

The Dialectic of Law and the Modern Legal Form

Abstract This chapter discusses the dialectic of law and the modern legal form. The dialectic of law, important in the tradition of the modern critique of law, entails that law is both a condition for emancipation and domination. Habermas' analysis of the dilemmatic structure of welfare state law in *The Theory of Communicative Action* addresses this dialectic in ways that he does not in *Between Facts and Norms*. In the latter work, Habermas instead discusses the dilemma of welfare state law at the background of the dialectic of legal and factual equality. I discuss the difference between this understanding and the dialectic of law.

Keywords Habermas · Menke · Dialectic · Law · Legal form

INTRODUCTION

By stressing the inherently dilemmatic structure of welfare state law in *The Theory of Communicative Action*, Habermas advances the interpretation that this law both enables and takes away freedom. In *Between Facts and Norms*, he argues it was too rash to characterise welfare state law as dilemmatic as such. Habermas instead thinks that the normalising consequences of welfare state law are understandable in the background of what he calls the dialectic between legal and factual equality.

In this chapter, I clarify the difference between the dialectic between legal and factual equality and the dialectic of law. The major difference

between these two accounts concerns whether limitations regarding emancipation are intrinsic to law or not. The dialectic of law analysis implies that it is. Habermas' analysis of welfare state law as dilemmatic is an example of this kind of analysis. The analysis of the dialectic of legal and factual equality is different, not because it does not address normalisation but because the criteria for assessing when measures turn from promoting equality and freedom to its opposite are internal to democratic law, when properly reconstructed. Habermas argues that the reconstruction of private and public autonomy gives us standards for assessing when measures are promoting autonomy and when restricting it. For this reason, the analysis of the dialectic of legal and factual equality does not imply that limitations regarding emancipation are intrinsic to the law in the way that the dialectic of law does.

As suggested in the introduction, I think that Menke's analysis is helpful in understanding the dialectic of modern law. His account builds on analysing the modern form of rights and the modern legal form. I therefore discuss how to understand the modern legal form, contrasting the accounts of Habermas and Menke. Both authors stress the primacy of rights in modern law and note how this initially developed in relation to private law. Yet, they also differ in several respects, among others in how Menke puts emphasis on rights relating to what is outside of law, non-law. This gives the modern understanding of subjective rights its specific characteristics. Menke suggests that the relation between law and non-law is one of self-reflection, thus, relying on certain elements of Luhmann's characterisation of modern law.

THE DIALECTIC OF LEGAL AND FACTUAL EQUALITY

In *Between Facts and Norms*, Habermas (1992: Chap. 9.2) advances the argument that the ambivalence of welfare state law relates to the dialectic between legal and factual equality. This dialectic refers to the adoption of measures and regulations that aim towards achieving de facto equal opportunities, central for the development of welfare state law in the twentieth century. However, this development is also ambivalent, Habermas (1992 [1996]: 416) argues:

[S]atisfying the material preconditions for an equal opportunity to exercise individual liberties alters living situations and power positions in such a way that the compensation for disadvantages is associated with forms of

tutelage that convert the intended *authorization* for the use of freedom into a *custodial supervision*.

Habermas (1992 [1996]: 416) gives some examples of when this happens, for instance, ‘when statutory regulations on work and family life *force* employees or family members to conform their behaviour to a “normal” work relation or a standard pattern of socialization’ or when recipients pay for compensations ‘with dependence on normalizing intrusions by employment offices, welfare agencies, and housing authorities’. Habermas (1992 [1996]: 416) also highlights problems of collective bargaining when the representation of interests is bought at the expense of ‘freedom to decide by organisation members’. These examples are similar to those Habermas gives in *The Theory of Communicative Action* about the colonisation of the lifeworld, but he no longer thinks that they point to an inherent dilemma of welfare state law. In *Between Facts and Norms*, Habermas concludes that it would be too rash to conclude that the dilemma he points to is inherent in welfare state law.

The reason for this change partly relates to Habermas abandoning the colonisation analysis and partly to the fact that he thinks that the ‘criteria by which one can identify the point where empowerment is converted into supervision are, even if context-dependent and contested, not arbitrary’ (Habermas 1992 [1996]: 416). More specifically, this refers to the reciprocal relation between private and public autonomy, which gives ‘an intuitive standard’ for judging whether measures and regulations promote or reduce autonomy (Habermas 1992 [1996]: 417). There are two dimensions to this, one having to do with political autonomy and the other referring to private autonomy.

Discussing this in terms of the reconstruction of private and public autonomy suggests that we should look at political processes of legislation and policy making for understanding when measures turn from promoting autonomy to its opposite. Normalisation would then arise as consequence of citizens not being involved in outlining measures, their focus and contents, their implementation, and so on.¹ In this case, normalisation is understandable in the background of political autonomy, more specifically citizens lacking appropriate ways to take part in political processes. Besides this interpretation, Habermas also discusses normalisation with regard to private autonomy. He argues that normalisation takes place ‘when welfare regulations, employing criteria of equal treatment in an attempt to secure an actual equality in living situations and

power positions, achieve this goal only under conditions or with instruments that... also severely *limit* the vulnerable areas in which individuals can autonomously pursue a private life plan' (Habermas 1992 [1996]: 416). This argument differs from the first one. The fact that Habermas makes this interpretation as well is of course not surprising, in particular, given the importance of private autonomy for the modern conception of rights. However, it partly runs counter to Habermas' argument that the reconstruction of the relation between private and public autonomy creates standards for assessing normalisation.

Stating that the criteria for assessing the adverse consequences of normalisation build on the reconstruction of private and public autonomy is in line with the overall argument in *Between Facts and Norms*. Habermas (1992: Chaps. 7–9) stresses the need for public debates about what are relevant societal circumstances to address when working out laws and policies aiming to achieve equal freedom.² Following the proceduralist approach, Habermas (1992: Chap. 9) advances that one has to judge on a case-to-case basis whether achieving equal opportunities requires one to treat cases similarly or differently. Feminist discussions of the equality/difference dilemma show this. For Habermas, discussions about whether to stress equal or different treatment depend on assessing 'which differences between the experiences and living situations of (specific groups of) women and men become relevant for an equal opportunity to take advantage of individual liberties' (Habermas 1992 [1996]: 425). The proceduralist approach opens up for interpreting equality and difference in new ways (see also Johnson 2001). Yet, there are reasons to inquire into the background conditions for this appearing as a problem with respect to feminist politics of equality in the first place.

To some extent, this has implications for the medium at hand, namely law and rights. An example is how Wendy Brown (2000: 232) elaborates on paradoxes of rights, arguing that a key paradox 'is that rights that entail some specification of our suffering, injury, or inequality lock us into the identity defined by our subordination, while rights that eschew this specificity not only sustain the invisibility of our subordination, but potentially even enhance it' (see also Brown 1995). Brown connects this to other themes familiar in the modern critique of law, for instance, that rights mitigate consequences of subordination but does not eliminate domination. She also draws attention to the problem of addressing intersectionality in law, that is, the difficulty of addressing 'subjects marked by more than one form of social power (race, gender, age, sexual

orientation, disability) at a time' (Brown 2000: 235). The latter has a specific bearing on Habermas' suggestion to deal with equality and difference on a case-by-case basis. In a specific case, it is likely that there are several differences that are relevant to consider. This, at least, complicates how to assess whether treating cases similarly or differently best advances substantial equality.

THE DIALECTIC OF LAW

A way to understand how the modern critique of law relates to the point Habermas makes about the dialectic of legal and factual equality is to draw attention to Weber's (1922: 439f) discussion about freedom and coercion regarding relations between workers and capitalists.

Weber noted that the expansion of contractual relations in modern society depends on developments of modern law. However, the extent to which this also means 'an actual increase of the individual's freedom to shape the conditions of his own life' is less certain, Weber (1922 [1978]: 729) thought. In order to assess the latter, we have to look at whether these possibilities are available to all. 'Such availability', Weber (1922 [1978]: 729) continued, 'is prevented above all by the differences in the distribution of property as guaranteed by law':

The formal right of a worker to enter into any contract whatsoever with any employer whatsoever does not in practice represent for the employment seeker even the slightest freedom in the determination of his own conditions of work, and it does not guarantee him any influence on this process. (Weber 1922 [1978]: 729)

We may interpret this problem along the familiar lines of the distinction between *de jure* and *de facto* opportunities, that is, in the light of what Habermas discusses as the dialectic between legal and factual equality. However, it is also possible to interpret it in ways that are closer to the tradition of the modern critique of law (see Menke 2015: 277ff). When Weber addressed this question, he did so by talking about freedom and coercion (*Zwang*). More specifically, he argued that the question is how to interpret contractual freedom in relation to coercion in one legal community compared to another, 'for instance, one organized along "socialist" lines' (Weber 1922 [1978]: 730). It is true that formally, the 'increasing significance of freedom of contract' represents

a ‘decrease of coercion’ (Weber 1922 [1978]: 730). However, taking into account actual opportunities of making use of these possibilities implies for Weber (1922 [1978]: 730) that ‘the exact extent to which the total amount of “freedom” within a given legal community is actually increased depends entirely upon the concrete economic order and especially on the property distribution’.

