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Jürgen Habermas' Reconstruction of Historical Materialism*

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If one wishes to differentiate Habermas' theory from that of Marx in terms of its central motifs, then one will have to argue along the following lines: from the very beginning, even in his doctoral thesis on Democritus' and Epicurus' Natural Philosophy, Marx pursued a programme of deciphering society as an 'organic' [*naturwüchsige*] form of increasing individualization. Marx's focus is on forms, at first on forms of consciousness (i.e., religion, philosophy, morality, law), then later on the forms or categories of political economy. For Marx, the focus on forms was identical with the critique of the inverted forms of social existence, an existence constituted by the life-practice of human beings. All these forms obtain as inverted form of a 'community' that is external to the individuals, and from which they must emancipate themselves in order ever to be able to interact with one another 'as individuals' (Marx and Engels, 1962, pp. 70f).¹ This central idea is presented in its most pregnant form in *The German Ideology*: 'The reality [*das Bestehende*], that communism creates, is precisely the real [*wirkliche*] basis for rendering it impossible that any reality should exist independently of individuals, in so far as this reality is only a product of the preceding intercourse of the individuals themselves' (ibid., p. 70). It is thus a matter of deciphering theoretically the appearance [*Schein*] of independence that this 'surrogate of community' posits (ibid., p. 74), and then of expelling it practically from the world so that human beings will be able to enter into relationship with one another, not as character-masks, but as real individuals.

Marx sees this new figure of society anticipated in the 'community of revolutionary proletarians, who extend their own control over the conditions of their own existence and those of all members of society. It is *as* individuals that the individuals participate in it. It is exactly this

combination of individuals (assuming the advanced stage of modern productive forces, of course) which puts the conditions of the free development and movement of individuals under their control – conditions which were previously abandoned to chance and had won an independent existence over and against the separate individuals precisely because of their separation as individuals' (ibid., pp. 74–5). His earlier conceptualizations, and in particular the discussion of alienated labour, the alienation from species-being, etc., always express this one central idea; they are to a certain extent the counter-concepts to the existing forms of an inverted society, including its forms of consciousness and surrogates of community. In *The Jewish Question*, Marx (1964, p. 370) presents it as follows:

All emancipation is a return of the human world and human relationships to humans themselves. Political emancipation is the reduction of man, on the one hand, to a member of bourgeois society, an egoistic and independent individual, on the other hand, to a citizen of the state, a moral person. Not until the real individual man has taken the abstract citizen back into himself and, as an individual man, has become a species-being in his empirical life, in his individual work and individual relationships, not until man recognises and organises his 'forces propres' as social forces and thus no longer separates social forces from himself in the form of political forces, not until then will human emancipation be completed.

Marx was not painting here a picture of a communist society, nor did he do so later. Communism means primarily the practical abolition of all these inverted forms of individualization, and therewith too of the surrogate forms of community; and it also means the creation of relationships in which human beings can interact socially with one another as individuals. What such a society might look like in detail, would, he imagined, be decided by the human beings themselves.

Turning now to Habermas. He begins with the assumption that after the experiences of German fascism and the development of really existing socialism, thoughts such as these can no longer be reiterated without scepticism and relativization. Habermas notoriously circumvents the question whether Marx's thematization of the forms of consciousness, or of the forms of value, that is to say, the categories of political economy, is not in itself significant, and that is regardless of the programme of their practical or potential abolition. This was the dilemma of Adorno's and Horkheimer's Critical Theory: although the potential

subject of practical transformation ultimately disappeared entirely from their field of vision, both held on to the theory of inverted sociability. This theory was primarily concerned with the genetic explication of society and society was understood as the totality of these inverted forms. In this Critical Theory agreed with the core idea of Marxist theory; the concept of totality is simply an Aesopian reformulation of Marx's conception of base and 'idealistic' (*German Ideology*) superstructures.

How then does Habermas come to terms with these forms? It is within this context that we want to explicate his *Reconstruction of Historical Materialism*.

What is meant by reconstruction? In the introduction to his book *Zur Rekonstruktion des historischen Materialismus* [On the Reconstruction of Historical Materialism], Habermas defines his intentions in the following way: Reconstruction means that 'one takes apart a theory and reassembles it in a new form in order once again to achieve the goal that it had set for itself' (p. 9). One can certainly approve of this formulation, yet it remains merely formal. What were the goals that Marx set for himself? More precisely: what were the goals that in Habermas' interpretation Marx set for himself? Habermas expressed himself emphatically on this matter a few years later: 'If one reads Marx correctly, one can see that embodied in the institutions of the bourgeois state are ideas belonging to that inheritance which deserves to be preserved in a socialist society.'² This inheritance is what Habermas is interested in; and we may consider his work as a full-scale attempt to determine this inheritance in precise terms, and to present proposals for a rational political practice so that it remains viable.

Habermas considers his work as a continuation, an updating, of the old Critical Theory associated with Horkheimer and Adorno. He reproaches the old critical theory for the failure to render intelligible the normative foundations of its critical standpoint, a failure which, for Habermas, is systematic because of its character as a critical theory. In relation to a liberated society, and against the background of the predominance – better: absolutizing of the concept of instrumental reason, this failure manifests itself in the claim to an expanded concept of reason which it can not explicate and validate. According to Habermas, Marx can be reproached for the same deficiencies. Habermas argues that Marx attached himself to the ideas of the Enlightenment and that he saw these embodied in the institutions of the bourgeois state. Habermas argues that Marx was unable to demonstrate how moral categories were 'built in' to the judicial and political institutions. This, then, led to the result that, in his theory of historical materialism, Marx was forced to

render the concept of production absolute (see Habermas, 1968 p. 72). Habermas' early differentiation between labour and interaction has to be seen against this background. This differentiation is of utmost importance for his work. It functioned as a kind of theoretical resolution which remained a determining factor in the later construction of his theory.

Base and superstructure versus developmental dynamic and developmental logic: the Starnberger dispute with Marxism

In order to unravel Habermas' reconstruction of historical materialism, it is instructive to refer to his early essay 'Reflections on the Evolutionary Status of Modern Law'.³ Here Habermas introduces the theoretical direction and thrust of his work. In this short treatise, he uses verbatim the term 'legal form' [*Rechtsform*]. That is, Habermas connects directly on to Marx's programme. How, then, does Habermas read 'built-in moral categories' out of the legal form? The text originated in the context of his 'Reconstruction of Historical Materialism' where he tried to formulate his position in explicit opposition to Marxist ideas, which he characterized rather frostily as 'enormously popular attempts to derive the juridical and political "forms" of the capitalist state from the form of economic intercourse, and ultimately from that of the commodity' – attempts which he considers misdirected (Habermas, 1976, p. 267). It may be supposed that Habermas is dealing with the rather unmeticulously developed analytical accounts of J. Hirsch and D. Läßle, to whom he refers here as representative of 'Marxist derivations of the state'. Nevertheless, the question naturally arises as to the validity of Habermas' criticism of the programme itself. For Habermas is not at all interested in 'deriving' the legal form and the form of the state; rather, he is interested in examining the already existing, that is constituted form and this with a view to discerning whether reason is embodied in it. He seeks – using a characteristic formulation from his Theory of Communicative Action – to decipher reason in the 'existing forms'.⁴

Accordingly, Habermas distinguishes between the form and the content of law. With regard to the content of modern law, his position (*ibid.*, p. 262) accords with traditional Marxist positions:

The contents of private law are determined first of all by the needs of capitalist economic interaction: its core is the institutional guarantee of property with the concomitant guarantees of contract freedom and rights to trade and inheritance. The contents of constitutional

law are tailored to a state that, supported by a largely centralised, administrative apparatus based on technical expertise and the division of labour, guarantees the conditions for the continued existence of a private economic order, without itself having to take on functions of production: the subjectively public laws [*subjektiv öffentlichen Rechte*] mirror the functional specification of state power *vis-à-vis* a private, autonomous economic interaction. Carried out from these viewpoints, a functional analysis of the most important legal forms [*Rechtsmaterien*] would be able to demonstrate how the law contributes to the systemic rationality of society.

Systemic rationality, however, is a viewpoint that interests Habermas only in terms of the developmental dynamic; and this is where Habermas' analysis parallels those of Hirsch and Läßle. 'The capitalist mode of production is of course decisive for the developmental dynamic that explains the contents and functions of civil law' (*ibid.*, p. 267). Nevertheless, the viewpoint itself should not be mistaken for an analysis of the modern legal form.

But how does Habermas conceive of 'form'? Given his objective, one must expect that he would direct his attention to the legal form; for when the content proves to be conditioned by capitalist development, then reason can inhere only in the form: 'Viewed in terms of a developmental logic, *the form of modern law* can be conceived as an *embodiment of post-conventional structures of consciousness* (*ibid.*, p. 266). Habermas assumes – and here he relies on Piaget and Kohlberg – that the post-conventional form of consciousness is logically no longer surpassable. In short, for Habermas a free and reasonable society can only be built on the already existing forms of reason, and modern law embodies this reason. It is primarily in this context that we must analyse his entire formal analysis of modern law.

How then is rationality subsumed [*aufgehoben*] in modern law – as a dialectician would say – or embodied in it – as Habermas says? Since, for Habermas, all rationality ultimately discloses itself as discursive, it is only under this aspect that legal norms can be deciphered as rational.

The rationality of norms measures itself immediately according to problems of justification that are to be overcome discursively; and, in a mediated manner, according to whether the institutional pre-conditions for the thematisation of validity claims for recognition and for an argumentative test are given. The object of the test is the question as to whether a problematic norm can express interests

capable of being generalised or compromised (i.e., values), such they would be accepted and preferred over known alternatives by those who might be affected by them (if they were to participate in a practical discourse). (ibid., p. 262)

Although Habermas had not yet completely formulated what later became his central discursive principles, this idea of his 'Reconstruction' already informs his conception of the rationality of legal norms and directs the conceptualization of modern law. For this reason Habermas speaks quite consciously in the subjunctive when he emphasizes the characteristic features of modern law in terms of an embodiment of rationality: *'The rationality of the law may be recognised in the fact that it is tailored to the strategic rationality of the purposively acting subjects.* This tailoring is visible not in its legal materials [*Rechtsmaterien*], but in its structural features: in positivity, in legalism, and in the formality of the law' (ibid., p. 264).

