CHRISTOPH MENKE

CRITIQUE OF RIGHTS

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Christoph Menke

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Translated by Christopher Turner

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MARX'S PUZZLE

The bourgeois revolutions that since the eighteenth century brought down the regimes of traditional domination [*Herrschaft*] are first of all declarations of equal rights: they declare the rights of the human being and of the citizen.[1] Regimes of traditional domination were regimes of inequality. In such regimes, the power to exercise political judgment and rule was distributed in a radically unequal manner. In contrast, bourgeois revolutions establish equality, and to them equality signifies equal rights. Equality and equal rights amount to the same thing, in the revolutions' view. However, they are not the same. Equality *does not mean* rights. Instead, equality of rights is a specific formal determination of equality. The decisive act of bourgeois revolutions is therefore not the decision in favor of equality. Rather, it is the decision to give equality the form of rights.

This decision is puzzling. In his analysis of "The Declaration of the Rights of Man and of the Citizen," Marx writes:

> 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.[2]

According to Marx, the revolutionary declaration of equal rights is puzzling because of the contradiction in the subject, namely the antithesis between the political subject who declares rights and the social or private subject (the two are equivalent in civil society) who is authorized by rights, and thus between the basis and the content of rights. The declaration of rights is a political act; it is *the* political act. In declaring rights, the political community creates itself in opposition to regimes of traditional domination. Because politically declared rights authorize the apolitical ("egoistical") human beings of civil society, however, the declaration of rights is at the same time the degradation of politics, its debasement to a mere means. It places the political community – which is "the true content and end"[3] – into the service of "egoistic man separated from his fellow men and from the community." The puzzle of the bourgeois declaration of equal rights is the puzzle of a self-reversal: it is the political act that authorizes apolitical human beings and thereby politics' deauthorization of itself – the politics of depoliticization. The revolutionary declaration of rights is the first and last political act: the relinquishing of political power by means of politics – politics for the last time.

Marx believes that "The puzzle is easily solved."[4] This solution amounts to the claim that "Political revolution is a revolution of civil society."[5] And this means that "Political emancipation was at the same time the emancipation of civil society from politics."[6] The puzzle is that the bourgeois revolution degrades political community into a means for the rights of apolitical human beings. The solution to this puzzle is the fact that bourgeois [*bürgerliche*] politics emancipates civil [*bürgerliche*] society from politics through the declaration of rights. Bourgeois politics assumes civil society as its "natural basis" and henceforth operates "on the presupposition of its existence."[7] It is governance as the administration of society. In other words, bourgeois politics is the "police."[8]

Marx seeks the – simple – solution to the puzzle of the bourgeois revolution in its effect, which he views as its secret goal. With the declaration of rights, the bourgeois revolution "degrades" politics into a means because it wants to make civil society the presupposition for politics and thereby to free it from politics. This simple solution, however, is too simple, because the puzzle of the bourgeois revolution does not merely consist in understanding why it degrades politics, but rather – and more fundamentally – in *how* it does this. In other words, the puzzle of the bourgeois revolution consists in understanding how it degrades politics *through the declaration of rights*. According to Marx, the equal rights declared by the bourgeois revolution are the decisive mechanism for politically producing civil society. It is therefore this mechanism, the

mechanics of rights, that must be understood if the puzzle of the bourgeois revolution is to be solved. Neither its ill effects – civil society with its new forms of domination (exploitation and normalization) – nor its good intentions, which, conversely, liberalism opposes to these ill effects, namely dignity, autonomy, self-determination, and so forth, can provide a solution to the puzzle of the bourgeois revolution. This puzzle requires an examination of the form of rights: of rights *as form*.

My thesis is that we cannot grasp the content, aims, and effects of the bourgeois declaration of rights without having understood how it operates. The "how" of rights has precedence over its "what," "why," and "to what end." The form of rights comes before their content, goal, and effect,[9] because this form is not neutral.

Rights are a specific form of normativity: to have a right means to have a justified and therefore binding claim. And to declare a right means to grant a justified and therefore binding claim. The bourgeois declaration of rights understands this to mean that a justified claim can only be a claim as equal. That is not all, however. For at the same time, it understands this normative justification of a claim in such a way that the claim is thereby transformed into something "factual" that is prior to and separate from the political community. This holds for everything to which we have a right: for example, by giving us rights, the bourgeois state allows "private property, education, occupation, to act in their way, i.e., as private property, as education, as occupation, and to exert the influence of their special nature. Far from abolishing these real distinctions, the state only exists on the presupposition of their existence."[10] For Marx, this is the basic feature of the mechanism of bourgeois rights. Contrary to what Marx repeatedly says (and something for which he was repeatedly criticized),[11] this mechanism does *not* consist in the justification of egoism (in general, egoism is not a category of legal theory or social criticism but rather an ethical category, a category of morality). Instead, this mechanism is the *naturalization of the social* (its transformation into something factual, the act of presupposing it), which happens when it becomes the content of legal claims.

