

Democracy and Rights¹

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Preliminary Remark

In 1987 Richard Bernstein published a critical essay which engaged with Richard Rorty's view on liberal democracy and the role that philosophy should play in its articulation, under the apt title "One Step Forward, Two Steps Backwards."² Rereading this text – as I did last summer, after Dick passed away – one cannot miss noticing that this is the formula that best characterizes most of the attempts to reform liberal democracy from within that have been undertaken in the decades since then. This is true especially for those attempts that articulate their reform agenda by way of an "immanent" critique of liberal democracy. For in doing so, they fail to appreciate and acknowledge the task Richard Bernstein has set in his text for a theory and practice of liberal democracy that are truly able to face its unresolved problems and contradictions. With reference to John Dewey, Bernstein calls this the "radicalization" of liberalism – the step from liberalism to "radicalism": "any liberalism which is not also radicalism is irrelevant and doomed."³ In this context, "radicalism" first of all means "radical change" – the "perception of the necessity of thorough-going changes in the set-up of institutions and corresponding activity to bring the changes to pass."⁴ For any step forward that is not radical will reinforce the forms of domination that define the liberal democracy, as it now exists, from within. And this is not the case because such a step will fail to realize its promises. It is exactly the other way round: every such step, which is not radical in Bernstein's Deweyan sense, will confirm, and even strengthen the power of the given by showing its reformability. As we have experienced in the last decades, the reformability of the existing socio-political conditions has become the most effective argument against their radical change. Thus any "defense of liberalism" that is not radical "is little more than an *apologia* for the status quo – the very type of liberalism that Dewey judged to be 'irrelevant and doomed.'"⁵

Bernstein's critical engagement with Rorty's account of liberal democracy also explains *why* this is the case. For the fact that Rorty cannot (and does not want to) think of a change that is truly radical – the radicalization of liberalism – is due to the deep structural limitations that already define his critical analysis of the existing liberal democratic society. To think radical change presupposes radical critique: it

² Reprinted in Richard J. Bernstein, *The New Constellation: The Ethical-Political Horizons of Modernity/Postmodernity* (Cambridge, Mass.: The MIT Press, 1992) 230-257.

³ John Dewey, *Freedom and Culture*, quoted in Bernstein, *The New Constellation*, 232.

⁴ *Ibid.*

⁵ Richard J. Bernstein, *The New Constellation*, 233.

presupposes to take seriously the radical “*challenge* that Marx poses for us in his critique of ideology, namely, that the structural dynamics of bourgeois society systematically undermine and belie liberal ideals.”⁶ As the juxtaposition of Marx’s and Weber’s analyses of capitalism that follow this remark in Bernstein’s essay makes clear, everything depends here on the term “systematically” – on understanding that and how liberal ideals are *systematically* undermined by the very society that realizes them. Bernstein summarizes this decisive point in exemplary succinctness:

Since the nineteenth century when the varieties of liberalism have come under heavy attack, there have been those (Marxists, socialists, anarchists, radical reformers, and even Weberians) who have argued that when we examine liberalism as it is embodied in concrete modern societies (especially in a capitalist economic order) we discover that it is not a merely accidental contingent fact that liberal ideals of universal freedom and equality are constantly betrayed in bourgeois capitalist societies. There are forces and tendencies at work (e.g., class conflict, social division, patriarchy, racism) that are compatible with liberal political practices but nevertheless foster real inequality and limit effective political freedom.⁷

Following Bernstein, defenses of liberalism in the model of Rorty entirely miss this point of a critical analysis that is radical by showing how liberal ideals “systematically,” i.e., by themselves – by the very mechanisms of their realization – produce a society that betrays them. Without such a critical analysis, however, the idea of liberal democracy will remain “irrelevant and doomed”: doomed to failure.⁸ Following

⁶ Ibid., 245.

⁷ Ibid., 246.

⁸ In the next chapter of *The New Constellation*, on “Rorty’s Liberal Utopia,” Bernstein thus also speaks of a “neglect of social facticity” in liberalism and approvingly quotes C. Wright Mills’ critique of the “detachment of liberalism from the facts of a going society.” (Richard J. Bernstein, *The New Constellation*, 287) Bernstein’s criticism of Rorty in *this* respect goes hand in hand with a critical evaluation of his anti-foundationalist epistemology that Bernstein endorses as a detranscendalization of normative foundations (see “Pragmatism, Pluralism, and the Healing of Wounds”, in *The New Constellation*, 327-339) and questions insofar as it leads to historicist and relativist consequences (see “Rorty on Liberal Democracy and Philosophy”, in *The New Constellation*, 239-249, and “Rorty’s Liberal Utopia,” 270-272). For a later more conciliatory account of Rorty’s philosophy see the chapter “Richard Rorty’s Deep Humanism” in Richard J. Bernstein, *The Pragmatic Turn* (Cambridge, UK: Polity Press, 2010), 200-216.

Bernstein, the only possible defense of liberalism that will stand the task is thus by way of its radical critique.

In the following I make the attempt to be true to Bernstein's Deweyan program of a radicalization of liberalism. However, I will do this in a field and on a path on which Dick Bernstein would certainly (or probably? Who knows? Dick was always good for surprises) not have been willing to follow me. This path leads into the field of a critique of rights. I will thus claim that the idea, or more precisely the modern form, of individual or "subjective" rights is one of those mechanisms by which the realization of liberal ideals turns against itself and "limit[s] effective political freedom" (Bernstein). Dick Bernstein saw of course how individual rights are constitutive for capitalist exploitation (as Marx and Weber alike have shown). But he thought that this contamination with social domination did not affect the idea of *political* rights as such.⁹ In the following I will develop an argument that tries to reject this strategy. But I see this as an attempt to redeem Dick's program to advance the critical defense of liberalism to the point where liberalism becomes radical – where liberalism turns into radicalism. I will therefore come back to Bernstein's methodology of such a critique of liberalism at the end of the paper.