In so far as Habermas bases the deciphering of rationality on these structural features, he remains within Marx's theoretical framework. For all these structural features 'define a system of action in which it is assumed that all members of the system behave strategically, in that they: 1. obey laws as officially sanctioned, but at all times legitimately alterable conventions; 2. pursue their interests without moral considerations; and 3. make optimal decisions according to their interest orientations within the bounds of valid laws. It is assumed, in other words, that they make purposive-rational use of their private autonomy' (ibid.).

Regarding these three structural features, the difference from Marx has less to do with the fact that Habermas sees the law as a functional complement to economic-calculating activity. Rather, it has to do with his conviction that modern law cannot be 'derived' from the 'form of economic interaction' – nor ultimately from the commodity form – but that it is, in fact, the other way around: it is only on the basis of the legal form that capitalist systemic rationality can develop(!).

The first-named structural features of modern law (conventionality, legality, formality) are general determinations of a legally binding institutionalisation of well-defined fields of strategic action. They make explicit the form, on the basis of which modern law can fulfil the functional imperatives of a market-regulated economic interaction. *But this systemic rationality results from legal structures in which purposive-rational activity can become generalised.* (ibid., p. 266; *author's emphasis*).

Formulations such as these are quite bewildering and – like Weber's Protestantism thesis – nourish the suspicion that a new monocausality is to be introduced to oppose Marx's theory. Habermas, however, wants something different. System and life-world are conceived as distinct forms of integration and neither can be reduced to the other. Each obeys its own distinct logic; the life-world a logic of development that cannot be attributed to systemic rationality. Systemic rationality 'does not explain how these legal structures are possible. Observed in terms of developmental logic, the form of modern law *can* be conceived of as an embodiment of post-conventional structures of consciousness' (ibid.; *author's italics*). At this point, Habermas argues cautiously – in the subjunctive – as if he were still unsure. In any case, his ideas about the legal form remain programmatic in this period.

The relationship between modern law and capitalist development is of no importance to Habermas. Rather, what is decisive for him is the conceptional distinction between life-world and system. His entire palace of ideas would collapse like a house of cards if it were possible to trace modern law in its specific form back to the structure of the socio-economic base. It would then no longer be possible to postulate that discursive reason is as constitutive of the human linguistic community as it is of modern law, nor to interpret the institutions of the modern constitutional state and of parliamentary democracy as partial embodiments of reason – least of all, as he has it, of a universally conceived reason: 'the capitalist mode of production is of course decisive for the *developmental dynamic* that explicates the contents and functions of civil law, but not for the *developmental logic* which alone explicates the form and structures of rationality of civil law' (ibid., p. 267). For Habermas, the studies of Piaget and Kohlberg appear to supply sufficient insights to justify the notion that there is a distinctive logical property in moral development. This logic, he argues (ibid., p. 266), can also be invoked for the reconstruction of the form of modern law:

the conventionalisation, legalization, and formalization of the law mean that it can no longer sustain itself on the unquestioned authority of moral traditions, but requires an autonomous foundation. Only in the post-conventional stage can the moral consciousness satisfy such a demand: only there originates the idea that legal norms are fundamentally criticizable and require justification; only here do we find the distinction between norms of action and principles of action, the concept of a principle-directed production of norms, and the notion of the rational unification of norms.

Although the title of this study reads 'Towards the Reconstruction of Historical Materialism,' Habermas' real goal is the reconstruction of the structures of rationality. These structures can be found in modern law. For this reason the entire explication of the form of modern law must up to this point remain unsatisfying because the decisive aspect, the structure of rationality, has yet to be thematized.

The previous considerations should support the thesis that the rationality of the law in modern society can adequately be analyzed, neither from the viewpoint of a growing systemic rationality nor from the viewpoint of an improved internal systemization of legal propositions [*Rechtssätze*], but rather only from the viewpoint of the enforcement of strategic rationality in the interaction of private subjects with one another. *But this these does not go far enough.* (ibid.; author's emphasis)

Habermas indeed wants to reconstruct how, in the evolution of law, discursive rationality is realized in the complex relationship between developmental logic and developmental dynamic; the other, above-mentioned structural characteristics are for Habermas unthinkable without this constitutive reason upon which the specific rationality of the norms rests: 'The increase in rationality of modern law [is measured] according to the rationality of its norms' (ibid.).

Habermas has considerable problems in detecting the specific rationality of norms immediately in existing law. His point of reference has of course to be the generality of norms:

I have yet to mention a fourth structural characteristic of modern law: *generality*. According to its own claim, modern law should consist of general norms that fundamentally exclude all exceptions and privileges. The discussion that has been carried on since the 1920s about extra-constitutional regulatory measures [*Massnahmegesetze*], about the difficulty of formally separating – from the viewpoint of generality – administrative acts and laws when the lawgiver must regulate increasingly concrete matters, is a symptom that this structural characteristic is perceived as essential. It is immediately linked to the legitimacy of bourgeois law. If and insofar as modern law *universally regulates* an area of strategic action, can the legal system as a whole be justified as an expression of generalizable interests. (ibid., p. 265)

In the above quote, we find in a nutshell not only the core of Habermas' construction but also, what is problematic about it. That he refers to legal theoretical discussions as a symptom is itself symptomatic. He correctly surmises that legal theorists view the structural characteristic of generality as essential because it is connected to the legitimacy of the law. But how is it linked to modern legitimacy? Is it, as he imputed to the legal theorists, because the form of generality itself, to which they so stubbornly cling, must be deciphered as the embodiment of discursive reason? Or is it merely the universal regulation which is as such sufficient to 'justify the legal system as a whole as an expression of generalizable interests'. These are not the same. The former would be a form-genetic explication, the latter the more or less lucid linkage of the legal norms with modern forms of legitimation; one can never be certain, whether this linkage is perceived as a matter of discursive rationality or rationalization. Especially his talk about 'the justification of the legal system as a whole' gives rise to the suspicion that Habermas – despite all of his expressly announced intentions – presents a construction in which rationality and rationalization have entered into a difficult marriage. Habermas' stubbornly repeated dispute with Weber's conception of legitimacy within the context of a theory of power [*Herrschaftstheorie*] can be interpreted as 'symptomatic': Habermas, it seems, has constantly to persuade himself that only rational argumentation can be the basis of modern legitimation, and not a belief in legitimacy.

His dispute with the 'marxist critique of bourgeois law' (ibid.) is characteristic in this context. Habermas starts with the assumption that this critique can prove that 'the generality of the legal norm is in many cases guaranteed only in word and form, but not with regard to its actual consequences' (ibid.). Yet, at the same time, he counters that this critique is nourished by a claim that is itself 'bound up with abstract law'. But what matters to Habermas is 'to explicate' precisely that claim itself and 'on that basis to legitimize modern law as the rational foundation for the organization of state and society'. Precisely herein – and Habermas does want to align himself with this rational tradition – 'consists indeed the historical accomplishment of rational natural law from Hobbes to Hegel' (ibid.). It is unclear which 'Marxist critique' Habermas refers to here; it is doubtful whether 'the' Marxist critique exists in the comprehensive collective singular. But his choice of words is revealing, when he speaks of the 'many cases' in which the generality of the legal norm is guaranteed only in terms of the form, and not with regard to the consequences – as if the latter were an avoidable accident.

He fails to appreciate the fact that we are dealing here with structural contradictions that exist in and through the generality of the legal norm itself, and that is the reality of the legal norm, its real validity and efficacy. As Hegel might have speculatively characterized it: The valid abstract law [*das geltende Recht*] is the effective injustice [*das geltende Unrecht*]. It is thus not a matter of proving this 'in many cases', but of showing that this contradiction is built into the structure of abstract law itself. To this extent Habermas – against his own intention – hit the nail on the head when he argues that the historical accomplishment from Hobbes to Hegel has been the explication of the claim of abstract law, but, it should be noted, only the claim.

Habermas reproaches Marxist theorists of the state for their apparent functionalist analysis of the legal system. Such an analysis, Habermas argues, serves only 'to accuse, not to suspend, the unredeemed normative claims to validity' (ibid., p. 266). In fact, Marxism's critique of ideology confronts the normative implications of abstract law with the reality of the law itself. We will have to come back to the question how far Habermas' own conclusions are to be trusted:

The functionally overextended notion that the normative claims to validity let themselves, in a systemic-theoretical manner, not only be analyzed but also absorbed inside the consciousness of the members of the system without *notable consequences for the existence of the legal system*, is something that I consider a social-science fiction, indeed a fiction that without transposition onto *other* anthropological grounds can hardly become the reality. (ibid.)

This passage requires interpretation. Habermas in no way attributes to Marxists totalitarian ideas regarding the yet-to-be-produced society. Nevertheless, he demands sociological realism: the immediate realization of the ideals of the Enlightenment (liberty, equality, fraternity, reason – that is, the notion that all human beings should be able to act immediately in their everyday practice in a moral way) would indeed mean the dissolution of the separation between morality and law. Law would then be immediately moral, i.e., it would no longer exist. Such conception belongs, there is no doubt, to the realm of social-science fiction: as dystopia.

Let us take stock. In his 'Reconstruction of Historical Materialism', Habermas is in considerable agreement with Marxist theory. Modern law is, explicitly in terms of its contents, proven to be functional for

the systemic rationality of capitalism. As far as the form is concerned, the three structural characteristics – conventionality, legality, formality – show that modern law is based on the legally binding institutionalization of strategic action; and this means that the form too is functional regarding the rationality of the system. Diverging from the Marxian programme, Habermas assumes that modern law becomes possible only at a post-conventional stage of moral development. This stage can itself not be derived from systemic rationality – in fact, it is this moral development that renders possible the universalization of capitalism. Habermas conceives this double-tracked argument – the division into developmental logic and developmental dynamic, into system and life-world – because he wishes to postulate on the one hand that the three characteristics of modern law make the form 'explicit' and that it is on this basis that it can fulfil 'the functional imperatives of an economic intercourse regulated through the market' (*ibid.*, p. 266); on the other hand, these three characteristics are simultaneously to be deciphered as an 'embodiment of post-conventional structures of consciousness'. This embodiment entails discursive rationality, and it is therefore constitutive for the universal form of the legal norm. It is this generality of the form that is associated with the rational legitimation of modern law; and this precisely because discursive rationality has permeated it in a form-determining way. The rationality of legal norms must thus be traced back to discursive rationality; claims that are connected with the universal form of the law should lead back to its origin and that is, to discursive rationality. Although modern law, for Habermas, proves itself to be functional for the systemic rationality of capitalism, it is, because of its norm-rationality, *not only* functional. It is more than that because post-conventional structures of rationality are embodied in its form; it conceals a rationality one can not do without if society is to be changed.