The equal rights declared by the bourgeois revolution are a particular, completely new kind of normative mechanism: they combine normativity and facticity. They are normatively regulative in securing equality, but they do this by – actively – presupposing factual conditions that they thereby remove from political governance. The normativity of bourgeois rights consists in their creation of a pre- and extra-normative facticity. The form of bourgeois rights expresses an upheaval in normativity's mode of being. *As a result*, the declaration of rights is the mechanism that

(as Marx maintains) gives rise to civil society and in so doing degrades politics into the police, into administration. In order to solve the puzzle of the bourgeois revolution – the puzzle of the political self-degradation of politics, the puzzle of the emancipation of civil society from politics through the emancipation of politics – we must understand the peculiar mechanism of bourgeois rights. We must understand the radical, ontological redefinition of normativity that lies at the basis of the bourgeois form of rights.

It is therefore the puzzle posed by Marx, and not his "simple" solution, that leads the way for our inquiry: it leads the way to an analysis of the bourgeois form of equal rights. As we proceed, we will have to subject liberalism to critical analysis,[12] since liberalism is based on the insight that the declaration of equal rights is absolutely constitutive for the bourgeois revolution's redefinition of politics and society. Yet, at the same time, liberalism is unable to understand that – and how – the bourgeois form of rights precisely degrades politics into the police and produces the "actual inequalities" of society. Liberalism counters the actual social and political effect of rights with its good ("moral") intentions. This is what liberalism calls criticism, namely confronting existing conditions with good, justified claims. With this superficial notion of criticism, it skips the analysis of form. It is through form, however, that intentions produce effects.

Marx calls this kind of criticism vulgar: "Vulgar criticism falls into . . . [a] *dogmatic error*." It criticizes by "*fighting* with its subject matter." "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."[13] The true analysis and true criticism of bourgeois rights are one and the same. True analysis is simultaneously true criticism because it discerns the – ontological, and not historical – genealogy of bourgeois rights. It confronts bourgeois rights not with their moral intention, but with their genesis, their basis. This means, however, that criticism is able to discover the other of bourgeois rights in their basis. According to this thesis, the basis of the bourgeois form of rights is the modern upheaval in the ontology of normativity. According to the program of true criticism, the ontological upheaval of modern law must therefore simultaneously call the form of bourgeois rights – which it establishes – into question; indeed it must undo and destroy this form. True genealogical criticism reveals a contradiction in the modern upheaval of law: it establishes *and* denies bourgeois law. True criticism, which proceeds genealogically, develops a radical objection *to* the existing conditions *out of* the existing conditions.

Criticism of the bourgeois form of rights consists in demonstrating the claim that it cannot grasp its own basis. In being traced back to its ground, the bourgeois form of rights gets buried as a result. A new right then becomes possible: a right of new, other rights; a right of rights that do not presuppose anything; rights that do not depoliticize what they entitle. It is true that the bourgeois revolution "resolves civil life into its component parts, without revolutionising these components themselves or subjecting them to criticism."[14] The rights of new right, in contrast, are revolutionary because they transform what they entitle. Critical understanding must lay the ground for this transformation.

* * *

The way to achieve this goal proceeds in four steps that can be summarized in four theses:

1 The modern form of rights breaks with the tradition of classical law. Classical rights are fair shares, while modern rights are legal claims to natural claims. The modern form of rights opens law up to the non-legal. Rights are situated at the limit of law.
2 The modern form of rights expresses a fundamental upheaval in the ontology of law. If all law is defined by the difference between form and matter, modern law is the materialist self-reflection of its form, establishing the difference between law and non-law within the law.
3 The bourgeois form of rights is law's self-reflection in the mode of its denial. This constitutes the positivism of bourgeois rights, namely that they reify law's non-legal substance into something positively given. Bourgeois rights authorize the subject's private self-will and thereby engender bourgeois society's new forms of domination.
4 A new revolution of rights that breaks with their bourgeois form must overcome their positivism: it must carry out the self-reflection of modern law [*Rechts*] dialectically. It thus establishes a new right [*Recht*]. The dialectic of activity and passivity in political judgment forms its basis: new right is the right of counter-rights.

This book will proceed by combining historical description and conceptual argumentation. On the one hand, it is a matter of grasping bourgeois law [*Recht*] today through readings of relevant texts. On the other hand, it is a matter of clarifying the basic concepts of the philosophy of law and developing them dialectically. The description of bourgeois law is prominent in parts I and III: part I explicates the historical difference between the classical and modern conception of rights; part

III examines the ideological presuppositions and social consequences of their bourgeois form. In contrast, parts II and IV foreground conceptual reflection: part II analyzes the relation of form and matter that is constitutive of law, and elucidates the concept of its modern self-reflection; part IV outlines a theory of the judgment that establishes rights by reflecting on the structure of political subjectivity. The social-historical description of bourgeois law and the conceptual unfolding of the dialectic of law are distinct projects. However, they refer to each other. Their connection is the critique of rights.