Introduction

Why subjective rights? Why did the modern bourgeois revolutions since the end of the 18th century declare the rights of citizens as "human beings"? Why did (and do) these revolutions declare the right to have rights, to be addressed and treated as a subject of rights, a holder of subjective rights? One need only look at the proceedings of the French National Assembly to see that this decision was by no means self-evident. Even a revolutionary as resolute as the Comte de Mirabeau, who was of course familiar with the modern idea of natural rights and was eventually to head the committee that drafted the Declaration of the Rights of Man and Citizen, went along with it only with great hesitation and little enthusiasm.¹⁰ He didn't find such a

⁹ See the chapter on "Statelessness and the Right to Have Rights" in Richard J. Bernstein, *Hannah Arendt and the Jewish Question* (Cambridge, UK: Polity Press, 1996) 71-87.

¹⁰ Presenting the draft of the declaration, Mirabeau said: "Gentlemen, the declaration of the rights of man in society is undoubtedly only an expression of some general principles applicable to all forms of government. From this point of view, one would believe a work of this nature to be very simple and not very susceptible to dispute and doubt. But the committee you have appointed to deal with it has well and truly realized that such an exposition, when destined to a political body, old and almost

declaration urgent or important for the revolution that he had started by rejecting the king's order to the assembly of the third estate to disperse. To Mirabeau, to declare rights did not seem to follow at all from the revolution's decisive basic concern. For this basic concern was political equality.

The old regime which was overthrown by the revolution had been an order of domination, of inequality. This inequality concerns power, and power means here the power to govern. The *ancien régime* is defined by a radically unequal distribution of governmental power. This political inequality is claimed to be grounded in natural inequality: the unequal distribution of the power to govern is justified by the unequal distribution of the capacity to judge. Accordingly, only some are capable of judging what is good and bad, just and unjust for all, and hence capable of governing. Domination is thus that relation in which someone who is capable and hence entitled or even obliged to do so judges *for* someone else *about* his or her life. The lord, the ruler, represents, he establishes and safeguards the good and just order for his subjects.¹¹ This is where the first blow of the revolution is directed: In beheading the king, it affirms the equality of judgment. The revolution declares that all are equally able to judge, and consequently to govern; it confirms the claim that – as Descartes had put it right at the beginning of his *Discours de la méthode pour bien conduire sa raison, et chercher la vérité dans les sciences* – the *bons sens*, the power of judgment, is the most fairly distributed thing in the world. With this claim of equality (which is obviously not empirical; or, if taken empirically, is obviously wrong¹²) the traditional justification for domination breaks down. It gives way to the modern, revolutionary idea of equality. Equality in this revolutionary sense is political equality. It means that everybody has an equal part in the collective process of judging (that is, in the process of self-government). Revolutionary equality means egalitarian democracy.

If this is right, we understand why Mirabeau was hesitant and unenthusiastic when the proposal was made to draft a declaration of rights. His hesitation follows from the insight that it is a huge step from the revolutionary idea of equality,

obsolete, is necessarily subordinate to many local circumstances, and can never expect anything but relative perfection. In this respect, a declaration of rights is a difficult work." ("Lecture du projet de déclaration des droits de l'homme par M. le comte de Mirabeau, lors de la séance du 17 aout 1789," in: *Archives Parlementaires de 1787 à 1860*. Première série (1787-1799), Tome VIII, (Paris: Librairie Administrative P. Dupont, 1875) 438.

¹¹ See Etienne Balibar, "Citizen Subject," in *Who Comes After the Subject?*, eds. Eduardo Canova, Peter Connor, and Jean-Luc Nancy (New York and London: Routledge, 1991) 33-57, part. III.

¹² Richard Bernstein refers to John Dewey's presentation of this claim as an act of "faith"; see Richard J. Bernstein, "John Dewey's Vision of Radical Democracy," in *The Pragmatic Turn*, 75.

politically understood, to the declaration of civil rights as human rights – a step which is quite unclear in its logic and justification. For the idea of rights does not follow, somehow by itself, “logically,” from that of equality. Political, democratic equality does not *mean* equal subjective rights. Furthermore, Mirabeau’s lack of enthusiasm in declaring rights – i.e., in articulating the fundamental “principles” (Mirabeau) of justice in that specific form – is the expression of a premonition that became a fact for Marx fifty years later (in his reading of the non-political part of the Declaration of Rights in the second section of *On the Jewish Question*): namely that the declaration of rights does not merely not follow from the democratic idea of political equality, but that that declaration will rather bring about consequences that jeopardize the realization of that idea. The name of these consequences is of course *bürgerliche Gesellschaft*, bourgeois society. For the order of subjective rights that the revolution declares is the legal infrastructure of the emerging bourgeois society, and the bourgeois society is, in Hegel’s term, the “dissolution of ethical life” (*Verlust der Sittlichkeit*) and hence that social form which blocks the fulfillment of man’s political “destiny” [*Bestimmung*] “to lead a universal life.”¹³ As Mirabeau already sensed right at the beginning, revolutionary democracy’s idea of political equality and the form of subjective rights stand in a relation of conceptual and normative tension.

In *On the Jewish Question*, Marx has called this relation a “puzzle” that cannot be solved.¹⁴ It cannot be solved internally: for Marx, there is no positive connection between democratic equality and the form of subjective rights. Their relation is a contradiction, and the form of subjective rights thus needs an explanation by an external causal source (which for Marx is the very reality of bourgeois society that the form of subjective rights brings about: Marx’s explanation of the form of subjective rights follows a functionalistic logic; it explains the declaration of rights by its socio-economic effect). Although I agree with Marx’s claim that subjective rights constitute

¹³ G.W.F. Hegel, *Elements of the Philosophy of Right*, ed. Allen W. Wood, trans. H.B. Nisbet (Cambridge, UK: Cambridge University Press, 2003), 276.

¹⁴ “It is puzzling enough that a people which is just beginning to liberate itself, to tear down all the barriers between its various sections, and to establish a political community, that such a people solemnly proclaims (*Declaration of 1791*) the rights of egoistic man separated from his fellow men and from the community. [...] This fact becomes still more puzzling when we see that the political emancipators go so far as to reduce citizenship, and the *political community*, to a mere means for maintaining these so-called rights of man, that, therefore, the *citoyen* is declared to be the servant of egotistic *homme*, that the sphere in which man acts as a communal being is degraded to a level below the sphere in which he acts as a partial being.” Karl Marx, “On the Jewish Question,” in *Marx & Engels Collected Works*, Vol. 3 (London: Lawrence & Wishart, 2010) 64.

the normative infrastructure of bourgeois society (and that they go hand in hand), I disagree with his separation of subjective rights from – or even opposition to – democratic equality. Marx misses the – dialectical – logic of their contradictory relation. He fails to see how political equality and subjective rights are connected precisely *by* their contradiction.