In contrast to Marxian theory which would insist on a form-genetic explication of modern law (as 'surrogate for community' based on the alienated social individual), Habermas wants to trace modern law back to a universally conceived practical reason that created a law that has indeed fulfilled the functional imperatives of capitalist economic interaction. However, because the form of law is impregnated with reason, it is equally well suited as a means of opposing the systemic rationality of capitalism and thus of making possible a society in which those ideas that a 'correctly read Marx' perceived in the institutions of the bourgeois state can realistically be achieved. This also means that human beings do not need to be 'transposed onto a new anthropological basis'; and, in addition, the existence of the legal system itself would

be safeguarded. Habermas' theoretical construction moves within these coordinates, and with these his entire later work can be deciphered.

In the interview cited above,⁵ Habermas talks about the basic tenets of his theory of communicative action. He mentions not only the deficits of the old Critical Theory, and/or Marxian theory, but also a further, then still vibrant political issue, namely: the bad, abstract alternative between 'uptight' neo-conservatives and the anti-growth young conservatives. The one group would like 'at almost any price, in any case rather violently, to hold on to the capitalist model of social rationalization' (Habermas, 1985, p. 183). Problems for socially integrated areas of life that result from this kind of politics, are then 'pushed back and forth' between the media of money and power, but they are not resolved. The anti-growth counter position (the Greens of that period) also conceals the danger of a post-structuralist renunciation of all forms of reason. 'Modern life-worlds are differentiated and should also remain differentiated so that reflexivity and tradition, the individualization of socialized subjects, the universal foundations of law and morality don't go to the devil' (ibid.). We see that Habermas held firmly on to the basic ideas expressed in his 'Reconstruction of Historical Materialism', even though these are now presented in a way that corresponds to the more developed state of his theory. The following sections focus on the development of his conceptual framework in his later work.

System and life-world

It has already been pointed out that Habermas made the decisive step in his theoretical development quite early on with the differentiation between labour and interaction. This step appears to have been motivated by what he perceived as the lack of practical political reason in the work of Marx and Critical Theory. However, Habermas' theoretical work did not develop in a straight line. As it is the case with Wittgenstein, one has to differentiate between Habermas I and Habermas II. There is, then, a break in the elaboration of his theory – a new beginning. This new beginning originated with his turn toward linguistic theory, leading to the development of universal-pragmatic conceptions and their connection to sociological inquiries.

There is no doubt in my mind that Habermas has made huge advances in discourse theory and linguistic pragmatism. What is particularly noteworthy is his attempt to connect these areas of study with the theory of action. There is no doubt also that his accomplishments

have not been appropriately recognized. That this is so is a result of the persisting division of labour between the disciplines. Linguistic theory is too complex for the sociologists, and the philosophers do not want to occupy themselves with sociological questions. But it is not my intention to deal with this problem here.

In the context of our inquiry, it is important to note that Habermas reformulated an important idea of Marx's theory, namely: individualization [*Vereinzelung*] is a social process. Marx conceived this thought materialistically when he argued that the egoistic action of individuals, mediated through money, is characteristic for the individualization of the individual within society. For Marx, then, individualization is a necessary form of a system in which social labour obtains in a mode of being denied, i.e. as private labour. As an earlier quotation from Marx's early work has shown, Marx conceives this system of social labour as an inverted form of individualization – an 'optimizing machine' through which the social relations of production subsist. What Marx criticizes in 'bourgeois' theory, and what he considers to be the central characteristic of the bourgeois character of the theory, is its presupposition of the individualized individual as an absolute – a false naturalistic syllogism which is complemented by its inability to comprehend the categories of political economy. Bourgeois theory, in short, is 'blind': it does not see the social character and existence of what it celebrates as the – individualized – individual. Habermas does not deal with *this* issue at all, nor does he discuss the question whether the self-reflexivity of modern subjectivity and the category of individuation are possibly tied to the form of social relations. Rather, he extracts this dialectic of individual and society from its original context and thematizes it exclusively within the framework of the now integrated linguistic and action theories. In short, the dialectic of individual and society becomes an intersubjectively conceived theory of the life-world. Habermas repeats Marx's critique of the absolutized concept of the subject in bourgeois theory as a whole. However, he does so on the basis of the life-world and his critique is targeted against the whole of modern philosophy which stands accused of not having recognized that it poses as absolute its own position on the philosophy of consciousness – a position from which a theoretical reconstruction of the simultaneous genesis of individual and society is deemed to be impossible. Habermas never raises the question whether the absolutizing of the subject in the philosophy of consciousness could possibly be indebted to the bourgeois relations of production. Instead he belittles the category of the egoistic individual and deprives it of its critical content. He does so by detaching the

individual, its history and being, from the relations of production, and by rendering it, in an action-theoretical manner, completely harmless. This he signals with his conception of strategic action. With the help of this concept he constructs the form of systemic integration (system) in distinction to the form of social integration (life-world) which he conceives as something made up of linguistically co-ordinated action.

Habermas distinguishes between two types of rationality. One belongs to the context of strategic action and systemic integration. It is seen as a reduced type of rationality: it is the sort of purposeful rationality, or indeed strategic action, upon which the entire development of economic theory rests and that, in its exclusively instrumental character, was absolutized as the only concept of reason by Max Weber and the Weber-Marxism of the Frankfurt School. The second type refers to an expanded concept of reason which according to Habermas, was taken up by Critical Theory and Marx, but which has never been developed in explicit terms. This expanded concept is located in the life-world, a world where action is oriented towards understanding [*verstehendungsorientiertes Handeln*]. It is this expanded concept of reason that provides the basis for the reconstruction of post-conventional consciousness.

With these types of action – understanding-oriented action and purposive-strategic action – Habermas constructs his two forms of integration: life-world and system. Against this background Habermas criticizes all of sociology and social theory as insufficiently complex because none appears to be adequate to the complexity that the object-field [*Gegenstandsbereich*] presents; and he insists that we need to account, both theoretically and methodologically, for the intertwining of social integration and systemic integration. In short, he insists on the development of a concept of society as the unity of life-world and system. Of course, he argues that these two, system and life-world, have to be combined within one another in a ‘non-trivial’ manner. In his view, all previous theory emphasizes one or the other theoretical position – the hermeneutical or the scientific – and conceives of society either as a ‘comprehensible’, communicatively mediated context of action [*kommunikativ vermittelten Handlungszusammenhang*] or as a reified system. According to Habermas, both of these positions have to be brought together to create a unified theoretical concept. The original point of departure – labour and interaction – has also been elaborated further; the postulated autonomy of the moral-practical sphere, its irreducibility to categories of the production process, has been developed in terms of the concept of the life-world; the sphere that was previously registered under the category ‘labour’ is now conceptualized with the help of Talcott Parsons’ media theory, that is the theory of subsystems.

It is with the help of Parsons' media theory that historical materialism is to be 'reconstructed'. Against the dialectic of the relations and forces of production, Habermas proposes the view that human history is an evolutionary process that is best understood as a complicated intertwining of developmental logic and developmental dynamic. He divides human history into three recognizable social formations: tribal society, the high cultures, and modernity. The first is distinguished by an immediate unity of life-world and system. Exchange and power have yet to achieve autonomy through the establishment of their respective subsystems. The second type, pre-modern high cultures, is characterized by the evolution of an independent subsystem whose integration is based on the medium of power. In modernity, finally, we find the constitution of the economic as an independent systemic structure. The evolution towards modernity goes forward, and is informed by, the medium of money.

Habermas' argument implies that the media operate as some sort of integrative mechanisms that allow society to reproduce itself in an increasingly complex way. An abolition of power and money is unthinkable in this theory. For that would mean regressing to forms of social integration that are incompatible with the already attained forms of the rationalized life-world. In Habermas' view, power and money are thus media that one can not do without under any circumstances. According to him, Marx made the mistake of conceiving political economy as an inverted form of the life-world (that is, not as a system), and that he therefore felt, that money and power could be abolished.

In contradistinction to Marx, Habermas presumes that there is a need to distinguish between the 'levels of systemic differentiation and the class-specific forms of its institutionalisation' (Habermas, 1981, p. 501). In other words: it is entirely conceivable that this 'evolutionarily advantageous integration level' and the subsystems steered by the media of power and money could have developed differently (with another, life-worldly starting point, for example with an ethic of brotherly love in the religious sphere); and it is conceivable that they could be transformed – without loss of complexity – to such an extent that the life-world, which is now colonized by power and money, would be decolonized. This would allow the life-world to, once again, function according to its own proper mode of integration. This then is Habermas' version of a rational society.

When Habermas criticizes and rejects Marx's historical materialism, he has a definite, and indeed a dogmatic, version in mind. This version does not stand up to a critical reading of *Kapital*. Of course, authors are permitted to change their point of view and to 'revise' their work.

One should therefore not speak of *the* historical materialism, but rather explicate Marx's conception of history against the background of his entire work. And because the critique of political economy stands at the centre of Marx's work, it seems sensible to reconstruct his theory of evolution from this perspective. It makes little sense to focus merely on those passages where the materialist conception of history is explicitly summoned – as in the *German Ideology* of 1845. Of course, in the *German Ideology*, Marx develops many themes that are central to his critique – the forces of production, the forms of intercourse, and the contradictions between them, as well as base and superstructure. But a naïve reading will overlook the fact that Marx here presented an amalgam of several central theses from the work of Adam Smith combined with his first attempt at a critique of political economy. Division of labour and accumulation are the central categories that, however, in the manner of the *Paris Manuscripts* of 1844 are conceived as an inverted form of human species being [*Gattungswesen*]. In the construction of this historical trajectory, the conceptualization carries more weight than it can bear. But a closer reading of the *German Ideology* reveals that Marx recognized only a single contradiction of this kind, namely that which obtains in the present⁶ and which manifests itself in repeated crises.