Part I

History: The Legalization of the Natural

> Here we find ourselves in the "Copernican" moment of the history of the science of law, at the boundary between two worlds. A new social order is born, whose nucleus will become an individual right that is developed entirely from the concept of *potestas*, elevated to the dignity of a right.[1]

Modern legal theory and philosophy of law were the first to speak of rights that belong to the individual and which the individual can exercise for his or her own ends. For this reason, rights here are also first characterized as a person's property, endowment, or capacity. It is only at this point that talk of "subjective" or "individual" rights could flourish. At the same time, rights are an essential way of formally defining private or civil law. Rights are primarily defined as claims that enable one person to impose an obligation on another person. The form of rights is therefore as old as the institution of civil law: they have existed ever since there were contractually regulated exchange relations. Both of these observations must be borne in mind at the same time. Together, they define the historicity of rights: rights are a form that can only be understood in historical terms.

We are concerned with the modern form of rights. This modern form cannot be understood by merely considering the continual formulations expressed by civil law regarding the normativity of exchange relationships that, beyond mere family arrangements, pervade all societies: the modern form of rights alters social exchange relationships so fundamentally that no concept of their normative regulation – obligation, freedom, equality, authority [*Herrschaft*] – is able to retain its traditional meaning. Nor can the modern form of rights be understood by attempting to derive

it directly from the basic concept of modernity's normative order, from the concept of the self-determining, autonomous subject: the modern form of rights does not exist because there are autonomous subjects, but autonomous subjects exist because the modern form of rights does. The modern form of rights results from a radical transformation of law. This transformation is radical because it concerns the *meaning of law*. With the modern form of rights, the concept of law, indeed the concept of normativity, acquires a new, fundamentally different meaning. The transformation in the conception of rights, which were traditionally expressed in terms of private law, thus does not remain restricted to this domain: "law" *as such* thereby comes to mean something else, and hence rights in their modern form only exist beyond private law.

A radical transformation of law takes place in the modern form of rights. The de-moralization [*Entsittlichung*] of law expresses this in negative terms: traditionally, law is the moral or rational order of the fair share in which each receives his or her own – his or her right. The modern administration of rights, however, must be defined in positive terms. It consists in the reconfiguration of the basic relation between the legal and the pre- or extra-legal, between norm and nature. In the modern form of rights, law becomes the process of juridification: rights are the mechanisms of an incessant legalization of the natural.

— 1 —

A PHILOSOPHICAL HISTORY OF RIGHT'S FORM

Historians debate who should be regarded as the first author responsible for formulating the new – contemporary or modern – way of talking about a right as a person's "power" [*Macht*]. In a series of influential essays, the legal historian Michel Villey maintains that William of Ockham was the first to have systematically understood a right in this manner. Ockham thus claims that:

> a right of using is a licit power [*potestas licita*] of using an external thing of which one ought not be deprived against one's will, without one's own fault and without reasonable cause, and if one has been deprived, one can call the depriver into court.[1]
>
> Lordship [*dominium*] is a principal human power of laying claim to and defending some temporal thing in a human court. "Human power" separates this lordship from the divine lordship.[2]

Villey's critics have cast doubt on whether these formulations by Ockham already amount to a break with tradition – something which is only supposed to have occurred with later authors.[3] At the same time, these critics have pointed out that similar formulations can already be found in "men who rediscovered the Digest and created the medieval science of Roman law."[4] However we date this break, though, it is undeniable that a distinction was established in the ideologically formative phase of modernity, between medieval nominalism, late scholasticism, and rational natural law. Indeed, Thomas Hobbes already invokes this terminological distinction as a frequently overlooked and yet obvious conceptual fact. Reviewing its history two hundred years later, Friedrich Carl von Savigny again cites it as a common, self-evident insight.