Another way of putting this objection against Marx's explanation of subjective rights in terms of their necessity for capitalism is a methodological argument. This is not directed against Marx's functional explanation; that subjective rights are indeed functional for capitalist modes of production and exchange (and hence of exploitation) is the unanimous understanding of the whole tradition of sociology from Marx through Weber and Simmel to Parsons, Luhmann and Habermas. The problem of Marx's functionalist explanation, however, is its reductionism. It fails to grasp the true ground (or reason) of this new, modern form of normativity. It is therefore also a bad, or limited, form of critique, and it is so according to Marx's own definition. For it misses what Marx, in his critique of Hegel's philosophy of the state, had proclaimed the task of "true philosophical" criticism. Such criticism neither judges the falsity of some idea or institution (Marx's example is the Holy Trinity) nor does it explain it from outside. "True criticism, by contrast, shows the inner genesis" of the things it criticizes. It "describes the act of its birth, [...] it *explains* them, it comprehends their genesis, their necessity."¹⁵ Neither normative judgment nor functionalist reduction but rather a genealogical reading: this is the task that Marx has set for true criticism. The attempt of the following is to sketch the outline of a critique of rights that is true to this methodological idea.¹⁶

This describes the program of the following: I want to try to answer the question "Why subjective rights?" in a genuinely political sense. I thus understand the question as asking: Why use the form of subjective rights to articulate, shape and regulate the political process of democratic egalitarian self-government? I will proceed in two steps. In the first step I will identify the problem that modern, revolutionary democracies try to solve by introducing the mechanism or form of subjective rights. This concerns the question why – in response to which problem – democracies have become "liberal." This turn or return to the underlying problem is intended to bring to light what Marx calls the "internal genesis" of the form of rights.

¹⁵ Karl Marx, "Contribution to the Critique of Hegel's Philosophy of Law," in *Marx & Engels Collected Works*, Vol. 3, 91.

¹⁶ The following analysis is a condensed and revised version of the extensive discussion in my *Critique of Rights* (Cambridge: Polity Press, 2020).

In the second step, I want to discuss whether subjective rights are a suitable instrument for solving this problem or whether, on the contrary, they open up a new problem that the liberal constitution cannot solve. I will try to show how and why the liberal establishment of subjective rights is a political strategy, a strategy of politicization, which indeed undermines itself. At the end, I will briefly come back to the question of the methodology of this critique which I discuss with reference to Bernstein's pragmatist re-definition of Hegel's dialectic.

1.

Politically understood, the question "Why subjective rights?" asks why political constitutions should use the instrument of subjective rights to accomplish their task to organize and thereby constitute political freedom, i.e., power.¹⁷ For the sake of brevity, I will call such a constitution "liberal." I thus use the term "liberal" in a narrow and specific sense – in the specific sense of "liberal-democratic" or even more specifically in the sense of 'liberal *because* democratic'. Most liberals would of course not have used the term in this way, because most liberals were not democrats, as Richard Bernstein reminds us at the beginning of his chapter on Dewey's conception of democracy.¹⁸ The question thus is: Why do liberal constitutions declare subjective rights in order to organize the self-government of the polity? Before I will try to answer the question, it might be useful to distance myself from two extreme positions that do not, or cannot, even pose the problem. These two positions are both extreme because they juxtapose the two sides of the relationship, the political constitution and the form of subjective rights, externally.

The first position sees the political constitution, i.e., the constitution of the political, and the declaration of subjective rights, as completely independent from each other, indeed opposed to each other. This is the position of Carl Schmitt in his *Constitutional Theory*.¹⁹ According to Schmitt, modern constitutions have two "components" (*Bestandteile*). He calls the first one the rule-of-law (*rechtsstaatlich*)

¹⁷ The definition of the constitution with which I work here, is that it is the body of rules that constitute politics; the constitution institutes a polity (or a "state" in the sense in which Hegel uses the term). Another way of putting this is to say that the constitution is enabling, in the sense of empowering. It produces the political freedom to collectively determine our fate.

¹⁸ Bernstein, "John Dewey's Vision of Radical Democracy," in *The Pragmatic Turn*, 70 ff.

¹⁹ Carl Schmitt, *Verfassungslehre* (Berlin: Duncker & Humblot, 1993), sect. 12. (The following quotes are my translation).

component and the second the “political” (or “democratic”) one. The rule-of-law part of the constitution is understood by Schmitt as spelling out the consequences that result from a substantive preliminary decision. This is the decision by liberal constitutions in favor of “bourgeois [*bürgerlicher*] freedom: personal freedom, private property, freedom of contract, freedom of trade and commerce, and so on.”²⁰ More precisely, following Schmitt, the liberal constitution’s basic decision to value bourgeois freedom implies a “principle of distribution” according to which the individual sphere of freedom is in principle unlimited, while the authority of the state to intervene in that sphere is in principle limited.²¹ The liberal decision thus grants individual freedom principled priority; it establishes that the state treats the freedom of the individuals as “pregiven” – as its precondition or presupposition. The task of the constitutional declaration of (the form of) subjective rights, then, is to secure this – bourgeois-liberal-individualistically asserted or demanded – distribution between the individual and the state.²² This is why, according to Schmitt, the liberal declaration of rights remains alien to the state’s internal, genuinely political constitution. Since subjective rights are about securing the priority of individual freedom, there are no rights in the other, political component of the constitution. This part of the constitution is concerned with a problem in which individual freedom has no say: it is about the organization of the political process so that an instance of power is constituted whose decisions can be considered the expression of the “identity” of a specific “people.”

The second position, which is not able to ask the question of the political reason of subjective rights, indeed, tries to exclude it from the outset, is the standard liberal one. It is the counter-position to the first. According to this position, individual participation in the political process has to be organized and secured by a special subtype of subjective rights, besides and in addition to the rights to bourgeois personal freedom that Schmitt considers. Here, political participation is therefore seen as just another, further content of subjective rights – as one of the “competences” (as Robert Alexy puts it²³) that go along with holding rights. Competences in this view that Alexy takes over from Wesley Newcomb Hohfeld’s private law definition of rights are,

²⁰ *Ibid.*, 125.