Discussing this in terms of freedom and coercion suggests not only linking legal and economic orders but also taking into account both dimensions when assessing whether contractual freedom overall implies a decrease in coercion in the legal community. Thus, Weber (1922 [1978]: 730) thought that coercion in a capitalist economy has a peculiar form: ‘In this type of coercion the statement “*coactus voluit*” applies with peculiar force just because of the careful avoidance of the use of authoritarian forms’ (Weber 1922 [1978]: 730).³

Weber’s argument about *coactus voluit* entails considering law in ways that allow us to understand how legal regulations may simultaneously enable freedom and be a condition for domination. Marx viewed private law in this way. As Bob Fine (1984: 119) pointed out in his discussion of how Marx abandoned the analogy between slavery and the conditions of workers in capitalism, Marx came to recognise that capitalist exploitation is ‘compatible with—not at odds with—juridic freedom and equality’. In private law, this equality centres on private property and contractual freedom. Market exchange was the medium for their realisation. The early modern social contract thinkers thought that ‘[n]atural rights will find their reliable counterpart in the laws of trade and commerce’ (Habermas 1963 [1973]: 95). Marx confronted this constellation in his problematisation of law. When arguing that exchange relations are ‘a very Eden of the innate rights of man’, Marx (1867 [1992]: 280) only took the social contract thinkers at their words.

Specific to capitalist relations are that they build on the selling and buying of labour power. This presupposes the legal equality of the bearer of this labour power. Legal equality is therefore the condition for exploitation. The bourgeois private law is a legal order that expresses both legal equality of persons and mechanisms that enable social domination (Menke 2015: 272ff). It has been common to understand this as ideology, legal equality only covering up what are unequal power relations. While there certainly is an ideological element, helping to sustain a certain presumption of equality in spite of its reversals, legal equality is not only (not primarily) ideology, rather it is a condition for the possibility

of domination. Capitalist exploitation can develop only on the basis of legal equality. Without legal equality, selling of labour power is impossible. Only based on the active use of rights in private law can persons be exploited (Menke 2015: 289).

Thus, legal equality plays a key role in enabling capitalist exploitation. To some extent, of course, exploitation is the reversal of equality. It is the opposite of equality and a mechanism for generating inequalities over time, but the important point with regard to private law is that this reversal takes place within law. The central legal means of private law, in particular, contractual freedom, is key for understanding how the reversal happens without violating private law. This does not mean that legal equality is not also emancipatory. To be sure, it has been difficult in much of Marxian theorising about law to keep both of these things in mind (see Collins 1982; Fine 1984; Kelley 1978). The problem is that it is neither possible to disregard the legal institutionalisation of equal freedom, to debunk it as mere semblance, nor is it possible to envision the struggle for emancipation only in legal terms, as that which is not yet achieved. The result, Fine (1984: 120) noted, is a deep ambivalence about the potential for liberation through rights:

Marx never overcame his ambivalence between his conception of bourgeois equality and freedom as “only a semblance and a deceptive semblance” and his realization that “this semblance exists nevertheless as an illusion on his [the worker’s] part and to a certain degree on the other side, and thus essentially modifies his relation by comparison to that of workers in other modes of production”.

Addressing this kind of ambivalence is central in much of critical thinking about rights and law, from Marx until our own times (see Brown 2000; Buckel 2007, 2009a, b; Loick 2014a, b; Menke 2015; Parla 2011).

Of course, we may think that this ambivalence is due to the inability to come to terms with modern law. In that case, the ambivalence appears as a fault in properly understanding law as a language for the realisation of autonomy (compare Baynes 2000). In part, this is what Habermas implies in shifting from considering welfare state law as dilemmatic in itself to arguing that the criteria for normalisation are found in democratic lawmaking. Habermas also advances a similar type of claim in other respects as well. It is, for instance, implied in his criticism of Foucault’s analysis of normalisation, Habermas (1992 [1996]: 79) arguing that

‘a sociology that would remain sensitive to tensions of this sort must not renounce a rational reconstruction of civil rights from the internal perspective of the legal system’. Besides Habermas misunderstanding the objectives of Foucault’s analysis, I am not convinced that Habermas is able to show that understanding normalisation presupposes the reconstruction he proposes.⁴ Moreover, Habermas is less than clear about this reconstruction and its use for assessing normalisation, as already pointed out. While arguing that the reconstruction gives us intuitive standards for assessing when welfare state measures turn from promoting to restricting freedom, he also relies on private autonomy as an independent criterion. The latter is not surprising but the more troubling with regard to the argument that it is the reconstruction between private and public autonomy that gives us the criteria for assessing problems of welfare state law. This points to the problem of building the reconstruction of political autonomy on rights in the modern sense. I have already pointed to some dimensions of this problem and will discuss it in the next chapters.

In general, much of Habermas’ arguments about standards of criticism are understandable in the background of an argument he put forward in early discussions about ideology critique. Habermas (1962: Parts 3 and 4) argued that such criticism should not be understood as invalidating the ideas and norms addressed. Instead, one should understand this criticism building on these ideas and how they are used to point to inequalities and injustices in society. Otherwise, criticism would lack direction, and it would not be clear about its own premises. Habermas’ argument was, of course, a valuable corrective to certain strands of Marxist ideology critique. Looking at the focus of this study, the implication of Habermas’ argument is that critique of domination (as exemplified above with respect to Foucault) requires taking legal equality and rights as presuppositions for criticism to have direction and clarity.⁵

However, addressing domination in terms of the dialectic of law does not invalidate that rights also serve emancipatory purposes. It does, however, imply that we also need to address how domination unfolds on the basis of rights, not only or always in contradiction to them. Rights being condition both for emancipation and for domination is what makes modern law ambivalent. Thus, the dialectic of law suggests that we consider another possibility than separating what explains domination and what enables emancipation. It suggests that we address how domination is the reversal of legal equality and freedom and yet, simultaneously, unfolding on the basis of law. The problem of not being able to resolve the tension

between law as semblance of liberation and vehicle for achieving emancipation is then less a fault attributable to inconsistencies and tensions of thinking. Instead, this ambivalence expresses contradictions of the modern legal form, the way in which the legal form both enables emancipation and is the basis for social domination (Buckel 2007, 2009a; Fine 1984; Menke 2015).

Marx primarily addressed the ambiguity of the private law, the institutionalisation of property rights and individual freedom of contract, and so on, arguing that while this allows for one to contest rights (right against right), it does not enable the more fundamental transformation he envisioned in the socialist revolution. There are reasons to stress the importance of private law, both for the development of modern law and for the modern idea of rights. Without taking this into account, the Marxian criticism of law becomes impossible to understand. Marx is certainly not critical of rights because he does not 'believe' in them, because he is sceptical of rights as such. Rather, it is their ambiguous role, how they are compatible with capitalist exploitation and in fact make up an element of the condition for the possibility of exploitation that is at the centre of his attention. Yet, Marx' focus on the private law made him misunderstand the struggles about which kind of law, private law or social law, should prevail. Marx overlooked the development of social law, Menke (2013, 2015: 281ff) argues, which had consequences for Marx' understanding of what the struggles for shorter working days, better working conditions and social protection, and so on entailed. Marx did not understand that these struggles involved claims of a right to life and the recognition of partaking in social life and instead interpreted them as private law claims.

The neglect of social law also had consequences for the understanding of social domination. In social law or welfare state law, domination takes the shape of normalisation, not exploitation (Menke 2015: 285ff). There are thus reasons to attend to how the dialectic of law in welfare state law is different from its shape in private law. Habermas understands this very well. In fact, the reason for him focusing on welfare state law as an example of colonisation of the lifeworld was largely that this allowed him to show the relevance of critical theory in the context where orthodox Marxism was not well equipped to make sense of the welfare state. Even though the specific way in which Habermas developed this turns out to be problematic, the guiding thread of the analysis that we deal with processes of normalisation and these tie in with characteristics of welfare

state law seems to me to be on the spot. When Habermas analyses normalisation in *The Theory of Communicative Action*, he does so in ways that point to the dialectic of law, showing how welfare state law simultaneously enables and restricts freedom. I will come back to this analysis in the next chapter, discussing how it is possible to develop it in terms of Menke's analysis of the modern legal form instead of Habermas' analysis of lifeworld colonisation by systems.