This distinction involves two different meanings of the term "right" [*Recht*]: the difference between *right* [*Recht*] as a justified or prevalent regime of laws and *a right* [*Recht*] as a person's claim. In explaining the title of his *The Rights of War and Peace*, Hugo Grotius formulates this distinction as follows:

> For Right in this Place signifies meerly that which is just, and that too rather in a negative than a positive Sense. . . . There is another signification of the word right, different from this, but yet arising from it, which relates directly to the person. In which sense, right is a moral quality annexed to the person, justly entitling him to possess some particular privilege, or to perform some particular act [C.M. - *qualitas moralis personae competens ad aliquid juste habendum vel agendum*]. This right is annexed to the person.[5]

Francisco Suárez explains the two "different meanings of the term 'right'" in a similar way:

> Sometimes "right" means an ethical claim [C.M. – *moralem facultatem*] to a thing or the right to a thing, whether we are dealing with an actual right of ownership or merely with the right to share in something. Right, in this sense, is the proper object of justice. . . . But "right" also characterizes law, which is a norm for ethically good action and which establishes a certain consistency in things. In this sense . . . , "right" coincides with "law." To put this concisely, we can call the first meaning "useful right" [*ius utile*] and the other meaning "ethical right" [*ius honestum*], or the first meaning could be called "real right" [*reale*] and the second meaning "lawful right" or "legal norm" [*legale*].[6]

Hobbes draws on a terminological distinction between law and right to capture the same conceptual difference[7] – a distinction that Hobbes introduces as a translation of the Roman distinction of *lex* and *ius*, getting to the heart of the decisive contrast, for him, between right as binding law and *a* right as freedom:

> For though they that speak of this subject use to confound *Jus* and *Lex*, *Right* and *Law*, yet they ought to be distinguished, because RIGHT consisteth in liberty to do, or to forbear; whereas LAW determineth and bindeth to one of them: so that Law, and Right, differ as much, as Obligation and Liberty; which in one and the same matter are inconsistent.[8]

> I find the words *Lex Civilis* and *Jus Civile*, that is to say, *Law* and *Right Civil*, promiscuously used for the same thing, even in the most learned authors; which nevertheless ought not to be so. For *Right* is *Liberty*, namely that liberty which the civil law leaves us: but *Civill Law* is an

> *Obligation*, and takes from us the liberty which the law of nature gave us. . . . Insomuch as *Lex* and *Jus*, are as different as *Obligation* and *Liberty*.[9]

Since German has no equivalent for this terminological distinction, "Let us call" what others refer to as *ius* or right[10] "a right of this person synonymous with privilege; some call it right in a subjective sense," as Savigny puts it two hundred years after Hobbes.[11] Right [*Recht*] "in the objective sense" is law [*das* Recht]: right [*Recht*] as governing statute [*Gesetz*]. Right in the subjective sense is *a* right, in other words, a claim that a person or "subject" can make which is normatively binding or, as Kant puts it, the "moral capacity for putting others under obligations."[12]

None of the modern authors who distinguished between right as law [*Gesetz*] and right as claim considered this distinction to be a new conceptual insight. Indeed, for the most part they never even maintained that a terminological innovation was involved. They instead presented the distinction as though it were already established by Roman legal practice or by Aristotelian-Scholastic legal theory. Yet such a distinction had never been made explicitly in practice or in theory, prior to modern legal thought. The distinction between right and a right, between law and right,[13] between right [*Recht*] as law [*Gesetz*] and right as claim, "right" [*Recht*] in the objective and in the subjective sense, seems as ancient as it is modern: ancient in *what* it says, in its content; but modern to the extent *that* it is said, that this content is explicitly formulated and established. On the one hand, it seems as if the distinction between right as law and right as claim is always already given. On the other hand, to *make* this distinction is to do something fundamentally new, with far-reaching consequences. In other words, this distinction is more rhetorically than semantically novel, more an act of distinguishing than an issue of content. In that case, however, can it still be the same distinction?

The Reversal of Primacy

Leo Strauss firmly declared Hobbes to be the original author of the distinction between law [*Gesetz*] and claim. Accordingly, Hobbes' distinction between "law" and "right"[14] – despite its derivation from the Roman distinction between *lex* and *ius* – must be regarded as a radical "innovation" that enabled him to definitively differentiate "modern" politics from its "ancient" understanding.[15] Strauss' argument for Hobbes as the original author of the modern distinction between law and right [*Anspruch*] (and

thus not Grotius, whom he viewed as still bound to tradition on this critical question) maintains that Hobbes was the first to understand it as "fundamental." In other words, Hobbes was the first to understand that this distinction concerns the *basis* of the legal system. For Hobbes "fundamentally distinguished" law and right to indicate precisely that "modern political philosophy takes 'right' as its starting point, whereas classical political philosophy has 'law'" (while Grotius still thought that the "moral quality by virtue of which a person has a right to or can do something [*ius proprie aut stricte dictum*]," which he distinguishes from right as law, "presupposes *lex*"[16]):

> Because Hobbes was the first to distinguish with incomparable clarity between "right" and "law," in such a way that he sought to prove the State as primarily founded on "right," of which "law" is a mere consequence [. . . .] – Hobbes is for that very reason the founder of modern political philosophy.[17]

Strauss' historical argument for Hobbes as the original author of the distinction between law and right [*Anspruch*] is thus based on his thesis concerning the *point* of this distinction: the reason for making it is to "subordinate law to right."[18]