²¹ *Ibid.*, 126.

²² According to Schmitt, this ultimately leads to the dissolution of politics. In this sense, the two components are not separate from each other: the rule of law, if it is conceived as the order of individual subjective rights to personal, bourgeois freedom, undermines the political.

²³ Robert Alexy, *A Theory of Constitutional Rights*, trans. by Julian Rivers (Oxford: Oxford University Press, 2002) 219 ff.

roughly speaking, legal rights to change one's legal position, i.e., one's rights and obligations. The liberal position understands political rights in the same way: as rights to change legal positions. It defines the liberal position that it never gives a reason for its identification of political empowerment as a subjective right. For the liberal position operates on the (false) assumption that to grant someone a normative status at all means – and cannot mean anything other than – that he or she has a subjective right. Thus, Ronald Dworkin opens his investigations into the logic and content of rights by declaring: “The debate does not include the issue of whether citizens have *some* moral rights against their Government. It seems accepted on all sides that they do.”²⁴ In its naïve version, liberalism naturalizes the form of subjective rights and thus also applies it, without asking why, to the political process. The basic concepts of private law, most prominently “contract” and “rights,” define here also the field of public law. Conceptually, or logically, liberalism is the privatization, and hence the dissolution, of politics.

Neither of the two ways of avoiding the question is convincing. The form of subjective rights is neither external to the political process (as Schmitt thinks) nor is it its self-evident form, for which there is no alternative (as Dworkin thinks). Rather, it must be understood as being grounded in an internal problem of the political process – in a problem of political normativity itself.

To see what this problem is, I want to recall, first and briefly, the normative point of the political constitution. As I said before, the constitution constitutes. It does not regulate the political process according to some pre-given moral ideals or norms; rather, the constitution brings the political process about in the first place. Its rules are constitutive (and not merely regulative) because it “institutes” a polity (Jean-Jacques Rousseau). To institute a polity means to transform the people from a

²⁴ Ronald Dworkin, “Taking Rights Seriously,” in: Dworkin, *Taking Rights Seriously* (London/New York: Bloomsbury, 1997) 223. Dworkin introduces this as an empirical statement about the “political debate in the United States.” But it immediately gains an axiomatic status for his conceptual analysis; for Dworkin, there is no relevant alternative idiom. Referring to a comparable trait in Rorty's thought, Bernstein speaks of a “historical myth of the given;” Richard J. Bernstein, “Rorty on Liberal Democracy and Philosophy,” 245. In this respect, Jürgen Habermas proceeds in a fundamentally different way. He also takes it for granted that the citizens have to grant each other individual rights, if they want to regulate their communal life with the instruments of positive law.” *Faktizität und Geltung. Beiträge zur Diskurstheorie des Rechts und des demokratischen Rechtsstaats* (Frankfurt am Main: Suhrkamp 1992) 109; my translation. But different from Dworkin, Habermas accounts for the emergence of the modern form of rights by a historical sociology of law (90 ff.).

multitude into a unity (which is called since Hobbes a “state”²⁵ or with Rousseau the “general will”). It is a misunderstanding to think that this political formation or transformation is about creating an instance of supreme political power, with the attribute of sovereignty. Rather, its point is normative; it is about self-government or political freedom, in the sense of autonomy. The normative claim of the modern constitution is that the people can only become self-governing, autonomous subjects if they form a unity. And the argument for this claim is that without the unity of the people – once again: the unity of *self-governing* subjects –, all government is merely the rule of some over others – of one part of the community over other parts. The normative point of the formation of the people into a political unity (a state) is nothing other than the attempt to overcome domination. Political unity is the condition of political freedom.

While political unity is thus normatively necessary – necessary for normative reasons: in order to overcome domination – it is structurally unrealizable; it cannot be realized because of the very structure of the political unity. As the advocates of political freedom-through-unity since Hobbes themselves have registered²⁶, the formation of the people into the unity of the state always produces on its reverse side a remainder that cannot be integrated (sublated or recognized) into the political process. The formation of the political unity produces something unformable over against, or even hostile to, the political form. This formless remainder has been described under different names: the crowd, the rabble, the masses, but also the “idiocy” (as Tocqueville put it) of merely private passions and interests, the “nullity” (Hegel) of bourgeois life. The polity can try to deal with this unassimilable remainder in different ways: oppression by the police, external regulation and control, education and activation by the welfare state, instrumentalization by charismatic leaders, and so on. But in all of these strategies, the unformed and unformable remainder that is produced by political unity-formation as its own other is recognized merely in its facticity or even necessity, but not in its *right*: The remainder has no right. It cannot have a right. For “right” is defined here politically: as being grounded in the contribution to, or participation in, the political process of forming a unity. And the remainder is precisely that which (or he or she who) does not contribute or participate.

²⁵ Quentin Skinner, “A Genealogy of the Modern State,” in *Proceedings of the British Academy*, Vol. 162 (2009) 325-370.

²⁶ Marina Martinez Mateo, *Politik der Repräsentation. Zwischen Formierung und Abbildung* (Wiesbaden: Springer, 2018) chapter 2.

This is the problem that lies at the bottom and defines the starting point of a liberalism that can truly be called “political” (thus not in the sense of Rawls’s). It starts with the acknowledgment of the unformable remainder: the acknowledgment of that which cannot, and will never, be integrated into the political process of unity-formation. Or put differently, it starts with the acknowledgment of that which is not, and cannot be, represented by the decisions of the political unity because, being stubbornly particularistic, it does not contribute to the formation of its (“general”) will. Liberalism in its truly political sense thus proposes a counter-model of political representation: political representation not as the formation of a unity but rather as mimesis, the mapping or replication of the people in its difference – not its difference in political matters but rather its difference from and over against the political unity as such.²⁷ By such a representation, the political process thus becomes self-reflective. It is political (in a self-reflective sense or mode) precisely by representing the non-political, which is different from (any) political unity, *in* the political.