THE MODERN CRITIQUE OF LAW

The dialectic of law is not the only way through which the ambiguities of modern law have been discussed. In order to situate the account of the dialectic of law, I briefly discuss some other central themes of the modern critique of law in this section (see Brown and Halley 2002; Buckel 2009a; Hutchinson and Monahan 1984; Kelley 1978; Kennedy 1985, 2002; Peters 1991: Part 5; Unger 1986). Doing so, I stress the Marxian background to the modern critique of law, paying less attention to its Hegelian dimensions (compare Fine 2001).

An important issue in much of legal analysis concerns the indeterminacy of law, that is, the problem, in Habermas' (1992 [1996]: 199) words, of how to guarantee '*the certainty of law* and its *rightness*'. While important for questions about the legitimacy of law, the debate on indeterminacy focuses primarily on the application of the law. There is an extensive discussion about these issues, but I will leave it aside in the following (see Frankenberg 2009: 106ff; Kress 1989; Unger 1986). Scholars in the tradition of critical legal studies sometimes connect indeterminacy to the analysis of the political conjuncture. Mark Tushnet (1989), for instance, addresses how appeals to rights and their expansion depend on the political forces that enable the recognition of rights and sustain their applicability. Social movements and civil society organisations are important for the recognition of rights, not only initially but also over time. Unless supported by political forces, Tushnet (1989: 409) noted that 'there is little reason to believe that, inertia aside, the right will continue to be recognized'. This is an important point and unfortunately, it often plays a subordinate role in much of legal-political analysis. However, it is not what I focus upon in this study.

Another central theme in the tradition of the modern critique of law is that law glosses over inequalities and power relations. This glossing over makes law ideological (see Buckel 2009b; Fine 2013; Hunt 1985).

To some extent, this effect of rights stems from them abstracting from the societal conditions in which rights function (Buckel 2007, 2009a). Anatole Frances' famous quip about sleeping under the bridges of Paris captures this problem. Related to this is another dimension of the ideological dimension of law and rights, specifically, that they express particular societal perspectives and ideals, such as bourgeois ideas or masculinist conceptions (see Collier 1995; Fine 2013; MacKinnon 1989).

Connected to the charge that law is ideological, creating the semblance of equality, sometimes but not always, attempts to analyse the emergence of modern law. Examples include several types of Marxian accounts of law, which tie law to the emergence of capitalism (Buckel 2009b; Collins 1982; Fine 1984, 2013; Poulantzas 1978: 86ff). One of the most important theorists in this tradition is Evgeny Pashukanis (1924 [1989]: 113), who analysed the interrelationship between private law and relations of production: 'The social relation which is rooted in production presents itself simultaneously in two absurd forms: as the value of commodities, and as man's capacity to be the subject of rights'. Pashukanis discussed the emergence of the legal subject in relation to the shift from the feudal to the capitalist economy, stressing the homologies between legal equality and exchange but also pointing out the specific roles of contracts and the settlement of disputes in this regard (see also Balbus 1977). Pashukanis did not view the law as an epiphenomenon and instead stressed that law is a specific social form. However, he did not fully overcome the Marxist base-superstructure argument. For Pashukanis, the legal form emerged in relation to capitalist exchange, and his account of the subject of right exclusively ties it to private law. Later, theorists who wanted to develop a materialist account of law often drew on Pashukanis, in particular, the idea of law as form, while attempting to overcome the problems involved in the reduction in the form to exchange and the privileging of private law.

Buckel's (2007) analysis of the modern legal form as technology of subjectivation and cohesion is an example. Buckel (2007: 237) stresses that the legal form is a social form in its own right, related to but not reducible to other social forms. Similar to Habermas, Buckel understands the mode of subjectivation in the modern legal form, in terms of the abstraction from concrete life contexts. This abstraction enables the 'commensuration' of interests and understandings of the good life between legal subjects, more specifically the kind of commensuration that allows for interests and ideas about what is good and worthwhile

to coexist. This also means that legal subjects relate to each other in an external fashion. In this sense, Buckel (2007: 237f) argues, law is also a technology of cohesion. As technology of cohesion, modern law establishes a mode of formal cohesion between abstract individuals. Buckel (2007) argues that in order to understand the effects of this modern legal form, how law is mode of subjectivation and technology of cohesion, we have to pay attention to how persons use legal reasoning and make legal claims. We need to investigate how individuals seek the redress of injustices, claiming equality or freedom, seeking the resolution of conflicts, establishing contracts, and so on, through the legal language. Buckel is, in particular, interested in how persons make use of this legal language in the context of courts and other legal bodies, where lawyers, judges, and other legal experts play a central role. Even though not drawing on Pierre Bourdieu's (1987) analysis of the juridical field, Buckel's (2007: 240ff) analysis has several similarities with the way that Bourdieu stressed that this field is one of practices, jurists making use of legal knowledge in addressing grievances, building cases, engaging in legal argumentation, and the like. It is through legal procedures and legal argumentation that law has real effects. Even though this allows for expressing and formulating grievances, making claims, and so on, the legal language also has specific formative effects. Similar to how Nicos Poulantzas (1978: 89f) thought that ordinary people have little command of judicial knowledge, Buckel (2007: 240ff) also stresses that it is largely through legal procedures that actors lose 'control' over how their concerns are addressed. Practically, this takes place through the need to formulate concerns in legal categories and to understand themselves in such terms. Thereby, an understanding of persons and their relations to each other that define human beings as legal beings is constituted. It is in this regard that it makes sense to talk about 'legal fetishism', as argued by Buckel (2007: 242f). Yet, fetishism is not illusion. Central to fetishism, Marx (1867 [1992]: 165) asserts, is that relations 'appear as they are'. The latter involves the common understanding that legal relations are actually specific and concrete. Thus, the fetish character of law entails that it takes on ontological meaning, defining human beings as legal beings (Marx 1843b: 231f).

Buckel (2007) argues that we should focus on understanding the structuring effects of the modern legal form. Several other scholars stress the importance of analysing the formative force of law. One common focus in this regard is the formative force of law as it relates to modern

conceptions of the subject. An example is how Judith Butler (1990: 2) argues that ‘law produces and then conceals the notion of “a subject before the law” in order to invoke that discursive formation as a naturalised foundational premise that subsequently legitimates that law’s own regulatory hegemony’. Even though not every theorist would agree with this specific understanding, the force and violence involved in becoming a legal subject is something several theorists point to (Buckel 2009a). More generally, the connection between violence and law has attracted wide attention, famously in the way that Walter Benjamin (1921) analysed the intertwining of lawmaking and law-preserving violence. Benjamin’s problematisation has played an important role in the critical analysis of law and politics (see Butler 2006; Hamacher 1994; Martel 2014). This goes not the least for the discussion initiated by Jacques Derrida’s (1992) reading of Benjamin.

Particularly important for the discussion of law in the context of Habermas’ political and social thought is the analysis of the formative force of law among the early generation of Frankfurt theorists (see Buckel 2007: B.II; Scheuerman 1994: Chaps. 1–2; Seifert 1971). Kirchheimer (1928) and Franz Neumann (1937) engaged in the analysis of juridification, and they focused on the function of law in guaranteeing social and political status quo, its role in disguising social domination, but in particular understanding, how law has become central for framing conflicts and expressing claims. Kirchheimer (1928: 36f) discussed this in terms of the establishment of the modern idea of the ‘legal state’ (*Rechtsstaatsgedanke*) that is formative for modern politics. The legal state was initially a tool in the struggle of the bourgeoisie against both feudalism and absolutist monarchs and later became the framework of modern politics. It came to define the ‘horizon’ of politics, a shaping and forming effect that Kirchheimer found ambiguous for reasons similar to those articulated by Engels and Kautsky.

