and the subject is to be understood in the sense of submission to a higher authority. The driving force of the world is rather the whole *cosmos* itself, rather than the *anthropos*. A society characterized by the rejection of the real world was in a sense obliged to consider the separation between human beings and the world, and presume the independence of human beings towards the general order of the world. Thus, rights are first conceived as power over the nature that one can renounce. However, when society begins its denaturalisation and secularisation process, this power is understood as an abstract liberty that can be understood materially as interests or benefits. When the subjective right sees nothing in its content other than free will of persons and their interests, nature is then ignored or reduced to a fictive object submitted to humans. The legal world is then completely full of *Anthropos* as the only subject. This tendency reaches its paroxysm when public powers are also submitted to the contractualisation process, as the current globalization shows. However, the subject of this right, imprisoned in this abstract free world, does not necessarily apply the Kantian moral rules. Without due respect to human dignity, other human beings can be reduced to

commodities and thus treated as means and not as ends; in the same way, without proper limits regarding the natural world, resources are only considered as values of capital markets. It is however difficult to maintain the coherence of this state of things due to recurrent human and natural catastrophes. Nevertheless, it seems difficult for new rights (as social rights or environmental rights) to cohabit with the traditional concept of subjective right. How can this delicate situation be solved?

Classical Chinese law proposed a theory of right which does not ignore the subjectivity (needs, desires, will, etc.) of a person, but submits it to general order of kinship. Ultimately, the rights are not free encounters of wills, nor free exchanges of interests, but an expected behaviour, which can be free, in a given position. In other words, in order to have subjective rights, we must identify (or law must recognize) an independent legal position to person. If the state or another general order destroys this position, there can be no subjective rights any more. But it can also degenerate if it is considered as the position of an absolute master. Between these two extreme situations, we would have to find the most balanced 'position' of a legal subject. As we have seen, one possible way is to reconsider the relationship between public and private laws with the relational point of view. The theory of Jellinek shares with more recent relational theories the fact that they do not define the essence of a subject – which does not mean that we cannot try to do it or that it is not important –, but examine the status/feature/position of a legal subject. One's subjective rights are not the legal form of his will or interests, but result from the understanding of his concrete 'role', or what he can reasonably, i.e. legally and within a given context, do. It is always situated in a given epoch, and even in given circumstances, and also justified.

It is perhaps something which would be more familiar to labour lawyers, as labour law considers generally that parties in a labour contract do not have equal 'positions'. Therefore, the workers, being the weaker party in the contract, enjoys subjective rights related to trade unions, collective bargains, strikes, working conditions, resignation, etc. Depending upon the legal system in question, these rights can be protected by the constitution, statutory laws, implied terms of a contract, etc. But what is essential in the recognition of subjective rights is the legal position of an employee. If labour relations (and social rights) have triggered conceptual difficulties for the liberal and abstract concept of subjective right, we may also believe that, in the Anthropocene, environmental challenges and the global capitalist mode of production call also for a deeper renovation of the current concept. By (re-)introducing 'the other' (human beings as well as nature) in legal relations, the legal subject abandons its abstract and fictive existence, and gets in touch with the reality in which the subject is located.