The starting point or driving force of the (truly political) liberal model is thus a critique of domination. Politically read, liberalism’s basic instinct is anarchistic: against domination.²⁸ More precisely: it is a reiteration of the critique of domination in the second degree. For let us not forget that already the first model that conceives of the political in terms of the formation of unity, as the formation of the state, is or was about a critique of domination. For this model starts from the insight that the relations of domination that shape a community – in the sense of social relations or relations of social domination – can only be overcome if the community is transformed, by means of the constitution, into a political unity in which everybody and everything is a “part” or an “element” (*partie* in Rousseau, *Glied* in Hegel). The political unity of the state is the counter-instance to social domination. Now, as seen before, the starting point of the liberal alternative model of mimetic representation consists in the insight that the political overcoming of social domination reproduces domination. For it produces a difference, an externality towards the political unity, over which it can therefore also only exercise violence from outside. With this critical insight, the impulse against domination turns against itself: it turns against politics. Or more precisely, the impulse against domination turns against the very idea of

²⁷ Martinez Mateo has convincingly traced this mimetic counter-model of political representation (representation in the sense of “Abbildung”: imitation or mapping) back to reflections in Burke, Madison and Mill (*Politik der Repräsentation*, chapter 3).

²⁸ This is not an empirical claim about the motives or affects of liberal theorists and politicians. It is meant in a systematic sense: without such a critique of domination, the liberal program makes literally no sense.

political unity that it has produced in the first place. It leads to the liberal, anti-political idea of the mimetic representation of that and those which and who are external to the political unity.

2.

Liberalism, politically understood, begins with the insight into the irresolvable contradiction of political unity and hence of political autonomy; it begins with the insight into the paradox of political autonomy. This paradox consists in the fact that the formation of the people into a political unity, which is the condition of possibility of political freedom, the freedom of self-government, turns by itself, and hence necessarily, into domination. This is the – good – reason for liberalism’s demand for rights (if we read – or rather, productively misread – liberalism as a genuinely political conception, a conception of politics). But how are rights supposed to solve the paradox? And can they?

The basic thought of liberalism that leads to the demand of subjective rights can be understood in the following way. As we have seen, its starting point is a critique of the idea that political representation is the formation of political unity. Or the starting point of liberalism is a critique of the state. The critique says that any political unity – the political unity as such, by being political – necessarily excludes and represses (namely that which is in nature non-political because it remains ‘particular’). At the same time, there is no viable alternative to the idea of political representation; i.e., to the idea that politics is the representation of the people. For this is what self-government means or demands. From this follows – pursuant to the conclusion of liberalism – that we should understand and practice political representation in a fundamentally different way. The unity- or state-model of political representation – representation as the formation of the political unity of the state – understands it in a transformative sense: it is the transformation of the “individual” into a “part” (Rousseau), of the “atom” into an “element” (Hegel and Marx). The liberal model, in contrast, conceives of the presence of the people in the political process as its limitation: political representation as the limitation of the political. Accordingly, the task of politics becomes now to reflect, like in a mirror, the untransformed will of the individuals: that is, the will of the individuals as it is and was already before, by itself, pre-politically or privately or socially. Some of what individuals pre-politically want is then regarded as so elementary and primal (and therefore generally or even

universally shared²⁹) that the liberal claims that each individual has an “inalienable right” to its consideration. This is the conceptual place of subjective rights in a political liberalism: Rights represent the pre-political (social, economic, cultural, etc.) will of the individual in the political process. Thereby “representation” acquires an entirely new meaning. To represent something politically no longer mean turning it into a matter of political formation and hence of political transformation. It now rather means that the mere fact that individuals pre-politically want some things, some goods, is raised to the normative status of a reason – reason as derived from facts – which is so strong or basic, that from now on it can only be relativized by reasons of the same kind – namely: by other rights or the rights of others. This is how rights at the same time limit and justify political decisions. Rights are “trumps” (Ronald Dworkin): they ensure that in every political decision the will of the individual, in certain fundamental respects, is taken into account in its unaltered, untransformed factuality – merely because it is a *fact* that individuals happen to want this. In this way, political liberals want to delimit the domination that the polity (the state) exerts over the individual. Rights serve to restrict political government to things secondary while everything essential, the equal distribution of the goods that are “primary” (Rawls), is guaranteed by having rights.

Now, obviously, fundamental rights, as subjective rights, are the result of political determinations. We have (or somebody has for us) decided about them in the constitution; that is its “rule-of-law component” (*rechtsstaatlicher Bestandteil*: Carl Schmitt). But the decisive point is how this political act of declaring rights proceeds, what it brings about and what its consequences are. It is the political act of limiting politics. In declaring rights, i.e., in binding itself to the form of rights, the political entity of self-government acknowledges that there are certain spheres and certain contents of the individual’s will that it has simply to take as a given. It hence has to de-limit the transformative power of politics to merely securing the possibility of such willing. This was Marx’s point in *On the Jewish Question*: “[T]he *political community*, [...] the sphere in which man acts as a communal being is degraded to a level below the sphere in which he acts as a partial being.”³⁰

Let me try to explain a bit further how I understand the de-politicizing effect of the politics of subjective rights. A good starting point is a comparison with another conception of rights that, in contrast to subjective rights, can be called “ethical rights,”

²⁹ As in John Rawls’ idea of “primary goods”; *A Theory of Justice* (Cambridge, Mass.: Harvard University Press, 1971), sect. 15.

³⁰ Marx, “On the Jewish Question,” 164.

sittliche Rechte. If *Sittlichkeit*, ethical life, is a normative order which is grounded in a shared understanding of the good, of what goodness for human beings is, then, ethically understood, I can only legitimately claim something, demand something for myself (be it from some other or from all of us together), if that which I claim or demand is good. The goodness of the claimed is the ground of the right of the claimant; the subjective sense of Right, *ius*, is derivative from the objective sense, *lex*. It is secondary and hence conditioned. In the conception of subjective rights this relation of dependency is turned around.³¹ This means negatively that subjective rights do not depend on a common idea of goodness. And it means positively, that they therefore have to address the individual in a way that is neutral to the ethical distinction of good *or* bad. My subjective right is a right to good *and* bad behavior; it is the entitlement to want and to do something good or bad as long as I respect the external limits (the “side constraints”³²) that are drawn within the equal realm of everyone doing so. In the form of subjective rights, the legitimacy of a claim is dissolved from the ethical goodness of that which is claimed. They are therefore rights to something that is described and articulated, in the perspective of rights, without using the basic ethical distinction of good or bad. Subjective rights, by their form, neutralize their content.