Habermas draws on Kirchheimer in *The Theory of Communicative Action*, when engaging in the analysis of how welfare state law is an example of the colonisation of the lifeworld. Kirchheimer, by contrast, addressed what Günther Teubner (1993) calls the ‘colonisation’ of politics, the formative role of law with regard to modern politics. Describing conflicts through modern law shapes the understanding of conflicts and the making of claims, what is possible to say and do. This simple fact directs attention to the kind of ‘language’ law is and what it makes possible to say. These features of what the force of law consists of are

central to the modern critique of law (see Buckel 2009a; Christodoulidis 1998; Loick 2014b). Implied in Kirchheimer's criticism is, in the words of Emiliós Christodoulidis (1998: 69), the critique that law serves 'as an (adequate) register of political meaning'. Yet, to talk about juridification as 'colonisation' of politics is in several ways imprecise; therefore, we have to engage in an analysis of the dialectic of law, how law is both a condition for freedom and a condition of social domination. As already discussed, the analysis of the dialectic of law involves stressing how the opposite of law, involving freedom or autonomy, is at the same time unfolding on the basis of law. In discussing this, I draw on Menke but there are other examples as well (compare Kompridis 2006). An example is Peter Fitzpatrick (2001) who argues that whereas modernity does not rely on some exteriority that defines it, it does produce the 'other' constitutive of it inside itself: 'Because a universalist encompassing modernity cannot allow of an engendering position apart from itself, its own 'self' creates the other against which it is constituted. Not only that, not only must the other be absolutely excluded from an encompassing modernity, this very quality of encompassment means that the other must also be included' (Fitzpatrick 2001: 63). Fitzpatrick analyses the conception of savagery in this context, how savagery is externally opposed to the civilisational role of law and yet included in it.

THE MODERN LEGAL FORM

Important for the discussion of Habermas' conception of law in the light of the modern critique of law is the question about how to understand the modern legal form. As is discussed in more detail in the following two chapters, Habermas views modern legal forms partly in terms of system differentiation, that is, how law ties in with the development of the systems media of money and administrative power, partly in relation to lifeworld rationalisation. Both dimensions are important for Habermas' understanding of the law, but the lifeworld anchoring of law is a key to his understanding of modern legal forms.

The rationalisation of the lifeworld involves the differentiation of morality and legality. Compared to ancient understandings, neither morality nor law anchors in ethical life any longer. In discussing the implications of the rationalisation process that sets free values and norms and makes them depend on processes of coming to an understanding, the 'vanishing point' of these processes entails a situation in which

‘legitimate orders are dependent upon formal procedures for positing and justifying norms’ (Habermas 1981 [1987], vol. 2: 146). Thinking that both morality and legality evolve out of the disintegration of ethical life does not mean that Habermas, along the lines of Kant, thinks that morality is the basis of law. In the contrary, it is only democratic processes of lawmaking that constitute the source of legitimacy of laws. In fact, the differentiation of morality and law makes up an important background for the possibility of modern democracy. As noted in the previous chapter, Gaus (2013) argues that a key element to Habermas’ reconstruction is that he thinks that citizens involved in establishing the constitution understand that they can only do so through positive law.

The key to the legal form for Habermas is how it involves a three-fold abstraction in comparison with morality (see also Klein and Menke 2011). First, law abstracts from the capacity of persons to bind their own will, and it only relates to persons being capable of free choice or exercising free will (*Willkür*). Second, law abstracts ‘the complexities that action plans owe to their lifeworld contexts’, Habermas (1992 [1996]: 112) argues, and ‘restricts itself to the *external relation* of interactive influence that typical social actors exert on one another’. Third, law abstracts the kinds of motivation that make persons abide by the law. Habermas (1992 [1996]: 112) argues that moral norms refer to persons individuated through their life histories, but it is different with legal norms:

[L]egal norms regulate interpersonal relationships and conflicts between actors who recognize one another as consociates in an abstract community first produced by legal norms themselves. Although they, too, are addressed to individual subjects, these subjects are individuated not through personal identities developed over a lifetime but through the capacity to occupy the position of typical members of a legally constituted community.

Habermas (1992 [1996]: 112) argues that these characteristics of legal norms and the legal person make the legal form have an ‘atomising effect’, but this does not negate the intersubjective basis of law. By this, Habermas means, in ways that have certain affinities with Hegel’s account, that the abstractions of the legal form and the notion of the person it contains do not compromise how law reflects the structures of recognition in communicative action (compare Buchwalter 2002; Stillman 1991).

While emphasising lifeworld rationalisation as important for law, Habermas also stresses the centrality of private law in the development of modern rights, rights tailored to individual choice. As Habermas (1992 [1996]: 27) notes, ‘the core of modern law consists of private rights that mark out the legitimate scope of individual liberties and are thus tailored to the strategic pursuit of private interests’.⁶ In line with the ambition to reconstruct the relationship between private and public autonomy, Habermas shifts from discussing how modern law involves stressing private autonomy to how this is a problem when we are interested in showing the interrelation of the two dimensions of autonomy. German civil law jurisprudence from Friedrich Carl von Savigny to Hans Kelsen, which is Habermas’ focus in this discussion, ‘concealed the real problem connected with the key position of private rights: the source from whence enacted law may draw its legitimacy is not successfully explained’ (Habermas 1992 [1996]: 89).

Menke (2015) details the importance of private law for the modern form of rights in ways that Habermas does not. Unlike Habermas and several others, discussing modern legal forms in terms of abstraction, Menke puts less emphasis on this element. Central to Menke’s analysis is instead how modern law builds on the relation between law and non-law. In this respect, his analysis resembles that of Luhmann but unlike Luhmann, Menke is not primarily interested in the sociological meaning of the normativity of modern law. Menke (2015: 7) focuses on understanding the specific form of equality institutionalised from the early modern revolutions onwards: equal rights. He develops on this in relation to Marx’ (1843a [1992]: 230) puzzle regarding the French Revolution⁷:

It is a curious thing that a people which is just beginning to free itself, to tear down all the barriers between the different sections of the people and to found a political community, that such a people should solemnly proclaim the rights of egoistic man, separated from his fellow men and from the community.

This, Marx thought, makes political freedom (the political community) into a means for realising rights manifested in private law. Menke thinks that the paradox of the early modern revolutions, political emancipation at the same time being an emancipation *from* politics, is understandable when investigating how this took place (compare Kouvelakis 2003). He

suggests that understanding this ‘how’ requires us to look closer at the form it takes, the form of rights. Understanding Marx’s puzzle necessitates investigating the form of rights and the modern legal form (Menke 2015: 7ff).

The key to Menke’s (2013, 2015) conception of the modern legal form is that law relates to what is outside of it, to what is non-law (*Nichtrecht*). In its modern understanding, rights are about this relation to the outside of law in a twofold way. Rights relate to what is outside of law as the ‘natural’ striving to self-preservation, on the one hand, and the interiority of individuals, on the other hand. Thoughts, desires, and inclinations of individuals are outside of law, something that law cannot ‘reach’ or regulate. This means that modern law sets free thoughts and desires of individuals, allowing for their expression and development. Instead of trying to secure the ethical integration or education of individuals, their thoughts and inclinations are set free. Law only regulates external behaviour. As seen, Habermas shares this view, an understanding that is central to most philosophies of modern law. Famously, Kant (1797 [1991]: 56) conceptualised law in this way, as the ‘sum of the conditions under which the choice of one can be united with the choice of another in accordance with a universal law of freedom’. Combining or regulating choices of individuals, as the latter are secured through rights are key to modern law. Moreover, these choices refer to the ‘natural’ striving for self-preservation. Self-preservation is about using powers and capacities for preserving and augmenting life. It is in this sense that Hobbes (1651 [1985]: Chap. 14 (189)) talked about the right of nature as 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’. The reference to what is outside of law is central for what the primacy of rights demands in modern law. Rights are about protecting the ‘natural’ striving, including the power and freedom this involves.

Both of these dimensions are important for understanding the primacy of rights in modern law. It is common to see the modern law as a change from duties to rights, following the dissolution of anchoring law in ethical life (Menke 1996). In much of modern natural law thinking, this shift to the primacy of rights means that rights exist prior to the establishing of the legal-political order. This, in turn, brings forward the counterclaim that only legally institutionalised rights are rights, properly speaking. Menke (2015: 28f) thinks that both interpretations misunderstand the implications of the modern focus on the primacy of

rights. ‘Natural rights’ do not refer to the founding of law, rights existing prior to law and providing the ground for it but to the content of rights. It refers to the material of rights in that rights refer to what is outside of law. Rights are about mediating between law and the outside of law. Menke (2015: Chaps. 2–4) explicates this in relation to the understanding of rights as claims and the reasons for the following law.