In the *Grundrisse*, where he first supplied a dialectical development of his categories, Marx presents a different conceptualization. Marx is thinking here of a repeatedly occurring historical process that only under certain historical conditions could take the specific course that it did in Europe. About a year later, with the publication of *Toward the Critique of Political Economy*, Marx presented in the Foreword a simplified version that later became the foundation of dogmatic historical materialism. It is this dogmatic reading of Marx that Habermas opposes when he presents his own theory of evolution.

The ambiguity in Marx's concept of history also sheds light on the concept of evolution. If Marx in the aforementioned Foreword presented – *malgré lui* – a version of history that deviates from that of the *Grundrisse*, then it is necessary to consider that Marx had to come to terms with the disappointment that the revolution he predicted for 1858 did not occur. In 1859, this dogmatic version amounted to a construction of necessity: if all previous history had run according to this model – as an always renewed contradiction between the forces and relations of production – then Marx could also be sure that the transition to communist society – the last one! – would likewise succeed.

The sequence of steps in Habermas' evolutionary construction has an analogous function. Of course, he does not want to be assured of the

practical overcoming of capitalist society. Instead, he seeks theoretical certainty for its eternal existence (or, in the best case, wishes to civilize it beyond recognition). This makes it possible for him to utilize and refine Parsons' theory of communication media. With the help of the media power and money, Habermas presents a sequence of social formations that, ironically, echoes those of the young Marx. Yet, Habermas' theoretical construction exudes not only magical connotations that should give cause for pause. There is also the sequence itself: the immediate unity of life-world and system in tribal society, the separation of the two forms in the high cultures, and finally the extreme form in which the life-world itself appears only as a subsystem among others. This sequence is not without metaphysical references. Habermas presents here in inverted form a specific characteristic of modern society: Although everything can only emerge from the life-world, and would not be anything without it, the life-world is treated as a mere moment of the whole. This treatment reduces the life-world to a factor among others, its constitutive existence seems to disappear; it is, in Adorno's words, merely carried along.

Of course, it should not be overlooked that, with his differentiation between developmental logic and developmental dynamic, Habermas introduces a completely new approach to the understanding of history. Indeed, his theory seems to render intelligible the transition from tribal societies to class societies with political organization (here he relies especially on the works of Klaus Eder). In any case, it is precisely this transition that Habermas thematizes most strongly. There is hardly any elaboration of the transition from political class-societies to modernity. This transition is much more important. It is in my opinion no accident that there are only a few comments on this transition. The conception of system that Habermas adopts from sociological discourse theory may be capable of explaining the first transition – above all in combination with his notion of developmental logic; but for the second transition, that to modernity, it fails. This failure is hardly surprising. His fundamental concepts themselves entail the constitutive weakness of his theory, especially and ironically his concept 'system'. Its origin is unthinkable without capitalist society. It is in this society, that the concept of system is grounded in real terms – it belongs to capitalism. Faced with the specific dynamic of the gradual process of the autonomization [*Verselbständigung*] of exchange value, with the moloch-like expansion of autonomized [*verselbständigter*] production where use-value is not just carried along, but where use-value is in fact created in order to preserve itself *as* autonomized

[*verselbständigte*] value-production, the universalistically defined concept of system fails.

Habermas' universalistic conception of system, in this case the economic subsystem, implies a naturalistic concept of production that is ideological in a strict sense. Against this background, the social character of an autonomized [*verselbständigtes*] system of value production is unintelligible. It has to be developed through the conception of the dual character of labour. This is the springboard for the critique of political economy that Marx introduced and elaborated, albeit highly insufficiently. However, if labour's constitutive significance for the proper understanding of the dynamic of capital is overlooked, then 'economics' is posed as a theory with naturalistically given elements. At the end of the third volume of *Kapital*, in the chapter on the 'Trinitarian Formula', Marx summarized with biting irony this structure of argumentation that is today offered as a theory of 'production factors'. In the *Grundrisse*, on the other hand, he concentrated above all on 'simple circulation' as a sphere whose being is, in the dialectical presentation of the categories, proven to be a pure appearance [*reiner Schein*] in the Hegelian sense. This early construction, that also lies hidden at the foundation of *Kapital*, was fully misunderstood by Engels who popularized it as simple commodity production.⁷ For Marx, the central point of his deciphering of simple circulation is the proof that science can only conceptualize the capitalist economy as a society of exchange, money only as a mediating medium, and capital and labour exclusively naturalistically. The consequences are considerable. In the *Grundrisse*, and really only there, Marx points out that Ricardo's theory of comparative advantage (on the basis of which the contemporary theory of foreign trade is still argued) rests on this appearance of simple circulation. Even the introduction of money as a means of reducing the costs of transactions is based on this appearance [*Schein*] of simple circulation. At the same time, and importantly, it lies at the basis of the entire media theory in sociology – and Habermas himself points out that all media are developed in structural analogy to the medium of money.

Money as medium

In 'Reconstruction ...', capitalism was still an explicit topic. This is no longer the case in the *Theory of Communicative Action*. Habermas focuses instead on systems-theoretical ideas and the media of money and power. He fails to appreciate that, in doing so, he reproduces the entire world of ideas that is based on the appearance of simple circulation. Let us have a closer look at the two media of money and power.

Habermas praises Parsons for his brilliant idea of introducing media as mechanisms of integration into his systems–theoretical construct. He criticizes Parsons for his over-generalization of the concept of media. Habermas emphasizes that Parsons' conceptual point of departure for his theory of media can be found in economics, and that Parsons developed the entire conception of media in structural analogy to the medium of money. Habermas then separates this structural analogy – although only in terms of the medium of power – on the basis of his own concept of society as comprising a unity of life-world and systemic integration. Although he accepts that this first generalization (of power and money as mechanisms of integration) is forced, he holds on to it: 'Thus, money and power do not differ in terms of being able to be measured, circulated, and deposited so greatly that the concept of power as a medium is wholly without value.' (Habermas, 1981b, p. 403). This section focuses thus on the money medium.

Habermas develops the adopted concept of media differently from Parsons. His point of departure is the theory of language, specifically, of language as a medium of action-co-ordination. In all system–theoretical conceptions the medium must be introduced for theory-immanent reasons. In a theory of society like Habermas', however, in which systemic integration is developed out of an action–theoretical context, the co-ordination of the system is conceived as a process that can run much more smoothly than the 'mastering of a situation' with the help of communicative action. Habermas thus bases his argument not on economics and commodity exchange relations. He does not sketch a theory of exchange; nor does he introduce money in terms of its economically accepted function to decrease transaction costs, and so to reduce the complexity of a multiple exchange-process; he does not conceive of value and the money form – as Marx does – in terms of the social relations of production and thus does not develop them from this reproductive structure. Rather, the money medium is conceived abstractly, that is in terms of what it is required to accomplish as a 'substitute for certain linguistic functions' (*ibid.*, p. 393).

What is meant by 'media'? Becker and Ritsert (1989) have characterized this – media – aspect of Parsons' and Habermas' theory with reference to Nietzsche's well-known phrase 'happy science' [*fröhliche Wissenschaften*]. Completely without reflection, and lacking academic seriousness, this concept was borrowed from a scientific discipline whose polished dogmatism they both mistake for a high level of intellectual maturity. Whereas Parsons repeats, completely uncritically, neo-classical ideas about the monetary medium, Habermas adjusts, as far as that is possible, these ideas to his conception of language as the

medium of action-co-ordination. In the life-world, communicative action raises the claims of validity in each action situation. These 'validity tests' make it possible to produce a commonly agreed situation-definition and only when agreement has been reached, can one action logically follow from another. However, with the introduction of a medium, this aspect of linguistic co-ordination is no longer necessary. This also means that the problem of failed understanding no longer obtains as an issue. The entire rationality-potential of language, which rests on the requirement of raising validity claims, recedes into the background; only a few features of language, such as 'the symbolic embodiment of semantic contents' or the 'structure of raising and realising claims' (*ibid.*) are 'simulated' by media.

Habermas relies in his account on Parsons. Yet, at the same time, his argument moves within an area of economics that today is practised only by careless economists. Habermas postulates that the medium is so constituted that it can be: measured; sold for various amounts; and saved. It must 'embody measurable amounts of value' that can 'circulate'; these 'amounts of value' or even 'masses of value' must be depositable in banks. And finally, this medium makes 'reflexive amassing' possible – as capital.⁸

Habermas argues neo-classically: not commodities, but goods are exchanged; it is not buying or selling that takes place, but exchange; value equals use. Disregarding the internal economic critique of the quantifiability of use, he immediately conceives of value as an amount of value, which can be circulated, saved, and deposited. Habermas has no idea that he reproduces here the repressed metaphysics of this entire discipline. He does not reflect on which category of value he assumes in each case, but moves uncritically between subjective and objective value-categories; nor does he find problematic concepts like 'measurable amounts of value' or depositable amounts of value.⁹

Habermas' neo-classical conceptualization of economics has, of course, consequences for his theory as a whole. The idea of an economy based on simple circulation repeats in modified form the absolutized individualism of classical economics, whether as methodological individualism, or as generalized strategic action which has no longer anything in common with the ugly class-society of capitalism. Habermas' understanding of the systemic integration of action is, in its specific fundamental concepts, harmless – it has no bite. That this is so is, again, not surprising. I have already emphasized that Habermas seeks to differentiate between the evolutionary advantageous integration level of an economic subsystem that is mediated by money and its

class-specific form of institutionalization. The monetary medium in this (theoretically presupposed but unexplained) 'relation of tension' is likewise 'innocent' – as is supposedly Marx's concept of the forces of production in capitalism, which in their material-technical structure are also seen to be suitable for socialist societies. Analogously in Habermas' theory: his version of the rational society is characterized by the reversal of the colonization of the life-world; that is to say, the money medium (like the medium of power) would be forced back into those areas where it occupies its legitimate function as a systems-integrating medium, and in the now vacated areas – that is, where action co-ordination is inevitably dependent on linguistic consensus-building and on the rationality potential of language – communicative action will be re-established. Typically, Habermas does not mention the relations of production – he is concerned only with the way in which his theory of action allows the legal institutionalization of the medium money. 'Relations of production' are considered politically malleable; and finally capitalism is characterized exclusively in terms of its 'overburdening of the monetary medium'. This allows Habermas to retain the 'evolutionary advantageous integration level' which, for him, is characteristic of a thoroughly differentiated society. In short, his characterization of capitalism allows him to disregard the drawbacks of a 'class-specific form of institutionalisation'.