Regardless of what we think about Strauss' suggested chronology, it forms the systematic substance of his interpretation of Hobbes. In distinguishing law and right [*Anspruch*], we are thus concerned with nothing less than a new response to the question of priority, and hence with the question of basis: at issue is "the supplanting of the primacy of obligation [C.M. – which the law imposes] by the primacy of claim."[19] By isolating the claim [*Anspruch*] in this manner, *over and against* obligation and law, it becomes the "fundamental moral fact" *prior to* law.[20] According to Strauss, this therefore means that modern politics begins by drawing the distinction between law and claim. To make this distinction *is* the modern act of revolution: "The fundamental change from an orientation by natural duties to an orientation by natural rights."[21]

Leo Strauss sees the basic process of liberalism at work in the reversal of primacy between law [*Gesetz*] and claim, between law [*Recht*] and rights.[22] Liberalism means thinking law, or the legal system, on the basis of rights, or from the individual. Liberalism is "that political doctrine which regards as the fundamental political fact the rights, as distinguished from the duties, of man."[23] Liberalism views the distinction between law and a right as the revolutionary act that separates modernity's political order from tradition, because, with this distinction, the right as claim is first *set apart* from law as statute (the legal claim is

no longer an effect of the legal system, as it traditionally was, but stands alone), so as to ultimately become *prior* to this system.[24] The semantic content of the distinction between *ius* and *lex*, or "law" and "right,"[25] may be an ancient one and merely analytical, a distinction between two modes or perspectives in which we can speak of "right." However, the rhetorical *meaning* or *purpose* of the distinction between law and a right – as Leo Strauss interprets liberalism, whose history accordingly begins with Hobbes – is to establish the claim as the basis of law [*Gesetz*], or rights as the basis of law [*Recht*].

But how can there be a legal claim that is able to normatively bind others *before* and thus independent of law's legal order? Is not the idea of *a* right before *law* "nonsense upon stilts,"[26] as Jeremy Bentham said of the rights of man, or, as Raymond Geuss puts it, "white magic"?[27]

Along with Strauss, Hans Kelsen has also objected to the concept of rights, arguing that liberalism establishes a "dualism" – of claim and law – which supposedly reverses the explanatory relations between them:

> The original intention of the dualism of objective and subjective right [*Recht*] expresses the thought that the latter precedes the former both logically and temporally: subjective rights emerge first (such as private property, the primary prototype of a subjective right), and only later do we also find objective right as a state order that protects, recognizes, and secures the subjective rights that have emerged independently from it.[28]

Subjective right precedes objective right, the claim precedes law. For Kelsen, this basic thesis of liberal dualism has an obvious "ideological function": it is supposed "to conceal the socio-economically decisive function" of capitalist private property.[29] However, the priority of claim over law is also conceptually incoherent. It encapsulates the aporia of modern natural law [*Naturrechts*] that lies at the basis of liberal dualism: the paradox of a natural legal claim – the idea of a claim that is supposed to naturally occur of its own accord *and* at the same time is supposed to be obligatory.

The idea of a natural right [*Rechts*] is paradoxical because it is the idea of a right [*Rechts*] before law [*Recht*]. "Rights before law," however, either (i) are *not rights* at all, or (ii) do *not* really exist *before law* at all.

(i) Either the following is valid: if claims, as natural, are supposed to precede law, there are no rights. This is clearly Spinoza's position: the talk that I have a natural "right" can only negatively mean that no one else has the right to hinder me – not because others are obligated to refrain from hindering me due to my legitimate claim, but because we stand beyond or, better, *on this side of* law *and* obligation. Natural right

before law is the semblance of a right because it has no corresponding obligation:

> [Everyone] always endeavors as far as in him lies to preserve his own being and (since every man has right to the extent that he has power), whether he be wise or ignorant, whatever he endeavors and does, he endeavors and does by the sovereign right of Nature. From this it follows that Nature's right and established order under which all men are born and for the most part live, forbids only those things that no one desires and no one can do.[30]

"There is no normativity in nature,"[31] and for this reason, too, there are no natural rights.

(ii) Or the following is valid: if rights are supposed to be natural claims, then they do not precede law. This is how Kant understood the matter: on his account, individuals admittedly already have "private" rights prior to the positive legal system of the "civil constitution." "What belongs to each is only secured, but not actually settled and determined" by such a constitution. ". . . Prior to a civil constitution (or in *abstraction* from it), external objects that are mine or yours must therefore assumed to be possible."[32] The existence of private rights here has a "provisional"[33] character (in the literal sense of the word): it remains in force "as long as it does not have the sanction of public law, since it is not determined by public (distributive) justice and secured by an authority putting this right into effect."[34] Private claims on what is mine or yours are thus pre-juridical (and in this sense natural) insofar as they are not under the legal protection of a public authority. In the crucial normative sense, however, they are already constituted by right [*Recht*] as law [*Gesetz*]: "for the obligation here arises from a universal rule."[35] Even natural rights are based on law, according to Kant: on a law that exists prior to and independent of all public legislation.