Looking at the first dimension, rights as claims, Menke (2015: Chap. 2) points out that in Greek antiquity, rights were understood in terms of justice, in line with justice meaning ‘to each his own’. Rights involved claims to what were due to persons on this basis. In settling claims, the focus was on restoring justice, what is properly due to persons. The Roman understanding was in some ways similar, that is, looking at legal claims in the light of what is just. However, in the Roman case, the equality of citizens was decisive in this regard, not the integration of citizens in a shared ethical life establishing what is good and worthwhile. Menke (2015: 47f and 90) interprets this as meaning that in Rome law was silent about the purposes of exercising rights. This is not the case in the modern understanding. The modern form of rights is not silent about the purposes of rights. Modern rights are about enabling individuals to engage in the natural striving for self-preservation. Thus, modern law is not only about the primacy of rights but also involves a specific understanding of what the legal claim is. It is a claim to something outside of law, to power or liberty to do something.

Concerning the second dimension, reasons for abiding by law, Menke (2015: Chap. 3) argues that in Greek antiquity, in line with seeing claims to what is one’s own anchored in an order of what is good and worthwhile, law was about ethical education. Law was about making persons virtuous. The Roman conception differed from this because of the abstraction from ethical life. Self-preservation and virtue had the same ontological status. Developing virtue was one possibility, the natural striving for self-preservation another. Again, Menke argues that we should not confuse the modern and the Roman conceptions of law. While the modern understanding has certain similarities with the Roman understanding, characteristic of the modern form is how it allows for individual will and choice (*Willkür*). This allowing stems from modern law not being able to impose laws that run counter to the self-preservation of individuals. Menke (2015: 81ff) takes Hobbes’ discussion of the sovereign as an example. Even though absolute and unlimited, the sovereign is restricted to the purpose of law, protecting self-preservation.

The sovereign cannot impose obligations that involve human beings acting against themselves, more specifically, against what is their own will. Menke (2015: 77ff) argues that this involves a turn to the interiority of individuals. Their will, which is the will for self-preservation, becomes central. This will is not uniform or ‘simple’ but dependent on the choice of individuals. Individuals use their own mind and imagination to make choices. Since self-preservation is their own concern, and rights are about enabling them in this natural striving, the sovereign cannot reach the inner thoughts of human beings. The latter are thereby set free.⁸

The combining of enabling self-preservation and allowing for individual choice that characterises modern law entails that both the activities for natural striving and the interiority of the individual are outside of law. Rights are about this dual relation to the outside of law, and modern law is characterised by this relation to non-law. The relation between law and non-law is key to the self-reflection of modern law, Menke (2011, 2015: Part 2) thinks. In this, he follows Luhmann’s analysis of the structure of modern law. Modern law is ‘law that reflects itself in its difference from its other, from that which is not law’ (Menke 2011: 124). Yet, modern law also involves the stopping or denial of this reflection. Reflection is not fully carried through. The consequence is that the outside of law is viewed as ‘given’ (Menke 2015: Chap. 7).⁹ This stopping or denial of self-reflection and the viewing of outside as given makes up the positivity or positivism of modern law. By positivism, Menke means the denial (*Verleugnung*) of reflection, as this has been criticised in epistemological discussions. Positivity is the term used by Hegel (1795) in understanding that which is handed down as given.

Menke argues that subjective rights express this positivity of modern law, the denial of carrying through the reflection between law and non-law. In this regard, we must pay attention to the distinction Menke makes between the concept of rights and its actual character in modern law. Conceptually, rights are about the carrying through of law’s self-reflection regarding what is law and what is outside of law. Yet, actually existing modern law involves the denial of this self-reflection (Menke 2015: 164ff).¹⁰ The actually existing law, in which subjective rights are central, is therefore opposite to the concept of rights. Conceptually, rights are the carrying through of reflection, but the actually existing law is instead the denial of this process. The outside of law appears as a result as given. This goes both for the outside in the sense of the capacities and powers involved in self-preservation and the interiority of individuals.

Menke's (2015: Chap. 7 and 13–15) argument that subjective rights express the denial of reflection implies that the critique of rights points to the need of setting free the process of reflection. This critique aims to continue the revolutionising of law and politics that began in the early modern era but which was only partially expressed in the eighteenth-century revolutions. Menke here relies on the familiar motif of Marx, who thought that the French Revolution stopped short of being full human emancipation and instead became the institutionalisation of bourgeois order. Marx looked upon the coming socialist revolution as fulfilling the revolutionising promise of modernity. However, Menke is at the same time critical of the implications of Marx' reasoning about the post-revolutionary society and develops an alternative reading by relying on Nietzsche. Menke (2015: Part 4) develops this in interesting ways, in this partly responding to Habermas' (2003) criticism of his earlier works.¹¹ However, I will not discuss this in more detail. The aim of this study is more modest, to reconsider some of the features of Habermas' elaboration of law and rights. For this purpose, I think that Menke's account of the modern legal form is useful.

Central in my view is how Menke discusses the primacy of rights in modern law, this referring to rights articulating a relationship to the outside of law. Similar to some reviewers, I am less convinced by Menke's analysis of the given (Möllers 2016). It seems to me that Menke gives two not always overlapping accounts of modern rights, one that involves the historical understanding of the primacy of rights and another that builds on subjective rights expressing the stopping and denial of self-reflection of law. The reason for thinking that these conceptions do not necessarily overlap is that there seem to be differences in how self-reflection is carried through and denied in the cases of private law liberalism and welfare state law. Certainly, both are modern legal paradigms, therefore, expressing an emphasis on rights related to individual will. However, they are different when we look at them from the point of view of reflection. The welfare state legal paradigm emerges out of criticism against private law liberalism. This criticism opens up for reflecting on what was given in private law liberalism, the reconsidering of assumptions about the relations between law and non-law. What is set free is a specific kind of denial of reflection found in private law liberalism. An expression of this is how it is central to welfare state law that the pre-conditions of freedom, education, and property, to speak with Marx, is taken into account when elaborating on equal rights and opportunities.

This does not mean that denial of reflection is absent from welfare state law, only that its shape is not the same as in the liberal paradigm of law. Thus, by arguing that actually existing law involves the denial of reflection, Menke underestimates the different shapes it takes in modern law. It does not seem to be the case that modern law is characterised by the same kind of denial of reflection. For this reason, I find his discussion of the denial of reflection somewhat problematic. However, this does not mean that Menke's historically oriented analysis of the primacy of rights and the modern form of rights is not both interesting and useful.

The relation-to-self that modern subjective rights enable is largely about the possibility of asserting one's own will. This assertion (or power) of the subject's will, Menke (2015: 207ff) argues, takes two forms in modern society. One of them involves demarcating a private sphere of the individual, a sphere in which the individual is free to do as he or she pleases. This is a common understanding of rights. Rights enable persons to make decisions, doing something or refraining from doing something. As already noted, this is what Kant expressed in his definition of law, and Habermas talks about private autonomy in similar ways. The conception of a private sphere is, however, only one of the relevant understandings in modern society. The other understanding is that which is central to the social law (and welfare state law).

Menke (2015: 207) illustrates this with the example of private property, which is the 'most simple and most fundamental' form of the legal enabling of the subject's will. Property played a key role in private law liberalism, not only for functional reasons but because it was an expression of the independence of persons, their will but also their work or labour. Several scholars point to the centrality of this, often discussed following C.B. Macpherson (1962) as 'possessive individualism'. Menke (2015: 211ff) argues that while this involves several paradoxes, notably the idea of persons 'owning' themselves as persons, what is decisive is the 'social' component of how will connects to work and labour. This element points beyond private law liberalism but was also contained in it, for instance, in how Locke understood property. For Locke, the subject of rights is not only the willing individual but also the working and labouring individual. What then comes into view are the capacities and knowledge that go into working and labouring. Abilities, knowledge and so on are central 'means' for making, creating, and cultivating matter. It is not only the individuals' will that counts but also his or her capacities and abilities. The latter are social

in the sense that they are learned and mastered (or not) together with others (Menke 2015: 218ff).