Habermas himself admits that he is not much of an economist. He is therefore not in the position to say what is to be understood by his notion of pushing back the 'overburdened monetary medium'. The sole essential feature of his new critical social theory is that money should be driven out of the domains of understanding-oriented action where, because of its integration mode, it has no business being. For this reason, Habermas (1984, p. 569) talks about the 'overburdening of the monetary medium'. One should not discount the possibility that Habermas has wide-reaching institutional changes in mind here, even if statements to that effect are as elusive as the proverbial needle in the haystack.

Personally, I no longer believe that a differentiated economic system can be transformed democratically from within in accordance with the simple recipes of workers' self-management. The problem seems to be rather one of how capacities for self-organization can be sufficiently developed in autonomous public spheres for the goal-orientated processes of will-formation of a use-value orientated life-world to hold the systemic imperatives of economic system and state apparatus in check, and to bring both media-controlled subsystems into

dependence on life-world imperatives. I cannot imagine that this would be possible without a *gradual abolition of the capitalist labour market*, and without a radical-democratic implantation of political parties in their public spheres. The secondary, although in no sense trivial, question then arises of how, under such altered initial conditions, plan and market are coordinated with each other, how their relative weights in the interaction of state and economy can shift. This would be difficult for me to anticipate, even if I had a better knowledge of economics. (Habermas, 1985, p. 255; author's emphasis.)

With the gradual abolition of the capitalist labour market – and this is simply another formulation for the abolition of the private ownership of the means of production – capitalism would be robbed of the conditions of its existence; and it might still be possible to develop a classless society in which the life-world, in the form of a radical-democratic republic, would achieve ever greater significance at the expense of the increasingly marginalized systemic integration. The pre-condition for such a development is, of course, the mature citizen who, schooled in this ongoing discourse, is able both to articulate his interests in the public sphere, and engage in the corresponding democratic legitimation process, which a thoroughly rationalized legal process [*Rechtsetzung*] involves.

Democratically constituted opinion- and will-formation depends on the supply of informal public opinions that, ideally, develop in structures of an unsubverted political public sphere. The [informal] public sphere must, for its part, enjoy the support of a societal basis in which equal rights of citizenship have become socially effective. Only on a basis *that has emerged from the confines of class and thrown off the millenia-old shackles of social stratification and exploitation*, can the potential of an unleashed cultural pluralism fully develop. (Habermas, 1992, p. 374; author's emphasis.)

In sum, Habermas' concept 'system' is essentially a loose category within his theory. He conceives of the system as something that has always to be pushed back out of the life-world; but it can never be abolished. Were that to happen, as he says, the evolutionary advantageous integration level would likewise disappear. His basic conceptualization, i.e., the concept of money as medium, takes this into account: the political notion of a gradual decolonization of the life-world is based on the idea that the media are neutral. This implies a concept of society whose

central category is that of intersubjectivity. The older Critical Theory, in contrast, put the concept of social objectivity at the centre of its understanding of society. The conceptualization of social laws depends, of course, on an understanding of social objectivity. When Habermas takes note of capitalist crises, he has to limit himself to empirical observations; his basic concepts fail to supply theoretical explanations. The harmlessness of his concept of 'medium' is constitutive for his theory which, in contrast to Marx's concept of 'capital', no longer allows the development of an objective concept of exploitation. This harmlessness also relegates the foundation of political demands to the area of the 'just' distribution of wealth. The relations of production remain taboo.

Legal theory

This section returns to Habermas' central category: the legal form. He develops this category along the same theoretical lines, and with the same analytical tools, as his conceptualization of the medium money. This allows him to shape his central category in a much more precise way than in his early work. In addition, and importantly, his theory is designed to safeguard the 'existence of the legal system'. He provides, in fact, theoretical 'guarantees' against threats to its existence. Indeed, for him, the possibility of an autonomous legal system is an exciting prospect. No wonder, then, that all his hope focuses on this. The discursive reason that he sees incorporated in positive law, implies for him a potential for rationalization which in a certain sense propels the modern state of law (*Rechtsstaat*) beyond itself. In contrast to Adorno's and Horkheimer's 'Dialectic of the Enlightenment', Habermas' 'Dialectic of Rationalization' points to a brighter future: because the law's mode of validity [*Geltungsmodus*] entails the rationally motivated recognition of normative claims of validity, there exists the possibility that rational arguments can explode the legal form in which they have hitherto taken place. Habermas had attempted to demonstrate this paradigmatically in his study on civil disobedience,¹⁰ and later he transferred this notion to the legal system as a whole. As Habermas (1992, p. 599) puts it:

a legal system does not acquire autonomy on its own. It is autonomous only to the extent that the legal procedures institutionalized for legislation and the administration of justice guarantee impartial judgement and provides the channels through which practical reason gains entrance into law and politics. There can be no autonomous law without the realization of democracy.

It is easy to be misled here by his decidedly unphilosophical terminology. What he proposes is, in fact, a most ambitious programme. In places even the Hegelian critique of the philosophy of understanding [*Verstandesphilosophie*] shimmers through; as for instance when he postulates a necessary internal connection between human rights and popular sovereignty [*Volkssouveränität*], or when he claims that there is an inner connection between democracy and the state of law [*Rechtsstaat*]. As long as philosophy argues from within the constraints of the philosophy of consciousness – so runs Habermas' criticism – it has not only to pose human rights and popular sovereignty as two opposing rights but, also, to render absolute one or the other. Yet, Habermas argues, these two rights are internally related. They belong together. What needs to be done, then, is to go beyond their respective limitations – limitations that are internal to each – in order to explicate in a stringently conceptual manner the 'rational unity' of human rights and popular sovereignty. Hence his critique of Kant and Rousseau. Habermas claims that such stringent conceptualization is possible on the basis of his newly acquired linguistic theory and the theory of universal pragmatism. He thus claims to be able to ground, in a discursive manner, the simultaneous origin [*Gleichursprünglichkeit*] of both rights. In other words, Habermas claims that his theory allows him to craft in precise terms the unity between human rights and popular sovereignty, a task in which all theoreticians before him failed(!). Legal theory is the goal and culmination of Habermas' theory of rationality. He claims to show how rational discursive action is already deeply ingrained in social institutions, rendering possible the emergence of a rational discursive reality. Habermas regards his legal theoretical constructions as a solution to the basic deficiency of Marxism and Critical Theory. According to Habermas, both these theories have not been able to decipher the moral categories built into bourgeois legal institutions. Both thus fail to appreciate and imagine alternative political practices. While, in other words, Marx and Critical Theory are reproached for summoning a concept of reason that points towards a world beyond capitalism, Habermas seeks a better world within the established order. Hence his critique of Marx and Critical Theory: these theories are reproached for employing a concept of reason that is without normative foundations. For Habermas, the normative foundation of the existing legal order supplies the basis for the future.

Let us look again at Habermas' Starnberger Theses. Here, the thematization of legal form is central. In contrast to the Marxist project, according to which this form would have to be developed from its base, Habermas starts out from the already 'existing forms' and attempts to

decipher the reason embodied in them. He interprets the content of these forms, in accord with Marxism, as fully functional for capitalism's systemic development. In terms of the form itself, he differentiates four characteristics: positivity, formality, legality, and especially generality. These can likewise be characterized as functional for the systemic rationality of capitalism; but because of their form they could just as easily be functionalized for different purposes – namely the gradual decolonization of the life-world from the overburdened monetary medium. His *Between Facts and Norms* suggests that much.

Habermas charges that, in modernity, traditional ethics no longer obtains in a unitary form. Instead, it is divided into modern morality and formal law. Of course, there exists a functional relationship between them. However, since they have been divided, each requires a new foundation. This is what Habermas seeks to do. Since the inherited notions of natural law have been dismantled long ago, discourse theory is the only path still available. In our context, only the foundational structure of law is of interest.

We have already noted that the starting position of the theory of communicative action is that systemic integration has to be 'anchored' in the life-world. The same holds for his conception of success-oriented strategic action. Habermas presumes (along with Durkheim, Weber and Parsons) that the stabilization of the economic subsystem cannot succeed exclusively on the basis of success-oriented action. Were this possible, an exclusively instrumental order would arise. Such an order would be very unstable and all attempts at stabilizing it would have to rely on norms. The purpose of Habermas' legal theory is to determine the nature of these norms.

Habermas (1992, p. 45) emphasizes that the historical point of departure for the modern development of law is to be found in private law which is the 'core of modern law'. The discourse-theoretical reconstruction of the rationality of law, the deciphering of reason embodied in law, must therefore begin with subjective rights:

I understand this interpenetration as a logical genesis of rights, which one can reconstruct in a gradual fashion. One begins by applying the discourse principle to the general right to liberties – a right constitutive for the legal form as such – and ends by legally institutionalizing the conditions for a discursive exercise of political autonomy. By means of this political autonomy, the private autonomy that was at first abstractly posited can retroactively assume an elaborated legal shape. (ibid., p. 154)

These lines sum up once again the entire claim of Habermas' project to supply really for the first time a theoretically consistent connection between popular sovereignty and human rights.

Let us take a closer look at his notion of legal form. In the Starnberger Theses, Habermas did not hesitate to see private law as part of modern law and modern law is characterized as an embodiment of post-conventional consciousness. In *Between Facts and Norms*, however, he is considerably more cautious. Here it remains unclear whether private law represents the legal form, or whether it merely sets-up the legal form. This ambiguity is in no way a result of definitional laxness. Rather, it is symptomatic of legal theory's systematic point of departure.