Either natural rights that precede law [*Recht*] do not yield any obligations, and for that reason are not really rights at all, and therefore not law's basis. *Or* natural rights that precede law are actually rights that are binding, but in this case are constituted according to a legal rule and thus, again, not the basis of law.

The corollary of this critique of the liberal "dualism" of a right and of law, which first renders rights independent from law and then explains the latter's basis, is expressed by Kelsen as the insight that rights only exist in *juridical relationships*:

> Thus if the concept of subjective right and the subjective bearer of rights reveals any ideological function . . . , all that emerges are juridical

> relations between human beings, or more precisely between statements of fact regarding human behavior that are connected to each other by the juridical norm, as its content. The juridical relationship is a relation between two statements of fact, one of which is a human behavior defined as a juridical obligation, while the other is a human behavior defined as an entitlement.[36]

Juridical relationships are the starting point, not rights. This means, first, that rights exist *in relation to* obligations; rights designate positions in a relationship that also includes other corresponding normative relations or, to put it simply: positions of obligation.[37] And, at the same time and contrary to how they are understood in terms of natural law, this means that entitlements can also only be grounds for obligations *within* particular juridical relationships: where juridical relationships exist, it is possible to say that on their basis someone is obligated to behave in a certain way *because* someone else is entitled to expect such behavior and to demand it. Where juridical relationships exist, rights can be the basis for obligations. *That* juridical relationships *do exist* – the premise of this relational basis – does not for its part depend on the existence of a rule or a law [*Gesetz*] that links the two kinds of behavior to each other in this specific normative way. According to Alexandre Kojève, it is only "the intervention of a third human being, C, impartial and disinterested" as representative of the "legal rule" which forms the "necessary or 'essential' constitutive element":

> This intervention [Tr. – of a third human being] is the specifically juridical element. It is this which confers a juridical character to the situation as a whole. . . . In this case, and in this case alone, we will be able to say the following:
>
> a) A *has the* ***droit*** [Tr. – the right] to act as he does; his action and the effect of this action constitute his *subjective right*, and he himself is the *subject* of this *droit*, [and] therefore a *subject of* ***droit*** in general (or a *juridical person*, either *physical* or *moral*).[38]

Rights only exist in juridical relationships, and juridical relationships only exist under laws [*Gesetzen*]: thus Kelsen's twofold move here – similar to Wittgensteinian linguistic therapy – traces rights back to their logical or grammatical place in our juridical discourse. The revolutionary claim of a liberalism founded on natural law, which on Strauss' interpretation is supposed to be expressed by the distinction of "right" and "law,"[39] is that rights are the basis of law [*Recht*] or statute [*Gesetz*], and this claim is therefore rejected by Kelsen as ungrammatical and meaningless. To put Kelsen's thesis into sharper contrast: rights can never be the basis of

law, since they are only normatively binding, and thus obligatory, on the basis of law.

As a result, Kelsen concludes that the conception of subjective right as an independent category must be abandoned: subjective right is only a "reflex of legal obligation." It can be "reduced to objective [right], attributed once more to objective [right]."[40] For Kelsen, to distinguish subjective right from objective right amounts to claiming that the former is the basis of the latter. Because that claim is meaningless, we can dispense with subjective right (in other words, a claim that is conceptually distinct from law) as a legal category – a misleading construction with ideological intentions.

However, this conclusion is wrong. For Kelsen's alternative – subjective right as ultimate basis *or* as mere reflex – is a false dichotomy: it misses crucial insights into the modern distinction between *ius* and *lex*, right and law,[41] between *a* right and law [*Recht*], between claim and law [*Gesetz*]. To understand this distinction, we must grasp its precise significance and the reason for this significance, namely that it frees the legal claim from the derivative position of being a mere reflex, *without* at the same time attributing an authoritative force to it that would form the basis for rights. We thus require a different understanding of the modern declaration of the primacy of rights over law, which Strauss justifiably considered to be the principle that inaugurates modern politics: an understanding that does *not* view the "priority of right over law" (Strauss) to mean that the claim forms the normative basis for law. For, conversely, Spinoza's argument is that a claim does not have any normatively binding force *prior to* law, and thus we arrive at Kant's argument that any claim has normatively binding force only *by virtue of* law.

The basic thesis of this alternative understanding is that the modern priority of rights over law is a redefinition not of law's basis, but of its form. The modern distinction between *a* right and law is the revolutionary act of modern politics: not because it prioritizes rights as the basis of law, but because it radically transforms law. The modern distinction between a right and law expresses a *revolution of legal form*. It defines law as *the right of rights*.