As the discussion of the new understanding of representation in political liberalism—representation as mirroring or mimesis – has shown, this furthermore means to treat the ethically neutralized content as a mere fact: something factually given, i.e., pre-given to politics that merely register, describes and distributes it. Subjective rights, I want to say, are thus not only neutralistic, but positivistic. Indeed, both aspects must be taken together. To merely take up what people want as a given fact by turning it into the content of a subjective rights, means to neutralize it ethically (and the other way around: neutralization means positivism, treating the neutralized

³¹ This explains why Savigny introduced the term “rights in the subjective sense”; see Friedrich Carl von Savigny, *System of the Modern Roman Law*, trans. by William Holloway (Madras: J. Higginbotham, 1867), 6. The distinction between right “in the subjective” and “in the objective sense” refers back to the distinction between *ius* and *lex* in Roman law. However, the modern distinction reverses their priority: “rights in the subjective sense” are prior to Right in the objective sense, as Law. The best account of this reversal is still Michel Villey, *La formation de la pensée juridique moderne*, ed. Stéphane Rials (Paris: Quadrige/Presses universitaires de France 2003) 240 ff.

³² Robert Nozick, *Anarchy, State, and Utopia*, New York: Basic Books 2013, 29 f. “In doing so, evil actions are *also* permitted (as far as they are not legally prohibited).” Niklas Luhmann, „Subjektive Rechte: Zum Umbau des Rechtsbewußtseins für die moderne Gesellschaft,“ in: *Gesellschaftsstruktur und Semantik*, Vol. 2 (Frankfurt: Suhrkamp 1981) 74.

content as positively given, a mere fact). This is how subjective rights, by their very form, address us: they do (and can) not address us as ethical subjects striving for the good. Subjective rights address us neutrally: as if our will were not about good or bad, not good or bad willing, but *mere* willing; as if we wanted not the good life, but *bare* life, life stripped of its ethical form.³³ I call this an act or process of “naturalization”: subjective rights naturalize.

Let me give two brief examples for such naturalization with reference to the two basic conceptions of subjective rights that are commonly distinguished. The first conception grounds rights in freedom, the second in interests; the first conception is German and Kantian, the second Anglo-Saxon and utilitarian.³⁴ Both are naturalistic (with the essential difference, however, that the first theory knows this and the second is ignorant of it). The freedom that rights secure according to the first tradition is natural–or naturalized–freedom. It is freedom as *Willkür*, arbitrary choice. Rights grant us, they protect equal spaces in which we can decide at our discretion. Whether we have good reasons for our decisions, indeed, whether we have any reasons at all, whether we even care for reasons is irrelevant for our legal entitlement. There can thus be no right “to autonomy” (as it is clear in Kant who therefore never speaks of “moral rights;” morality is about duty – not rights). There can only be (legal) rights to free spaces of arbitrary decision-making that I can use, at my discretion, either in an autonomous way, i.e., guided by reason, or in a heteronomous way, i.e., driven by external, “sensual” forces. The freedom of choice to which I am legally entitled is indifferent to this distinction. It is precisely the freedom *from* the ethical distinction between a will guided by reason and a will guided by the senses, between the good and the bad (or even evil) will. We can also say that subjective rights address us as if we were beings for whom the difference between autonomy and heteronomy, rationality and sensuality, good and bad did not count: a strange kind of natural

³³ Here a comparison with and discussion of Giorgio Agamben’s reading of the modern form of (human) rights in the context of the Western tradition of a politics of producing “bare life” would be necessary; see his *Homo Sacer. Sovereign Power and Bare Life* (Stanford: Stanford University Press, 1998), part. 3. This is a too extensive and difficult task to take up here. As Marcia Morgan has indicated in her very helpful comments to an earlier draft of this paper, this would have to include an engagement with Judith Butler’s critique of this term, bare life (viz. in Judith Butler, Gayatri Chakravorty Spivak, *Who Sings the Nation-State? Language, Politics, Belonging* (Kolkata: Seagull Books, 2007) 4-5. For Butler rightly insists on the internal duplicity, even contradictory logic of “setting free” life from the political order; it can be of an emancipatory and/or a repressive character.

³⁴ For an overview see Jeremy Waldron, *The Right to Private Property* (Oxford: Oxford University Press, 1988) chapter 3.

beings, neither animal nor human (or humans who have become animals, as Marx and Arendt describe the bourgeois lifeform).

Something similar holds for the concept of “interest,” on which the second conception of subjective rights is based. According to this conception, rights are there to protect or ensure not the choices but the interests of individuals. But what is an interest? An interest is a specific way of striving. We usually distinguish between needs (by which we are driven and determined) on the one side and acts of the will (which are free) on the other. Interests are neither. Interests are not like needs, because they are reflective and hence abstract; rather than striving for fulfillment and satisfaction (like a need or desire), interests refer to the means that are deemed necessary for fulfillment and satisfaction: chances, security, capacities, income, in short: capabilities.³⁵ At the same time (and for the same reason), they are not like the goals that we decide to pursue for their goodness. The capabilities in which we are ‘interested’ are not good in themselves (or parts of that which is good in itself, i.e., the good life), but rather “preconditions” for the good life.³⁶ Thus, also by ascribing interests to us, subjective rights address us as a strange kind of beings: neither mere animals—because desiring in a reflective way—nor truly human—because not willing the good. The concept of interest is thus not innocent. It is meant to give an account of human striving that deprives it of its rational ground and ethical goals. Insofar as rights are about interests, they thus legalize ethical deprivation.