Klaus Günther, a jurisprudent colleague of Habermas (and to whom he owes, as he mentions in the Foreword to *Between Facts and Norms*, 'so much instruction' that he must almost hesitate 'to relieve him of responsibility for my mistakes'), has stressed the 'dyad of compulsory authority and private autonomy' as the most striking feature of legal form (see Günther, 1994, pp. 470–87). These characteristics are, as Günther expressly points out:

historically given ... they describe nothing but the fact that the regulation of social interaction has legal form ... If any society wants to regulate its social interactions in such a way that it forcibly ensures its citizens' adherence to legitimate norms, without in so doing injuring its moral intuitions and without excluding rational motivability altogether, then it must serve this legal form with its stated characteristics. (ibid., p. 478)

This is the point where, in my opinion, the critique must begin. The legal form that has these characteristics is assumed to be historically given. Now everything depends essentially on 1. how this legal form is developed theoretically in this specific duality, and 2. how the connection between legal form and the principle of discourse can be conceptualized. Habermas has to demonstrate that there exists a 'necessary inner connection', i.e., the principle of discourse is not externally applied to the legal form. Only when this can be shown can Habermas' claim to decipher the post-conventional form of consciousness embodied in the institutions of law be maintained.

With regard to 1.: As mentioned earlier, Habermas constructs the duality of life-world and system in an action-theoretical manner, and he conceives of system as a specific form of integration. This must be stabilized through specific norms; that is, it must be 'anchored' in the

life-world. It is worth noting that Habermas in no way develops the historically given legal form from a specifically social starting point; rather he constructs it from the premises of his basic action-theoretical concepts. He is 'looking for' particular norms that must satisfy two criteria:

According to the above analysis, the type of norms *required would have* (author's emphasis) to bring about willingness to comply *simultaneously* by means of *de facto* constraint and legitimate validity. Norms of this kind *would have* (author's emphasis) to appear with an authority that once again equips validity with the force of the factual, only this time under the condition of the polarization already existing between action oriented to success and that oriented to reach understanding, which is to say, under the condition of a *perceived* incompatibility of facticity and validity. *As we have already assumed* (author's emphasis), the metasocial guarantees of the sacred have broken down, and these guarantees are what made the ambivalent bonding force of archaic institutions possible, thereby allowing an amalgam of validity and facticity in the validity dimension itself. The solution to this puzzle is found in the system of rights that lends to individual liberties the coercive force of law. *We can then also see, from a historical perspective, that 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* (author's emphasis) (Habermas, 1992, pp. 44–5).

As could already be surmised from these formulations, Habermas' procedure is analogous to his construction of the monetary medium, which, as we have seen, is developed entirely from the perspective of the linguistic co-ordination of understanding-oriented action. In his construction of the medium money, Habermas postulates that the standardized action-situation allows the neglect of specific linguistic acts. This postulate is carried over to his conception of the legal form. This form is deduced from the entire theoretical construct and is understood as the unity of autonomy, freedom, and legal constraint [*Zwangsbefugnis*]. 'On the one hand rules *must* present *de facto* restrictions that alter the relevant information in such a way that the strategic actor feels compelled to adapt her behaviour in the objectively desired manner. On the other hand, they *must* at the same time develop a socially integrating force by imposing obligations on the addressee – which, *according to my assumptions* [translation modified; German original: *nach unserer Voraussetzungen*], is possible only on the basis of

intersubjectively recognised normative validity claims' (ibid., p. 44; author's emphasis). At times Habermas appears to agree with the Marxist determination of the legal form as a unity of autonomy, freedom and legal constraint. Nevertheless, what needs to be asked here is whether Habermas – even when he appears to share Marx's insights – projects his action-theoretical premises on to an historically given legal form and that he does so merely in order to pull them out again – like the proverbial rabbit out of the hat – i.e., in order to reconstruct them rationally. The title of Günther's (1994) 'defence' poses this in a nutshell: 'A Discourse Theory of the Law', or: 'Liberal Natural Law in Discourse Theory's Clothing'.

Let us now look at our second point, the connection between legal form and the principle of discourse. The question is this: is it possible to decipher the legal form, insofar as the validity mode [*Geltungsmodus*] of rational legitimacy is concerned, as a specific form in which the same compelling unity of meaning, validity claim, and discourse can be established – just as Habermas postulates these as necessary components of co-ordination in communicative action? Since every valid norm is supposed to embody rationality, it must at the very least have passed through the filter of rational discourse, just as all substantiated knowledge comes into being through the questioning of implicitly raised validity claims. Characteristic in this context is the circular argument in which Günther gets caught when he presents the rational elements of the legal form as necessary components of this same form.

In Günther's sketch of Habermas' position, the acting subjects are both the addressees and authors of the law; they constitute the law to which they simultaneously subject themselves out of 'respect for the law'. At the same time, however, Günther, like Habermas, maintains that the acting subjects will contingently encounter the historically given legal form. How is that conceivable? Günther (1994, p. 478) breaks the matter down in the following way: '*Because the legal form cannot be derived in a discourse-theoretical manner* (author's emphasis), there is no normative necessity of any kind for subjects capable of speech and action to unite as a community under the law [*Rechtsgemeinschaft*]. Rather, the *decision to make use of* (author's emphasis) the *historically given legal form* (author's emphasis) in order legitimately to regulate social relations with the help of positive law is *entirely contingent*'. In good Kantian fashion, these actors are subjugated as empirical subjects to the world of causality, and are therefore unfree, coerced into using the historically given legal form. As intelligible subjects in the rational reconstruction, however, they can make their own decisions. 'Of course this decision is *contingent only from the perspective of discourse theory*. It is indisputable

that [this decision] is conditioned historically (and socially) by complex and improbable premises' (ibid.; author's emphasis). The discourse theoretician of legal form appears to have to seek refuge in fictitious formula. He has to suppose a fictitious society of free people in order to predicate the existence of the legal form rendering it theoretically justified. At the same time, this legal form is assumed to be an historically given. 'But when a society decides to unite as a community under the law, then it must accept those characteristics of the legal form ... Among the most prominent of these is private autonomy, the other side of legal constraint. These characteristics are historically given' (ibid.). This 'society that decides contingently' is, in the counterfactual premises of communicative action, the legal-theoretical concretization of the fiction of an ideally expanded assembly hall [*ideal erweiterten Auditorium*]. According to the postulates of discourse theory, this historically given legal form, since it contains the specific characteristics of guaranteed liberty and legal constraint, i.e. an 'embodiment of rationality', must already be a product of discourse. Günther concedes this too.

It is self-evident that the citizens, insofar as they mutually acknowledge each other as addressees of the law, are also, in a *functional* (emphasis in original) sense, already authors – just as the citizens of Hobbes' state of nature or Kant's nation of devils are *in a certain sense* the authors of their mutually granted right of liberty. For this reason even the theoretician who connects the discourse principle with legal form can observe *so to speak* from the outside that the citizens who have chosen to regulate their coexistence with the help of legitimate laws, must also implicitly grant each other the role of author of those laws, as bearers of which they mutually recognize themselves. Nevertheless, without a discourse principle it would not even be possible to recognize even from outside – not to mention from the perspective of the citizens themselves – that the bearers of the laws also must be their authors. (p. 479; author's emphasis)

As empirical subjects, however, they are only *functional* authors, i.e., they are not aware that they are the makers of *legitimate* law (in Habermas' sense); it is for the discourse theoretician to explain this to them. But is the legitimacy of law not supposed to be tied to the discourse which they themselves carry out?

This, then, is to be the basis on which the entire legal system is to be reconstructed! As we already emphasized in the discussion of the Starnberger Theses, Habermas' reconstruction of the rational content of modern law, and his deciphering of post-conventional forms of

consciousness in modern law, can only be convincing if he can demonstrate a direct connection between discursive rationality and the form of the norms themselves. For this reason the issue of the generality of the legal norm stands at the centre of Habermas' quest for rationality and this because the generality of the norm 'is connected immediately with the legitimacy of bourgeois law' (Habermas, 1976, p. 265). Does this, however, hold true for private law which is at the core of modern law and is characterized by the generality of norms. In my view, it does not. Of course, others have noticed this weakness as well; and Günther (1994, p. 479), in his exegesis of Habermas' legal theory, has had to defend himself against the contention that discourse theory had only been applied externally, from the outside, to modern law:

These characteristics of legal form may not be reified and restrictively laid down as the normative substratum of citizens' democratic self-determination process. Rather, this legal form and its characteristics now enter into a linkage with the discourse principle. And it is this which produces the system of laws (not legal form!) at first from the perspective of the theoretician, then with the establishment of the rights of political participation and of a democratic process of the formation of public opinion...based on the recommendations and decisions of politically autonomous citizens.

The problem that we are dealing with here is structurally identical to that of the genesis of the value form. When Marx announced that he was developing his critique as 'science in the German sense', he was referring to the genetic development of the money form and the other categories of political economy, that was modelled on Hegel's *Logic*. So his critique was twofold: on the one hand the genetic representation of real value forms, that is to say, of money, capital, etc. in the reality of capitalism; and on the other, the critique of economic theory, whose specific characteristic (and those of current economic theory, too) is its disregard for the genesis of its form and, in part, its complete lack of awareness of the problem as such. As Marx (1962, p. 94) puts it, 'political economy now has analyzed, albeit incompletely, value and value-amount and discovered the hidden content in these forms. But not once did it raise the question as to why this content took that form.' Marx also describes these forms as 'objective forms of thought', subjective-objective categories, forms of unity that result naturally from relations between human beings, but that cannot be traced back to conscious-intentional action. Rather they are constituted in and through human action. At the same time, from the perspective of the acting

individual, they appear as something given [*vorgefunden*]. The core problem of Marx's critique is this: how is it possible to understand the circumstance that human action is constitutive action at the same time as human beings appear to be ruled by already existing abstractions. In his *Logic*, Hegel had already anticipated this problem in terms of the unity of positing reflection and external reflection.