A New Form of Government: "Modern Roman Law"

This is already the meaning of Savigny's distinction between the two conceptions of right, right in the subjective sense and right in the objective sense. For Savigny himself, and not merely his critics, also

understood subjective right in relational terms. The basic concept of Savigny's legal theory is the juridical relationship, and not subjective right.[42] Thus for Savigny, the concept of subjective right is not at all supposed to designate a prior ground at rest in itself, on which the legal system can be established. Rather, Savigny employs the concept of subjective right to characterize the specific new form of currently existing juridical practice.

The "Roman Law" to which Savigny's title refers (in what follows, this will be capitalized [Tr. – and in quote marks] to distinguish it from the juridical era of Roman law, or law in ancient Rome) is civil or private law, which he sharply distinguishes from public law: "The first has for its object-matter the state, that is the organic manifestation of the people; the second the totality of jural relations which surround the individual man."[43] Private law is the "jural relation ... as a relation between person and person, determined by a rule of law."[44] It is only here that we find "right in the subjective sense." There can be no individual rights here, and public law is operative as the obligation-imposing statute, since "in public law the whole appears as the end, the individual as subordinate."[45] In contrast, the private juridical relationship between persons is a matter of rights as an individual person's power, quality, competence, claim, or freedom. These (subjective) rights are based on an (objective) legal rule. According to Savigny, the distinction between the two usages of the term "right" should thus not be understood to mean that both are considered to be normatively independent of each other, which would then entail that the claim has normative priority over law. Rather, Savigny is concerned with differentiating two *domains* or *types* of law that are sharply distinct in their basic relations: on one side, public law, the only place where the normative structure of law and obligation prevails; on the other side, private or civil law, in which mutual equals have claims on and obligations to each other. While rights cannot exist in the individual's public or political relationship to his or her community (since in this relation of membership there is no reciprocity or opposition: the community is just the person him- or herself in another form), private law is the domain of rights: for Savigny, private law is the form of law that is exclusively concerned with the rights of individuals. While the community is the individual's goal in public law, in private law the individual's claim becomes the goal of the legal system.

In restricting rights to the domain of private law, we can clearly see the limits of Savigny's line of thought: he misconstrues the logic and dynamic that were inscribed in the modern conception of rights *from the very beginning* and simultaneously driven beyond the domain of private

law. In what follows, this will be shown in detail.[46] At the same time, however, Savigny defines modern private law in such a way that the concept of law is utterly transformed. Private law's power to transform law itself is a direct consequence of its new social significance. For modern "Roman Law" is already distinguished from traditional law by the fact that it defines not merely a limited domain, but the totality of society and its normatively regulated relations. "Private law exists in all societies," explains Franz Böhm, it is "an element of the most diverse social orders. But it is only one element, not the whole of social order."[47] In contrast, private law in modernity comes to define the whole of society; this is why Böhm calls modern civil society "private-law society." Bourgeois society's totalization of private law, making it into the fundamental principle of society, also simultaneously generalizes the functional definition of private law, something emphasized by Savigny: the securing of the individual's rights becomes the new *functional definition of law in general*. Law now *exists so that* rights may be secured.

For this reason, Savigny's "Modern Roman Law" is not merely a special domain of law that is concerned with the claims of individuals. In fact, through its social totalization, it fundamentally reinterprets the category of the claim as a legal concept. This revolutionizes the concept of law, making manifest the modern distinction between *a* right and law: the modern declaration of the primacy of the claim – the primacy of the claim over law [*Gesetz*] – signifies a *redefinition* of law [*Recht*]. Distinguishing between claim and law [*Gesetz*] as two meanings of "right" [*Recht*] amounts to establishing a new concept of law *and* of claim: a new understanding of the *relation* between claim and law [*Gesetz*]; an understanding in which claim has priority over law or precedes law, because now the task, indeed *the function of law in general*, *is to secure claims*.[48]

The modern primacy of rights is thereby understood in a manner that is *rechtsimmanent* (Niklas Luhmann) [Tr. – "immanent to law"]. Strauss and Kelsen understood the ideological program of natural law liberalism to be its wish to base law on rights and to base rights on the subject; "the basis of rights was now the individual, conceived of as subject."[49] In contrast, Savigny's choice of the title "Modern Roman Law" provides a perspective from which we can understand the primacy of rights functionally, rather than normatively and thus concerned with grounding rights. The "rupture of subjective and objective right" is therefore a matter not of the "*source* of law" but of "legal *protection*,"[50] a matter not of the basis, but of the meaning and function of law. "Primacy of rights" means that law [*Recht*] – right [*Recht*] in general – is now a matter of safeguard-

ing and securing rights. Law operates solely by safeguarding and securing juridical claims.