Let me reiterate the decisive point. I have defined liberalism as (or with) a specific understanding of the idea of representation that defines the modern conception of political self-government, i.e., that defines political freedom (in the modern, egalitarian sense). This liberal understanding is specific insofar as it is directed against representation as the formation of political unity (call it *volonté generale* or *Staat*). For as liberalism – in its best, anarchistic moments – rightly observes, such unity-formation means domination or exclusion and oppression. That is the problem. Liberalism solves this problem by delimiting political self-government. Any act of political government must accordingly represent – reflect, mirror, or reproduce – the individual in its pre-political being. This is the political function of subjective rights. Their function is to safeguard the will of individuals – in certain respects that are agreed to be fundamental – over against political self-

³⁵ See Amartya Sen, “Rights and Capabilities,” in Amartya Sen, *Resources, Values and Development* (Cambridge: Harvard University Press, 1984) 307-324.

³⁶ An “interest” is a striving for something that is merely an instrument. It is therefore not surprising that interest is interest in always more (as has been stressed from Hobbes to Rawls).

government (and they do this by protecting individual spheres of arbitrary choices and ensuring the individual fulfillment of interests). This liberal solution, by way of subjective rights, to the problem of political domination – to the problem of domination or the paradox of autonomy that defines the political unity as such – is naturalistic in the double sense of neutralistic and positivistic. Subjective rights are, firstly, *neutralistic*, because they address the individual in a (literally) un-ethical way; they neutralize the normative, ethical distinction, between good and bad, rational and irrational, for the evaluation of individual striving. The liberal solution to the problem of political domination by way of subjective rights is, secondly, *positivistic*, because subjective rights take the will of the individuals as a given; they treat the individual choices and interests like, or as, a fact – pre-given to the political communal will, unattainable for and unchangeable by its power.

Both aspects of naturalization through subjective rights therefore have the effect of depoliticization (what Marx called the “degradation” of politics). The depoliticizing effect of the neutralism of subjective rights is indirect; it consists in allowing, i.e., legalizing, new forms of social domination (like capitalist exploitation and “control power” [Marx]³⁷). The liberal empowerment of the individual over against the state is de facto—for conceptual, not empirical reasons – the endorsement and reinforcement of the dominant social (economic, cultural, religious, etc.) powers. For these powers exercise their domination not against, but precisely through the legal entitlement of the ruled (like the free contract signing by the proletariat and the social empowerment of the welfare clientele). In contrast, the depoliticizing effect of the positivism of subjective rights is direct; it consists in a restriction of political power (or of the power of the political). Any political government that is bound by or to the form of subjective rights must confine itself to finding out what it is that individuals happen to want, which choices they want to make, which interests they want to fulfill, and to then establish a scheme of equal distribution that allows each individual to realize those choices and interests alongside every other. As Carl Schmitt rightly saw, the constitutional establishment of the form of subjective rights implies a new principle of distribution of power: the individual sphere of freedom is in principle unlimited while the authority of the state is in principle limited. From now on politics cannot intervene anymore into the individual sphere (which is, as seen before, not

³⁷ The step from the neutralization that defines the form of subjective rights to those forms of social domination is mediated by the legalization of un-ethical behavior. Subjective rights legalize viz. the striving for self-preservation and self-enhancement independently of ethical judgment about good and bad. This is the “subjective” condition for capitalism.

but the social sphere: the sphere of social relations of domination). Or it can only intervene externally: by observation, description, and (re-)distribution. It cannot intervene by judging, criticizing and consequently transforming the matter, the what and the how, of the individual's willing and striving. Politics ceases to be transformative: it ceases to be the medium through which individuals fulfill their determination (or destiny) to lead a universal life; that is, the medium through which individuals transform themselves into parts and elements of a universal form of life.³⁸

3.

My thesis is thus that the form of subjective rights is indeed – as Hegel has suggested, Marx has shown and Wendy Brown has said – defined by a “paradox.”³⁹ More precisely, we should speak of the tragedy, that is, the tragic irony of rights. For the form of rights is defined by a logic of reversal or inversion: good intentions turn into bad consequences. The *good intention* of a politics of rights is to resist the oppressive, exclusionary logic that defines the formation of political unity or generality. The initial impulse of the politics of rights is directed against domination; its driving force is anarchic. The *bad consequence* of the form of rights is its ‘degradation’ of politics; the politics of rights is a politics of de-politicization. It produces zones – both between subjects as well as within the subject – that are systematically withdrawn from political intervention and hence collective interpretation, criticism and transformation: zones of social domination. The reversal of those good intentions into these bad consequences takes place *via the means employed*: the form of rights. This form brings forth the necessary character of the reversal. The good intentions – critique of political domination – and the bad consequences – the legalization of social domination – are connected via the form of rights whose mode of operation I have described as “naturalization.”

If this scheme of analysis holds – the form of rights as the dialectical unity of intentions and consequences – then the politics of rights cannot be understood by either looking at their good intentions – the reasons that are given for declaring and

³⁸ This transformative idea of politics is the normative pre-condition for the critique of the neutralism and positivism of rights. I cannot say more about this conception here. But certainly Dewey's “idea of democracy as an ethical life form” (Richard J. Bernstein, “John Dewey's Vision of Radical Democracy,” 72) is one possible version of it.

³⁹ Wendy Brown, “Rights and Losses,” in: Wendy Brown, *States of Injury: Power and Freedom in Late Modernity* (Princeton: Princeton University Press 1995) 96-134.

implementing rights – or at their bad consequences – their functionality in the organization and preservation of social domination. We cannot look at either one *or* the other because we have to look at both at once. But not at their empirical, external, contingent connections but rather their inner, conceptual unity. This is the unity of form (or the “concept”) of subjective rights that determines their mode of functioning. The paradox of rights – good intentions turning into bad consequences – *is* thus the unity of their form or the form of their unity.

