

PREFACE

This study addresses Jürgen Habermas' theorising of law, rights, and democracy, as discussed in *The Theory of Communicative Action* and *Between Facts and Norms*. The central issue of the study is Habermas' claim in *Between Facts and Norms*, specifically that his reconstruction of private and public autonomy has an emancipatory aim. This aim makes it relevant to consider Habermas' thinking about law and rights in the light of the modern critique of law, which since Hegel and Marx have directed attention to the limitations of conceiving of rights as vocabulary of emancipation and law as language of autonomy. More specifically, the study addresses the relevance of considering the dialectic of law, law being condition for both emancipation and domination, in relation to Habermas' thinking.

Habermas relies on the motif of the dialectic of law in *The Theory of Communicative Action* in a way he does not in *Between Facts and Norms*. In the former work, he argues that the dilemma of the welfare state law, of both enabling freedom and normalisation, relates in intrinsic ways to this kind of law. In *Between Facts and Norms*, he argues that this is not the case, because the criteria for assessing when welfare state law turns from guaranteeing freedom to normalisation are built into democratic law making, at least when the relation between private and public autonomy is properly reconstructed. Habermas outlines this through a system of rights. This reconstruction is problematic for several reasons, most importantly because it builds on the modern idea of rights, tailored to enable and protect private autonomy. While acknowledging that

public autonomy should build on rights of a different type, one that is not tailored to individual choice but to autonomy in the Kantian sense, Habermas faces the problem of showing this other kind of rights. The reason is because there is, at least so far, only one type of rights. All rights, including political rights, are about individual will or choice. It is therefore doubtful whether Habermas can show that criteria for when welfare state law turns from freedom to custodial supervision is inherent to democratic law making. This shows, in my view, the relevance of considering the dialectic of law when trying to understand what rights make possible. In order to be enlightened about the possibilities of rights as vocabulary of emancipation, we also have to direct our attention to the limitations of this language.

I want to acknowledge the important suggestions made by the anonymous reviewer of a previous draft of the manuscript as well as kind assistance provided by Imogen Gordon Clark at Palgrave.

Malmö, Sweden

Mikael Spång

Emancipation, Democracy and the Modern Critique of
Law

Reconsidering Habermas

Spång, M.

2018, IX, 131 p., Hardcover

ISBN: 978-3-319-62889-9