Private law liberalism involved the regulation of these social dimensions through their private appropriation. Rights involved claims to this appropriation, the claim to call abilities ‘mine’, regulating the control over capacities by the individual. However, the social character of abilities and knowledge also means that built into this conception is the possibility of contesting the private law order. This takes the shape of stressing social partaking. This became important in several social movements from the nineteenth century onwards, even though it of course also resonates with a long tradition of stressing what is common. The focus on social partaking may take either of two forms. It may either involve an emphasis on partaking as an alternative to the private appropriation of capacities and abilities, or it may be stressing the equal access to the private appropriation of abilities and knowledge. When phrased in terms of rights, the latter dimension becomes central. This is largely how social partaking became institutionalised in welfare states. While being a transformation of liberal law, welfare state law is also similar to it in several respects. As Menke (2015: 223—my translation) states: ‘The right of social partaking *follows* from the legal empowerment of the subject’s own will...and that means are social and therefore only can be appropriated through partaking’. In this analysis, Menke stresses, similar to Habermas, the importance of private autonomy in private law liberalism (the liberal legal paradigm) and social law (the welfare state legal paradigm). The major difference between the thinkers is that Menke discusses this in terms of the private appropriation of socially developed capacities and abilities, whereas Habermas focuses on the social conditions for the exercise of individual liberties.

Menke’s elaboration of the form of rights, rights relating to what is outside of law, has certain similarities with how other theorists address the importance of life when wanting to understand modern rights and modern law. Hannah Arendt (1958) pointed to this in her analysis of the centrality of labour and with that ‘life itself’, involving the emphasis of the biological dimension of human beings, as well as in her discussion of biological existence as problematic ‘ground’ of human rights (Arendt 1951: Chap. 9). Partly building on this, Foucault (1976a, b; 1978) developed an analysis of disciplinary and regulatory power in modern societies. Foucault (1976b: 142) makes the point that the partial shift from sovereign power to new forms of power in the eighteenth

and nineteenth centuries implies that ‘biological existence’ for the first time ‘was reflected in political existence’. In knowledge about individual bodies and populations, ‘the fact of living was no longer an inaccessible substrate’ but that which was actively engaged with, moulded and made part of the operations of power. This also implies a change in social and political struggles, in the nineteenth century increasingly focused on the right to life, rights concerning ‘one’s body, to health, to happiness, to the satisfaction of needs...was the political response to all these new procedures of power’ (Foucault 1976b: 145).

Whereas Foucault did not focus primarily on law, law is central when discussing Giorgio Agamben (1995: 127), who directs attention to how the modern declarations of right ‘represent the original figure of the inscription of natural life in the juridico-political order of the nation-state’. Agamben points in this regard to the inscription of the body, the *corpus*, in law, more specifically with regard to *habeas corpus* and the requirement to show the taken body. More generally, inscribed in modern rights and democracy is the understanding of life as *zoe*, the life that is common to living beings, human beings and animals alike, and not the qualified life of the citizen, the *bios*. Not *bios* but *zoe* came to define modern democracy. However, this inclusion of natural life has to be understood at the background of its exclusion in Greek antiquity. The result, Agamben (1995: 6) concludes, is the ‘zone of indistinction’ that defines the modern condition. Foucault (1976b) describes this process differently because life is not held in the sovereign ban. Menke’s (2015: Chaps. 2–4) understanding of the modern legal form is closer to that of Foucault’s than that of Agamben. The modern legal form is not the sovereign ban but instead the opening of law in relation to what is outside of law, rights playing the crucial role of articulating this relationship.

CONCLUSIONS

In this chapter, I have clarified the similarities and differences between analysing the dialectic of legal and factual equality, which Habermas focuses on in *Between Facts and Norms* and the dialectic of law. The latter refers to the law being simultaneously conditioned for emancipation and domination. Marx pointed to this in his discussion of legal equality and capitalist exploitation, and it guides Habermas’ analysis of welfare state law as dilemmatic as such. Habermas later considers this characterisation as too rash and discusses instead the dialectic of legal and factual

equality as a way of understanding the normalisation part of welfare state law. Habermas argues that the criteria for understanding when welfare state measures turn from promoting to restricting autonomy are given by the reconstruction of private and public autonomy. This implies that the problems of welfare state law arise because citizens are not able to take part in legislation, policy making, and so on, in proper ways. Habermas also relies on private autonomy independently of the reconstruction of private and public autonomy. This is not surprising, given the central role that private autonomy plays in modern law.

I have also addressed how to understand the modern legal form, contrasting Habermas' understanding of modern legal forms to that of Menke. Both authors stress the importance of private law and the understanding of private autonomy for the modern conceptualisation of rights. A major difference between them is that Habermas, similar to several other theorists, understands the legal form as an abstraction, whereas Menke argues that law is characterised by the relation between law and non-law, where rights have the central function of articulating this relation to what is outside of law. The modern form of rights is characterised by a twofold relation to the outside of law: it relating to the natural striving for self-preservation and to the interiority of individuals. The reason for discussing understandings of the modern law is that I think that Menke's characterisation of this form is of help in analysing the dialectic of law. I will specify this in the next chapter where I address Habermas' analysis in *The Theory of Communicative Action*. In my view, the latter analysis involves considering the dialectic of law but the way that Habermas does so, as the colonisation of the lifeworld, is problematic. Later, Habermas abandons this analysis but in doing so he also forfeits the analytical tools used to understand the dialectic of law. Instead, Habermas argues in *Between Facts and Norms* that normalisation in welfare state law is a side effect. This leaves us in a difficult situation because we cannot simply go back to the colonisation analysis when wanting to continue the analysis of the dialectic of law. We need other conceptual tools for this, and I suggest that Menke's analysis of the modern form of rights and the modern form of law is helpful in this regard.

NOTES

1. As we will see in the following chapters, this makes up an important theme to Habermas' analysis of welfare state law, not only in *Between Facts and Norms* but also in *The Theory of Communicative Action*. It is

also evident in much of Habermas' previous works, for instance, when he analyses the public sphere in twentieth century welfare states (Habermas 1962) as well as in his discussions about technocracy (Habermas 1968). On the relation between these early discussions and the works of the 1980s and 1990s, see Specter (2010).

2. As is discussed in depth in Chap. 4, there is an extensive scholarly debate on these themes, broadly tying in with accounts of deliberative democracy and the role of social movements in modern democracies.
3. *Coactus voluit* means 'it is his wish, although coerced' (Weber 1922 [1978]: 752).
4. Habermas does not consider the objectives of Foucault's analysis of power, among them the shift away from the dominance of the juridical form of power in modern societies. Nor is he considering Foucault's argument that invoking right against discipline and normalisation is problematically tied to sovereignty (see Ashenden and Owen 1999). What is required, according to Foucault (1976a [2003]: 40), is a new type of right, 'both antidisiplinary and emancipated from the principle of sovereignty'. See also Buckel (2007: 198ff), Golder (2015), Mourad (2003), Tadros (1998).
5. Another example besides Habermas' critique of Foucault is his criticism of some of Menke's earlier arguments where the centre of attention is Menke arguing that there are limitations to liberal conceptions of equality that he thinks has bearings on the concept of equality as understood by liberals (more specifically, Rawls). Habermas (2003) argues against Menke's assessment by distinguishing between empirical analysis of the factual limitations to the realisation of equality and the conceptual clarification of equality.
6. Some scholars suggest that Habermas thereby underestimates the role of rights in protecting the possibilities of persons to develop their own conception of the good (compare Maus 1996: 850f). It is true that Habermas discusses this only marginally in *Between Facts and Norms*, but it makes up an important element to his discussion about cultural pluralism and multiculturalism (see Habermas 1996, 2003). Honneth (2011: B.I) engages in an extensive discussion of law and ethical self-examination. Legal freedom enables ethical self-examination, Honneth claims, but it is only half the story. The reason is that while the distancing from common sense is important for individuals figuring out what is their good life, the actual working out of what is good and worthwhile requires taking up relations to others. It is not possible for individuals to reflect on and to pursue what is good for themselves without relating to others in ways that include them as subjects that are like them engaged in developing and pursuing what is good. However, legal freedom does not secure this relation to others. In fact, legal freedom implies the distancing

- from others in order to be free from social obligations. The result is paradoxical. Legal freedom guarantees freedom from common sense in order for individuals to be able to develop their own conception of the good, but cannot secure the conditions for this development to be possible.
7. Menke (2015: 7ff) notes that the phrase egoistic man is misleading, and one of the reasons for why Marx' point has often been misunderstood. Central in this regard is not the egoism as moral category but the private law conception of the individual.
 8. As long as individuals follow law regarding the limitations it imposes on behaviour, the reason for following law is not the concern of law (Menke 2015: 78ff). As Habermas (1992: 47ff) notes regarding modern positive law, it leaves open the reason for obeying laws, either strategically, viewing laws as external obstacles, or out of respect of law.
 9. Some reviewers think that Menke's account of the given and how to overcome it is unclear. For instance, Christoph Möllers (2016: 311—my translation) argues that Menke's analysis implies viewing 'law as deficient in so far that it is not politics'. For Möllers, law is inevitably implying an element of what is given because law is about stabilising relations, practices, and expectations.
 10. Menke (2015: 165ff) uses the term 'bürgerlichen Recht' in this regard.
 11. Habermas (2003 [2005]: 6) thought that Menke's reflections, the example here is his discussion of Rawls, express a certain 'quietism of a persistent reflection on the limits of freedom'. In *Between Facts and Norms*, Habermas (1992 [1996]: xlii) argues that he has no illusions about the problems of bringing out the 'hunch' he develops, that rule of law is only possible if combined with radical democracy, but that 'defeatism' is not justified.