Can the paradox of rights be avoided? As I have said in my preliminary remark at the beginning, I read Richard Bernstein’s political philosophy of radical democracy as answering the question in the affirmative. I assume that he would have found my paradoxical reading of the form of rights overly negativistic. To remain stuck in a paradox stands in contrast to the attitude by which Bernstein defines what pragmatism means for him. Bernstein has explained this meaning in the last chapter of *The New Constellation* that is dedicated to Hegel. In this chapter, Bernstein presents Hegel as the thinker of reconciliation *and* rupture – indeed, of reconciliation *by* rupture. “These are two intrinsic necessary aspects of the same dialectical process. For it is only by violent rupture – self-diremption—that Spirit achieves reconciliation with itself.”⁴⁰ It is thus not by accident (and not without a certain irony⁴¹) that Bernstein explains his Hegelian pragmatist attitude with reference to Adorno’s resistance against “extorted reconciliation” and characterizes the new perspective that is opened up by such a (negative?) dialectic with a term that Adorno has introduced in order to describe the dynamics of the artwork: “*Kraftfeld*,” “force-field,” or, as in the title of his book, “constellation.”⁴² These “metaphors” (as Bernstein calls them) can help us to think differently – beyond the alternatives of either reconciliation or mere rupture and contradiction (and hence of either optimism or pessimism). For they suggest that the force of rupture splits two elements in such a way that their connection, which seemed so natural and “organic” to us, dissolves – but at the same time also opens up new possibilities of how they might be related to each other differently. The question that Bernstein’s Hegelian pragmatist methodology urges and encourages us to ask thus

⁴⁰ Bernstein, “Reconciliation/Rupture,” in *The New Constellation*, 299.

⁴¹ The irony consists of course in Adorno’s own disinterest and indifference towards pragmatism. Bernstein does not take this attitude too seriously and is rather interested in exploring where these different traditions meet.

⁴² Bernstein, “Reconciliation/Rupture,” 309. In light of this explanation, the title of the book – *The New Constellation* – does not (or not only and primarily) refer to a specific constellation of thoughts that is new. Rather, it is the constellation itself, the thought of and the thinking in constellations, that is new: that makes new thinking possible.

is, whether – and this always implies the further question, how – it is possible to conceive of the form of rights, whose paradoxical, self-contradictory logic we have seen, as a “constellation,” or as a “force-field,” that calls for a transformative practice – i.e., for its politicization.

Following Bernstein’s pragmatist-dialectical methodology, we thus would have to ask for the forces that shape the field of rights in order to explore the possibility of unfolding them in a different way – i.e., in a way that does not lead into the dead end of the form of subjective rights in which rights work as the normative mechanism that produces social domination. Looking back at the argument that I have sketched before, we can see now that this was actually already its procedure. Because this is exactly what a “genealogical” critique is about: to explain a given social form by uncovering its “genesis” – as Marx defines the “truly philosophical criticism” – means nothing else than to turn from form to force; it means “to read the existing as the text of its becoming.”⁴³ Furthermore, the investigation into the genesis of the form of rights has revealed two aspects of the forces that produce it. These forces do not only consist of a plurality of impulses, tendencies and directions that oppose each other. The forces that produce the form of rights furthermore operate on two different levels. The possibility of a critical intervention into the practice of rights, in the sense of Bernstein’s pragmatist-dialectical methodology, then depends on whether these two levels can be separated from each other.

On the first and basic level we find the dialectic of community and individuality that defines modern ethical life.⁴⁴ This dialectic means that the modern subject at the same time only exists in or through social participation *and* resists being defined as, or reduced to, a social member. For social membership implies violence; social membership is equally enabling and distorting. Individual rights are the normative instrument that is meant to articulate and organize this double character of modern subjectivity; individual rights aim at normatively securing and delimiting social membership at the same time. However, they can only do this by referring to the individual as a pre-given entity to which they attribute certain strivings and

⁴³ „Lesen des Seienden als Text seines Werdens“: Theodor W. Adorno, *Negative Dialektik*, in: *Gesammelte Schriften*, vol. 6 (Frankfurt am Main: Suhrkamp, 1973) 62; my translation. The term “genesis” thus has an ontological meaning: it does not refer to historical processes but to the inner processuality, the “becoming,” that constitutes a given form.

⁴⁴ Again, Bernstein describes this dialectic with reference to Dewey; see Richard J. Bernstein, “John Dewey’s Vision of Radical Democracy,” 71-75. The basic structure is obviously Hegelian; see Richard J. Bernstein, *Praxis and Action. Contemporary Philosophies of Human Activity* (Philadelphia: University of Pennsylvania Press, 1971) part I.

liberties that the individual is meant to possess (as if) by nature. This is the second level in the force-field of the theory and practice of rights. On this second level, forces of two different kinds interact with each other: inner-legal forces that develop a new legal anthropology centered around the terminology of “interest” and “freedom of choice” (*Willkür*) and outer, social and especially economic forces that can only develop if the old idea of law as producing a just order of things (*ius sive iustum*) is overcome and replaced by a new law that guarantees equal spheres of individual power.⁴⁵

If we re-describe our critical, “genealogical” analysis of the form of rights in this way with the help of Bernstein’s metaphors of “force-field” and “constellation,” we can therefore ask the question “Can the paradox of rights be avoided?” in a new and more precise way. The question can be asked in a more precise way because we learn that it is, in fact, a double question. The first question asks if and how we can fight the forces that operate on the second level that we have described. These are the joined forces of the naturalization of the legal subject and the interest of the existing capitalist order in rejecting any attempt at a radical democratization and politicization of the economy. Here, philosophical critique can play a role in exhibiting the false presuppositions and moves of a philosophy of law that takes the form of rights for granted; this is the reason why a critique of liberalism, in the way that I have sketched in this paper, seems to me still relevant and necessary. The more difficult task is set by the second question that refers to the fundamental level of forces which drive the modern subject in opposite directions. Here, critique is not enough. Rather, it needs that kind of philosophical (and political) experimentalism that Bernstein has described as the true heritage of Hegel’s “speculative thinking”: “Speculative thinking does not abhor contradictions. On the contrary it sharpens contradictions, recognizes the “positive side of contradiction” and shows how the contradictions are reconciled in an absolute totality.”⁴⁶ Breaking the power of the paradox by which the form of rights determines our social and political fate requires the (theoretical and practical) development of a form of social totality that Bernstein calls “absolute” precisely because it only exists by unfolding the rupture, the diremption between of community and individuality. This is the step that Bernstein has described and demanded as liberalism becoming “radical”—the step from liberalism to radicalism.

⁴⁵ See Niklas Luhmann, „Subjektive Rechte: Zum Umbau des Rechtsbewußtseins für die moderne Gesellschaft,“ in: *Gesellschaftsstruktur und Semantik*, Volume 2 (Frankfurt: Suhrkamp 1981) 45-104.

⁴⁶ Bernstein, “Reconciliation/Rupture,” 315.

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