In academic economic theory – regardless of which value theory it favours or whether, in neo-Ricardian fashion, it renounces theory altogether – money is 'derived' as the reduction of transaction costs. From Marx's perspective, however, derivations such as these are only fictional derivations – they represent the historically given money form as the result of the intentional action of participants. Such 'theory' misses its target: the element of universality and unity that the money form represents cannot be traced back to intentional or rational behaviour. Economics is not technology.

The same assessment holds for the legal form. It is constituted by individuals who, at the same time, encounter it as something already given. Günther expressed this quite clearly, without however being aware of it: people must make use of the *historically given* legal form; at the same time as they are its *functional authors*, since the people have also to be the creators of this form. Legal form is 'in itself' – as Hegel would say – a form of unity. And in my opinion Habermas seeks to grasp this conception of the unity and universality of the form itself when he postulates an internal relationship between validity and discourse. Discourse ought to constitute this moment of universality and unity – but how can this be, since legal form already shows this constitution prior to all discourse? It is this moment of the unity and universality of legal form, and indeed of subjective private law, that Hegel links with the concept of general will, and which Kant defines as the moral moment of law, as the 'universal law of freedom'. But even Kant and Hegel begin with the already-constituted form as a 'fact of reason' (Kant); Hegel's genetic developments in the philosophy of law are therefore only fictional derivations.

But how might the genesis of this form be conceived? There are hints in Marx's early work, above all in the *German Ideology*. The starting point for Marx's argument is the perception of a particularly formed interest situation [*Interessenlage*] in bourgeois society, whose treatment is comparable to that of the money form in his critique of political economy. At times he presents his treatment in rather drastic formulations:

The attitude of the bourgeois to the institutions of his regime is like that of the Jew to the law; he evades them whenever it is possible to

do so in each individual case, but he wants everyone else to observe them. If the entire bourgeoisie, en masse and all at once, were to evade bourgeois institutions, it would cease to be bourgeois – a conduct which, of course, never occurs to the bourgeois and by no means depends on their willing or cunning. The dissolute bourgeois evades marriage and secretly commits adultery; the merchant evades the institution of property by depriving others of property by speculation, bankruptcy, etc.; the young bourgeois makes himself independent of his own family, if he can by in fact abolishing the family as far as he is concerned. But marriage, property, the family remain untouched in theory, because they are the practical basis on which the bourgeoisie has erected its domination, and *because in their bourgeois form they are the conditions which make the bourgeois a bourgeois*, just as the constantly evaded law make the religious Jew a religious Jew. This attitude of the bourgeois to the conditions of his existence acquires one of its universal forms in bourgeois morality. (Marx and Engels, 1962, p. 163f; author's emphasis.)

What Marx sketches here is a structural peculiarity of the bourgeois relations of reproduction based on the division of labour – a structure in which everyone is dependent on everyone else, and each person can only reproduce himself inasmuch as all others become means for him. On the basis of this initial situation, each person is endowed with two contradictory interests: each individual can only pursue and realize her own particular interests when her conditions of reproduction, which are identical to those of everyone else, are accepted, respected, and recognized by everyone else. But each individual is like all others, so that from the start everyone has two hearts beating in her breast: she has a particular will and at the same time shares with all others a will in which they all are united, which is common to all [*allen gemein*] i.e., is universal [*allgemein*]. This 'will common to all' refers to the preservation of life-conditions that are 'common to all', and that are the condition through which particular interests are realized.

The individuals who rule in these conditions – leaving aside the fact that their power must assume the form of the state – have to endow their will, which is determined by these definite conditions, with a universal expression as the will of the state, as law, an expression whose content is always determined by the relations of this class, as the civil and criminal law demonstrates in the clearest possible way. Just as the weight of their bodies does not depend on their idealistic

will or on their arbitrary decision, so also the fact that they enforce their own will in the form of law, and at the same time make it independent of the personal arbitrariness of each individual among them, does not depend on their idealistic will. Their personal rule must at the same time assume the form of average rule. Their personal power is based on living conditions which in their development are shared by many individuals, and the continuation of which they, as ruling individuals, must preserve in opposition to others while at the same time maintaining that they hold these conditions to be for the good of all. The expression of this will, which is determined by their common interests, is the law. It is precisely because individuals who are independent of one another assert themselves and their own will, and because on this basis their attitude to one another is bound to be egoistical, that self-denial is made necessary in law and right. (ibid., p. 311)

This is not, of course, a satisfying theoretical development of the legal form; but Marx does show the way forward. Two aspects are essential: one is the historically produced egoistic mode of action, which can only be realized when each individual respects and recognizes the conditions for reproduction that are common to all. Thus everyone is simultaneously both a particular and a universal. As a universal, she is the abstract proprietor; and in this definition she is identical to, undifferentiated from, all others. And this universality and unity of all people is posited for itself and maintained by the threat of coercion – as a universal will existing for itself – as the law, that guarantees private autonomy and that is equipped with the power of legal constraint. The individual then of course can also act out of 'respect for the law' because it is in the law that her universal will, which is identical with that of all others, is incorporated, without her having, as author in a discourse, given her consent. She is, as Günther declares, a 'functional author', and can then, of course, act strategically as well – like the 'religious Jew' in the above-cited passage of Marx.

At the same time, and this is the second aspect, Marx emphasizes that the reality of this egoistic action is founded on the existence of class. The reality of bourgeois society is not that of the simple 'exchange of goods', but the appropriation of a surplus product in the form of values, and the maintenance and expansion of these values. So when the discussion turns to 'amounts of value' that are circulated, stored, and even expanded, then Marx is always focusing on abstract objective value; and not on 'contemplated' value (as Marx puts it in the *Grundrisse*), but

rather on the enduring total value [*Gesamtwert*] which in its existence is 'preserved' by the permanent extraction of surplus labour from the working class.

The reality of egoistic action, its form and content, cannot be divorced from the relations of production. Were one to do that, one would have either to declare it absolute in an anthropological naturalistic manner, or espouse it as a success-oriented strategic action, elevating egoistic action to an ahistorical theoretical construct. In both cases, the notion 'relations of production' would be negated and therewith dismissed in an *a priori* manner as the proper foundation for the understanding of egoistic action. It is questionable whether Habermas' basic conceptualization, the categorical distinction between understanding-oriented action and strategic action, is able to recognize the circumstance that the communal conditions of reproduction represent the condition of the possibility of strategic action. Concerning strategic action, there is no doubt that we find, in the act of exchange, a silent symmetrical recognition of liberty and equality. There is, in other words, a reciprocal, as yet abstract and unintended positing of the participants as private owners of property.¹¹ This insight would, of course, be entirely comparable to the Habermasian construction of the 'symmetrical premises of communication' in the ideal speech situation. Yet, for Habermas the ideal speech situation takes place only in understanding-oriented action. The fact, however, that this reciprocal relationship of recognition can be expressed as legal form (in private law) and acquire *de facto* validity, is founded on the existence of a labouring commodity: the working class. Characteristically, in defining the norms of autonomy and legal constraint [*Zwangsbefugnis*], Habermas does not even begin to consider the really existing antagonism of interests. Instead, he focuses on their institutionalized form. According to Habermas, it is only within the confines of a developed legal form that one can act strategically.

Where, for the discourse theoretician, do these equal, individual rights originate? The actors – according to Habermas and Günther – find legitimate law as given in the legal form. They did not contribute to its creation as conscious beings but merely as functional authors. These authors create equal subjective law and they do that automatically and without any prior consideration about the meaning and substance of this equality. Does the legal form entail equal subjective rights, or have the discourse theoreticians projected these into the legal form?

The principle of discourse moreover also brings to light yet another implication of the decision to regulate coexistence according to

legal form: there must be equal rights to individual liberty. Only when a reciprocal change of perspective is possible for them, can those who correspondingly should restrict their individual liberty come to see that coexistence in individual liberty is possible only in the form of an equal right to liberty (with equal rights to realize that liberty). These conditions, and with them the insight into the necessity of an equal distribution of the right to subjective freedom, are first made explicit through the principle of discourse. (Günther, 1994, pp. 479–80.)

It is the principle of discourse – and not the relationship between the owners of private property – which it seems has to be deciphered as the 'in itself' of equal subjective rights. For Habermas, the principle of discourse, anchored as it is in universal communicative premises, allows us to understand why equal rights entail subjective freedom. For Habermas, this is the way it has to be. The central bourgeois principles of liberty, equality and justice are not allowed to result from the relations of production or exchange. Rather, Habermas has to look for their origin in the universal premises of communication. On this basis, he is able to argue that democracy has proven itself to be the realization of universal reason.

Given his theoretical framework, Habermas is not able to ask whether the *a priori* character of the ideas of freedom, equality and justice might possibly be connected with the bourgeois relations of property. I have already shown the circularity of thought in his theoretical starting position regarding the rational reconstruction of law. This is neither surprising nor coincidental. The entire line of political philosophy from Hobbes, through Rousseau and Kant, to Hegel, approaches legal form in the same way as economics assumes the money medium and other categories. That is, the legal form is approached as if it were merely an existing form (*daseinde Form*) and for this reason, the approach has always to presuppose human beings as legal subjects. This presupposition of the human being as an *a priori* legal subject can take different forms: a person in the state of nature may be endowed with so-called natural rights (whereby the characteristics of legal form are given as the natural rights of presocial individuals); or, with Kant, the law may be defined as the totality of conditions in which the arbitrariness of each individual, according to a universal law of freedom, is in harmony with the arbitrariness of all others. In this way, the individual finds the universal law of freedom itself given as a 'fact of reason'.

It is amazing that Habermas, not even in his theory of law, does not engage in any meaningful way with Hegel. Even more amazing is that

he does not deal anywhere in expressive and precise terms with the notion 'abstract law' itself. He employs this notion in the Starnberger Theses, but it does not reappear in his later work on legal theory. Yet, he proposes that practical reason, that is, post-conventional structures of consciousness are embodied in law. The postulated generality of the legal norms is understood an essential characteristic of the rationality of norms. This rationality, according to Habermas, is closely connected with the legitimacy of modern law. This raises the question how the the relationship between the generality of the norm and the form of abstract law is to be understood. It is obvious that Habermas' central thesis – that ideas are 'embodied' in norms – is drawn from Hegel; so it is even more remarkable that he never even sketches how his concept of embodiment differs from Hegel's notion of objectification. The lack of any conceptualization of 'abstract law' is very curious indeed.