REFERENCES

- Agamben, Giorgio. 1995 [1998]. *Homo Sacer. Sovereign Power and Bare Life*, trans. Daniel Heller-Roazen. Stanford: Stanford University Press.
- Arendt, Hannah. 1951. *The Origins of Totalitarianism*. New York: Harcourt Brace.
- Arendt, Hannah. 1958. *The Human Condition*. Chicago: University of Chicago Press.
- Ashenden, Samantha, and David Owen (eds.). 1999. *Foucault Contra Habermas. Recasting the Dialogue Between Genealogy and Critical Theory*. London: Sage.
- Balbus, Isaac. 1977. Commodity Form and Legal Form: An Essay on the "Relative Autonomy" of the Law. *Law & Society Review* 11 (3): 571–588.
- Baynes, Kenneth. 2000. Rights as Critique and the Critique of Rights: Karl Marx, Wendy Brown, and the Social Function of Rights. *Political Theory* 28 (4): 451–468.

- Benjamin, Walter (ed.). 1921 [1965]. *Zur Kritik der Gewalt*. In *Zur Kritik der Gewalt und andere Aufsätze*, ed. Herbert Marcuse, 29–65. Frankfurt: Suhrkamp.
- Bourdieu, Pierre. 1987. The Force of Law: Toward a Sociology of the Juridical Field. *The Hastings Law Journal* 38: 805–853.
- Brown, Wendy. 1995. *States of Injury. Power and Freedom in Late Modernity*. Princeton: Princeton University Press.
- Brown, Wendy. 2000. Suffering the Paradoxes of Rights. *Constellations* 7 (2): 230–241.
- Brown, Wendy, and Janet Halley (eds.). 2002. *Left Legalism/Left Critique*. Durham: Duke University Press.
- Buchwalter, Andrew. 2002. Habermas, Hegel, and the Concept of Law. In *Discourse and Democracy. Essays on Habermas's Between Facts and Norms*, ed. René von Schomberg and Kenneth Baynes, 129–152. Albany: State University of New York Press.
- Buckel, Sonja. 2007. *Subjektivierung und Kohäsion. Zur Rekonstruktion einer materialistischen Theorie des Rechts*. Weilerswist: Velbrück Wissenschaft.
- Buckel, Sonja. 2009a. Zwischen Schutz und Maskerade – Kritik(en) des Rechts. *RAV Informationsbrief* 102: 11–23.
- Buckel, Sonja. 2009b. Neo-Materialistische Rechtstheorie. In *Neue Theorien des Rechts*, ed. Sonja Buckel, Ralph Christensen, and Andreas Fischer-Lescano, 115–133. Stuttgart: Lucius & Lucius.
- Butler, Judith. 1990. *Gender Trouble. Feminism and the Subversion of Identity*. New York: Routledge.
- Butler, Judith. 2006. Critique, Violence, and Sacred Life in Benjamin's "Critique of Violence". In *Political Theologies. Public Religions in a Post-Secular World*, ed. Hent de Vries and Lawrence Sullivan, 201–219. New York: Fordham University Press.
- Christodoulidis, Emilios. 1998. *Law and Reflexive Politics*. Dordrecht: Kluwer.
- Collier, Richard. 1995. *Masculinity, Law and the Family*. London: Routledge.
- Collins, Hugh. 1982. *Marxism and Law*. Oxford: Oxford University Press.
- Derrida, Jacques. 1992. The "Mystical Foundation of Authority". In *Deconstruction and the Possibility of Justice*, ed. Drucilla Cornell, Michel Rosenfeld, and David Gray Carlson, 3–67. New York: Routledge.
- Fine, Robert. 1984 [2002]. *Democracy and the Rule of Law. Marx's Critique of the Legal Form*. Caldwell, NJ: The Blackburn Press.
- Fine, Robert. 2001. *Political Investigations. Hegel, Marx, Arendt*. Abingdon: Routledge.
- Fine, Robert. 2013. Marxism and the Social Theory of Law. In *Law and Social Theory*, 2nd ed., ed. Reza Banakar and Max Travers, 95–110. Oxford: Hart.
- Fitzpatrick, Peter. 2001. *Modernism and the Grounds of Law*. Cambridge: Cambridge University Press.

- Foucault, Michel. 1976a [2003]. *Society Must Be Defended. Lectures at the Collège de France, 1975–1976*, trans. David Macey. New York: Picador.
- Foucault, Michel. 1976b [1980]. *History of Sexuality. Vol. 1: An Introduction*, trans. Robert Hurley. New York: Vintage.
- Foucault, Michel. 1978 [2007]. *Security, Territory, Population. Lectures at the Collège de France, 1977–1978*, trans. Graham Burchell. Houndmills: Palgrave.
- Frankenberg, Günter. 2009. Partisanen der Rechtskritik: Critical Legal Studies etc. In *Neue Theorien des Rechts*, ed. Sonja Buckel, Ralph Christensen, and Andreas Fischer-Lescano, 93–111. Stuttgart: Lucius & Lucius.
- Gaus, Daniel. 2013. Rational Reconstruction as a Method of Political Theory between Social Critique and Empirical Political Science. *Constellations* 20 (4): 553–570.
- Golder, Ben. 2015. *Foucault and the Politics of Rights*. Stanford: Stanford University Press.
- Habermas, Jürgen. 1962 [1990]. *Strukturwandel der Öffentlichkeit*. Frankfurt: Suhrkamp.
- Habermas, Jürgen. 1963 [1988]. Naturrecht und Revolution. In *Theorie und Praxis*, ed. Jürgen Habermas, 89–127. Frankfurt: Suhrkamp. Translated by John Viertel as ‘Natural Law and Revolution’. In Habermas, *Theory and Practice*. Boston: Beacon Press, 1973, pp. 82–120.
- Habermas, Jürgen. 1968. *Technik und Wissenschaft als ‘Ideologie’*. Frankfurt: Suhrkamp.
- Habermas, Jürgen. 1981. *Theorie des kommunikativen Handelns*, 2 vols. Frankfurt: Suhrkamp. Translated by Thomas McCarthy as *The Theory of Communicative Action*, vol. 1 1984 and vol. 2 1987. Boston: Beacon Press.
- Habermas, Jürgen. 1992 [1996]. *Faktizität und Geltung. Beiträge zur Diskurstheorie des Rechts und des demokratischen Rechtsstaats*. Frankfurt: Suhrkamp. Translated by William Rehg as *Between Facts and Norms. Contributions to a Discourse Theory of Law and Democracy*. Cambridge: Polity Press.
- Habermas, Jürgen. 1996. Inklusion – Einbeziehen oder Einschliessen? Zum Verhältnis von Nation, Rechtsstaat und Demokratie. In *Die Einbeziehung des Anderen. Studien zur politischen Theorie*, 154–184. Frankfurt: Suhrkamp.
- Habermas, Jürgen. 2003 [2005]. Kulturelle Gleichbehandlung – und die Grenzen des Postmodernen Liberalismus. In *Zwischen Naturalismus und Religion. Philosophische Aufsätze*, ed. Jürgen Habermas, 279–323. Frankfurt: Suhrkamp. Translated as ‘Equal Treatment of Cultures and the Limits of Postmodern Liberalism’. *The Journal of Political Philosophy*, vol. 13, no. 1: 1–28 (2005).
- Hamacher, Werner. 1994. Afformative, Strike. Benjamin’s “Critique of Violence”. In *Walter Benjamin’s Philosophy. Destruction and Experience*, ed. Andrew Benjamin and Peter Osborne, 110–138. Abingdon: Routledge.

- Hegel, G.W.F. 1795 [1971]. Die Positivität der christlichen Religion. In *Frühe Schriften*, ed. Hegel, 104–216. Frankfurt: Suhrkamp.
- Hobbes, Thomas. 1651 [1985]. *Leviathan*. ed. C.B. Macpherson. London: Penguin.
- Honneth, Axel. 2011 [2014]. *Das Recht der Freiheit. Grundriss einer demokratischen Sittlichkeit*. Berlin: Suhrkamp. Translated by Joseph Ganahl as *Freedom's Right. The Social Foundations of Democratic Life*. Cambridge: Polity.
- Hunt, Alan. 1985. The Ideology of Law: Advances and Problems in Recent Applications of the Concept of Ideology to the Analysis of Law. *Law and Society Review* 19 (1): 11–37.
- Hutchinson, Allan, and Patrick Monahan. 1984. Law, Politics, and the Critical Legal Scholars: The Unfolding Drama of American Legal Thought. *Stanford Law Review* 36 (1/2): 199–245.
- Johnson, Pauline. 2001. Distorted Communications. Feminism's Dispute with Habermas. *Philosophy and Social Criticism* 27 (1): 39–62.
- Kant, Immanuel. 1797 [1991]. *Metaphysik der Sitten*, ed. Karl Vorländer. Hamburg: Felix Meiner Verlag, 1966. Translated by Mary Gregor as *The Metaphysics of Morals*. Cambridge: Cambridge University Press.
- Kelley, Donald. 1978. The Metaphysics of Law: An Essay on the Very Young Marx. *The American Historical Review* 83 (2): 350–367.
- Kennedy, Duncan. 1985. The Role of Law in Economic Thought: Essays on the Fetishism of Commodities. *The American University Law Review* 34: 939–1001.
- Kennedy, Duncan. 2002. The Critique of Rights in Critical Legal Studies. In *Left Legalism/Left Critique*, ed. Wendy Brown and Janet Halley, 178–228. Durham: Duke University Press.
- Kirchheimer, Otto. 1928 [1976]. Zur Staatslehre des Sozialismus und Bolschewismus. In *Von der Weimarer Republik zum Faschismus: Die Auflösung der demokratischen Rechtsordnung*, ed. Wolfgang Luthardt, 32–52. Frankfurt: Suhrkamp.
- Klein, Eckart, and Christoph Menke (eds.). 2011. *Der Mensch als Person und Rechtsperson. Grundlage der Freiheit*. Berlin: Berliner Wissenschaftsverlag.
- Kompridis, Nikolas. 2006. *Critique and Disclosure. Critical Theory between Past and Future*. Cambridge, MA: MIT Press.
- Kouvélakis, Stathis. 2003. *Philosophy and Revolution. From Kant to Marx*, trans. G.M. Goshgarian. London: Verso.
- Kress, Ken. 1989. Legal Indeterminacy. *California Law Review* 77 (2): 283–337.
- Loick, Daniel. 2014a. Juridification and Politics: From the Dilemma of Juridification to the Paradoxes of Rights. *Philosophy and Social Criticism* 40 (8): 757–778.
- Loick, Daniel. 2014b. Terribly Upright: The Young Hegel's Critique of Juridicism. *Philosophy and Social Criticism* 40 (10): 933–956.

- Macpherson, C.B. 1962. *The Political Theory of Possessive Individualism: Hobbes to Locke*. Oxford: Clarendon Press.
- MacKinnon, Catharine. 1989. *Toward a Feminist Theory of the State*. Cambridge, MA: Harvard University Press.
- Martel, James. 2014. *The One and Only Law. Walter Benjamin and the Second Commandment*. Ann Arbor: University of Michigan Press.
- Maus, Ingeborg. 1996. Liberties and Popular Sovereignty: On Jürgen Habermas's Reconstruction of the System of Rights. *Cardozo Law Review* 17 (4–5): 825–882.
- Marx, Karl. 1843a [1992]. Zur Judenfrage. In *Marx-Engels Werke*, vol. 1, 347–377. Berlin: Dietz Verlag, 1977. Translated by Gregor Benton as 'On the Jewish Question'. In ed. Karl Marx, *Early Writings*, 211–242. London: Penguin.
- Marx, Karl. 1843b [1977]. Kritik des Hegelschen Staatsrechts. In *Marx-Engels Werke*, vol. 1, 201–333. Berlin: Dietz Verlag.
- Marx, Karl. 1867 [1992]. *Das Kapital. Kritik der politischen Ökonomie*. In *Marx-Engels Werke*, vol. 23. Berlin: Dietz Verlag, 1968. Translated by Ben Fowkes as *The Capital. A Critique of Political Economy*, vol. 1. Harmondsworth: Penguin.
- Menke, Christoph. 1996. *Tragödie im Sittlichen. Gerechtigkeit und Freiheit nach Hegel*. Frankfurt: Suhrkamp.
- Menke, Christoph. 2011. The Self-Reflection of Law and the Politics of Rights. *Constellations* 18 (2): 124–134.
- Menke, Christoph. 2013. Die "andre Form" der Herrschaft. Marx' Kritik des Rechts. In *Nach Marx. Philosophie, Kritik, Praxis*, ed. Rahel Jaeggi and Daniel Loick, 273–295. Frankfurt: Suhrkamp.
- Menke, Christoph. 2015. *Kritik der Rechte*. Berlin: Suhrkamp.
- Möllers, Christoph. 2016. Form der Rechte als Form des Rechts? *Deutsche Zeitschrift für Philosophie* 64 (2): 307–312.
- Mourad, Roger. 2003. After Foucault. A New form of Right. *Philosophy and Social Criticism* 29 (4): 451–481.
- Neumann, Franz. 1937. Der Funktionswandel des Gesetzes im Recht der bürgerlichen Gesellschaft. In *Demokratischer und autoritärer Staat. Beiträge zur Soziologie der Politik*, ed. Franz Neumann, 7–57. Frankfurt: Suhrkamp.
- Parla, Ayse. 2011. Undocumented Migrants and the Double Binds of Rights Claims. *Differences: A Journal of Feminist Cultural Studies* 22 (1): 64–89.
- Pashukanis, Evgeny. 1924 [1989]. *The General Theory of Law and Marxism*, trans. Barbara Einhorn. London: Pluto Press.
- Peters, Bernhard. 1991. *Rationalität, Recht und Gesellschaft*. Frankfurt: Suhrkamp.
- Poulantzas, Nicos. 1978 [2000]. *State, Power and Socialism*, trans. Patrick Camiller. London: Verso.

- Scheuerman, William. 1994. *Between the Norm and the Exception. Frankfurt School and the Rule of Law*. Cambridge, MA: MIT Press.
- Seifert, Jürgen. 1971. Verrechtlichte Politik und die Dialektik der marxistischen Rechtstheorie. *Kritische Justiz* 4 (2): 185–200.
- Specter, Matthew. 2010. *Habermas: An Intellectual Biography*. Cambridge: Cambridge University Press.
- Stillman, Peter. 1991. Property, Contract, and Ethical Life in Hegel's *Philosophy of Right*. In *Hegel and Legal Theory*, ed. Drucilla Cornell, Michael Rosenfeld, and David Gray Carlson, 205–227. New York: Routledge.
- Tadros, Victor. 1998. Between Governance and Discipline: The Law and Michel Foucault. *Oxford Journal of Legal Studies* 18 (1): 75–103.
- Teubner, Gunther. 1993. “Man schritt auf allen Gebieten zur Verrechtlichung”: rechtsoziologische Theorie im Werk Otto Kirchheimers. In *Der Einfluß deutschsprachiger Emigranten auf die Rechtsentwicklung in den USA und in Deutschland*, ed. Marcus Lutter, Ernst Stiefel, and Michael Hoeflich, 505–520. Tübingen: Mohr & Siebeck.
- Tushnet, Mark. 1989. Rights: An Essay in Informal Political Theory. *Politics and Society* 17 (4): 403–451.
- Unger, Roberto Mangabeira. 1986. *The Critical Legal Studies Movement*. Cambridge, MA: Harvard University Press.
- Weber, Max. 1922 [1978]. *Wirtschaft und Gesellschaft. Grundriss der verstehenden Soziologie*, ed. Johannes Winckelmann. Tübingen: J.C.B Mohr, 1972. Translated by Ephraim Fischhoff et al. as *Economy and Society. An Outline of Interpretive Sociology*. Edited by Guenther Roth and Claus Wittich. Berkeley: University of California Press.

Emancipation, Democracy and the Modern Critique of
Law

Reconsidering Habermas

Spång, M.

2018, IX, 131 p., Hardcover

ISBN: 978-3-319-62889-9