Let us take a quick look at Hegel's *Philosophy of Right*. In the addendum to para. 71, where he thematizes the transition from property to contract, Hegel (p. 242) adds: 'In a contract I hold property on the strength of a common will; that is to say, it is the interest of reason that the subjective will should become universal and raise itself to this degree of actualization. Thus in contract my will still has the character of *this* will, though it has it in its community with another will. The universal will, however, still appears here only in the form and guise of community.' Like Habermas, Hegel ties reason to legal form, so that the general will can represent itself as general will. The subjective will should become universal will; but it initially becomes so only as common will. At the same time, however, it already is, in this form of commonality, a general will – if at first only in itself.

The above leads to the understanding that even common will in a contract is not adequate to the notion of the universal will. In his handwritten remarks to para. 81 and in the addendum, Hegel speaks therefore of the communal will as an 'arbitrary universality'. Why? The positing of an 'identical' will in a contract means that the two contracting parties are 'indistinguishable'. The contract demonstrates an 'immanent universality' precisely as the indistinguishability of two wills, which Hegel referred to in a handwritten addendum (to para. 79) 'the will that with another is posited as one'; the contract is 'the unity of different wills and thus a unity in which both [parties] surrender their difference and also their special characters' (para. 73). There arises, then, a new form of unity. This form is brought about exclusively by communal positing and it receives its validation beyond the immediacy

of the communal positing. As long as the contract exists in immediately communal terms, however, this specific quality of 'immanent generality' remains tied with the specific content of the contract. The universal aspect of the contract emerges as such only gradually, i.e. it becomes conscious through its negation. The specifically legal character, then, constitutes itself unconsciously.

In his handwritten addition to para. 81, Hegel argued: 'what is bound and what is binding – in the will of both – is that in it there is a being-in-itself – the law in itself – i.e., the existence of the will as such – in the contract both have alienated not only their particular wills, but also presupposed that what is valid, the existence of the will in general – what is the law in this situation – this is the inner essential condition – breaking the contract, the failure to perform, is entirely against the law'. This will is lawful because it *ought* to be valid; and validity means that it is binding. This is one of the conditions that are involved in communal positing without the participant being entirely and immediately conscious of that fact. It enters into the consciousness of the actors as injustice. Now the character of generality, that is the generality of law, comes to consciousness. In the contract, the principle of law in itself is present as something posited, and its inner universality is there as a commonality of arbitrariness and of the particular will. This appearance [*Erscheinung*] of law, in which it and its essential existence, the particular will, correspond immediately, i.e. fortuitously, is next transformed 'into an opposition between the law in itself and the particular will' (para. 82). What we find here is that 'arbitrariness' is subsumed [*aufgehoben*] into the universal will. There arises, then, a new problematic. Insofar as the particular wills are 'subsumed'; or with Habermas: 'embodied' in this single will, their various contents that are presented in this form, obtain now only as particular contents of contract. The constitution of this form, a form of unity, entails an inversion: the particular content appears now only as an example, and presents itself as a particular application of the contract: the unity of the form presents generality which includes all particularities. The validity claim – law ought to be valid – is internally connected with the abstract form of law, its generality and universality. This form, then, appears itself as something universal, something unconditional – what is right [*das Recht*] ought to be valid.

Let us leave behind Hegel's speculative representation of legal development, and focus instead on some extractable individual motives. What is worth noting, though, is that there are remarkable parallels to

Habermas' method of rational reconstruction. For example, the validity claims raised in every speech act entails universality and this can not be otherwise since it is the basis of all discourse theory. Yet, when the validity claim is raised, the possibility exists that universality becomes a conscious issue and the same holds for the claim of intersubjective validity. This then is the beginning of discourse. The identical structure in Hegelian/Habermasian argumentation is underscored by Hegel's remark in the addendum to para. 86. Just as in the case of an unintentional injustice, universal rightness is respected and willed by both, and the wrong consists merely in a person 'holding what he wants [for what] is right'. Just as the principle of rightness [*das Recht an sich*] comes to consciousness as something universal, so in the judgment 'a rose is not red' it is recognized that 'it has a colour. Hence I do not deny the genus; all that I negate is the particular colour, red' (Hegel, 1965, p. 245). The validity claim is accepted as such; both participants in the discourse agree that the truth ought to be found; only the individual statement is called into question. This situation is different for Hegel in terms of his concept of fraud, and for Habermas, in terms of strategic action. With fraud, the law itself is negated, but simultaneously still maintained as appearance (*Schein*). 'The principle of rightness is characterized as something demanded, as the essential thing; yet in this situation it is still only something demanded [thus] the universal is set aside by the particular will and reduced to something only showing [*einem Scheinenden*]' (para. 87). The actor acts strategically when he treats the validity claim as mere appearance (*Schein*); that is, when he presumes validity claims in communicative action, objectifies this premise, and at the same time maintains it only for the sake of appearances. Habermas does not see these parallels; or at least he does not bother to mention them, for were he to do so, he would have to rethink his entire theory.

The form of contract law and, proceeding from it, the construction of property in private law, which Hegel conceives of as 'general will', result from the arbitrary behaviour of the participants. Yet, the specific form of the positing of both unity and universality, constitutes the objectivity of a form that contains an unconditional demand for validity and that is recognition. The form of law can thus not be interpreted as the result of the subjective intentions of the multitude. Rather, the law has to be recognized, that is, obeyed.

Habermas' point of departure is strategic action, that is, the arbitrary behaviour of the participating actors. His argument implies that formal law can come into being only on the basis of universalizable interests. These can be discerned and made precise in discourse (regardless of

whether they are already legally organized). For Habermas there can be no such thing as an interest that is predetermined as universal. This is in contradistinction to Marx. For him, the bourgeois relations of production entail that the totality in which the human individual moves and acts, is determined action and this determined action takes place inevitably in exchange where all actors are connected with each other through mutual respect and perception. In short, the conditions of social reproduction are common to all. The positing of the form of contract is the core of modern law. The further development of this form of contract and its elaboration in the law of property and inheritance, etc., posits conditions of exchange that are implicitly recognized in any exchange as the expression of the universal will, which at the same time is equipped with the power to sanction. The claim that the law ought to be valid unconditionally is reinforced by the state's power to sanction. But this does not take place in legally organized discourse; it is rather the work of jurists and state authorities. For Habermas, the form of law is conceived as something that is not only universally applicable but also in the universal interest of everyone. Really everyone?

Of course not everyone! Equipped with the category of strategic action and money as medium, Habermas' innocuous action-theoretical conceptualization works within the parameters of economic thought where money is attempted to be derived as a reduction of transaction costs(!). If one would still wish to consider this sort of thing theory, then Marx's critique, in the *Grundrisse*, of the 'appearance of circulation' might be a good guide for understanding the theoretical appeal of such wonders. In the reality of bourgeois society, however, we have to deal with commodity capital, industrial capital and money capital; contracts are concluded among property owners who have as their primary goal the realization of a profit margin – hardly a pleasant matter. And these infinitely many contracts between the owners of the means of production are made possible by the infinitely many contracts with those who are free to sell their labour power: the workers who produce surplus value. But on the surface of society, as Marx calls it, all appear as contracting parties, as persons, as exchange-participants – and not in their character-masks as members of their respective classes. The contents of contract, however, are conditioned by the existence of classes. In the reality of bourgeois society, we will always have to deal with actual contracts in which for this reason even arbitrariness and the general will – in Hegel's words – coincidentally concur.

In his concept of general will, Hegel not only translated Rousseau's *volonté générale* into German, but also sought to grasp the moment of

the supra-individual, that is, the moment of unity and universality that cannot be traced back to the intentionality of all (that would be the *volonté de tous*). Just as each specific commodity contains use-value and exchange value – both unity and multiplicity – so too the agents in the act of exchange: as owners of value they are indistinguishable and posited as equals – a unity; as the possessors of concrete things, they comprise a multiplicity. Modern theories of natural law as well as those of sovereignty wallow around in categorial unconsciousness within this pre-given constellation; they posit in advance people as always already equal and free legal subjects, and as contracting parties, but can only conceive of political forms as something that is the result of intentional action. Habermas' espousal of what he calls the 'self-understanding of modern legal theory', conceives of sovereignty and human rights through the lenses of a deliberative radical democracy. Habermas tells us more than he is conscious of: the self-proclaimed heir to critical theory practises exactly that for which critical theory reproached traditional theory.¹² Habermas shares, with traditional theory, the inability to thematize and to develop genetically the actual forms of bourgeois society. Insofar as Habermas is a critical theoretician, he does not connect his theory to reality; insofar as he connects it to reality, his theory is not critical – a twice half-baked theory.

Notes

- * This chapter is translated from German by William Martin and Joseph Fracchia.
- 01. All quotes from Habermas and Marx are based on the German texts.
- 02. Habermas in an interview with the editors of the journal *Ästhetik und Kommunikation* on the occasion of the publication of his *Theorie des kommunikativen Handelns*. Published in Habermas (1985, p. 176).
- 03. See also 'Vorlage für eine institutsinternes Seminar', in Habermas (1976, pp. 260ff).
- 04. An instructive formulation from his *Theorie des kommunikativen Handelns*, (Habermas, 1981a, p. 9).
- 05. See note 2.
- 06. 'The contradiction between the means of production and private property is the product of big industry. For the creation of this contradiction, industry has to be most developed' (Marx and Engels, 1962, p. 66).
- 07. There is no doubt that Marx tried to hide his 'dialectics' in *Kapital*. On this: Reichelt (1995).
- 08. See the account in Habermas (1981b, pp. 263f).
- 09. See Backhaus (1997) on economics as a secret metaphysics.
- 10. See his 'Ziviler Ungehorsam – Testfall für den demokratischen Rechtsstaat', in Habermas (1985, pp. 79–117).

11. On this see Marx (1953, pp. 153–61).
12. On this see Horkheimer (1992).

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