The talk of "natural rights" thereby comes to have a different meaning as well. If we understand the primacy of rights normatively, rights are deemed "natural" because they are supposed to precede law [*Gesetz*] and form its basis. Yet, as we have seen, modern natural law, in Spinoza or Kant, never grasped the connection between a right and law (even if both Strauss and Kelsen attribute this position to modern natural law and criticize it as the ideological primacy of rights). For this reason, talk of the natural when it comes to rights means something completely different from a source of right before law. Instead (as in the thesis we are about to consider), it is the *contents* of a claim that are natural, the aspirations that bourgeois private law, socially totalized, exists to safeguard and secure, according to Savigny. This thesis runs as follows: if the primacy of rights is to be understood functionally and not normatively, then natural rights are not law's basis but its matter. Aspirations and actions are natural, when law has functionally provided for their safeguarding and securing. To say that – according to its new modern definition – there is *nothing more* to law than rights means that law is a matter of *normatively* securing prior and given *natural* aspirations and actions (that is, ones existing before law). The primacy of rights is functional, not normative, but the functional understanding of the primacy of rights simultaneously entails a new conception of the normativity of law. It entails defining the normativity of law [*Recht*] by its *relation to* natural claims. The normativity of the modern right [*Recht*] of rights has the structure of a *legalization of the natural*.

Savigny's examination of "Modern Roman Law" focuses on the historical upheaval in private law. This is related to the thesis that private law today creates a *new concept of (subjective) right or the claim*: the "natural rights" talked about in modern theory are not a new class of rights. Above all, they are not pre-juridical rights that form the basis for law, but signify a radically new way to understand what rights are.

This new understanding combines two features:

(i) The *functional totalization of the claim*. The definition of modern law (as such or in general) is *the securing of rights*.
(ii) The *naturalization of the content* of rights. The modus operandi of modern law consists in the *legalization of the natural*.

The modern totalization of private law creates (i) a new understanding of law (all law secures rights), which (ii) implies a new understanding

of rights: all rights legalize the natural. On Savigny's view, this new understanding of law and of rights begins in private law, but – contra Savigny – it is not limited to it. Modern private law establishes a new understanding of law [*Recht*] and of rights that is impelled beyond private law *according to its own concept* and from its own internal logic, since it inverts the meaning of law [*Gesetz*] in general by granting claims primacy over law. As I will show in the third part of this book, the modern conception of rights definitively includes private *and* public rights. As remains to be shown, however, we can only understand the new modern *meaning* of the concept of rights if we understand it on the basis of the historical upheaval of private law that marks the beginning of modernity.

Excursus: The Politics and History of Civil Law (Weinrib)

Why is the distinction between the two meanings of "right" [*Recht*] – between law [*Recht*] and a right – so fundamental in the modern conception of law? Because drawing this distinction means determining the modern conception of rights by radically redefining the relation between law [*Gesetz*] and claim. This redefinition is radical because it involves the relation of norm and nature (and because this relation, as will be shown, is constitutive of law[51]). – We thus have our question, and a provisional answer that remains to be further developed in what follows.

This answer is critical of two other common ways of defining law as claim. *First*, it clearly rejects the idea that the concept of a right (in the subjective sense of the word, namely a right which one has and exercises) can only be understood on the basis of a subject who is the bearer of rights: rights as claims are not a property of the subject, which the subject asserts and establishes. *Second*, however, rights are also misunderstood if, because of this, they are merely defined as a moment in the legal relationship between two persons. The step from rights as a property of the subject to rights as a moment in a relationship is correct, but insufficient. To stop here amounts to a depoliticization and a dehistoricization of the concept of rights.

This thesis is opposed to a theory that – in Ernest J. Weinrib's pointed formulation[52] – seeks to protect the "autonomy" of "the idea of private law" from its economic functionalization and from sociological critique. The goal of this theory is to conceive the legal relationship between a person who is entitled to something and a person who is correspondingly obligated as an independent relationship. In other words, this theory

aims to conceive such a legal relationship in the juridical "form" that it has itself established. It thus characterizes this relationship as a "direct," "immediate" relation between two persons, which is defined by a "correlation" of entitlement and obligation. Thought in purely immanent terms, this relation's "unity" is to be found in the correlation of law and duty, since this correlation entails that the basis for one person's responsibility, for that person's having to do something (having an obligation), and the basis for another's claim to something (having a right), is *the same*. On Weinrib's thesis, this is why the private legal relationship can only be understood on its own terms.

One aspect of this thesis is the irreducibility of legal obligation. In even their most elementary forms, private legal relationships between persons (such as relations of exchange) must become autonomous, independent of the motives that inclined individuals to enter into them (and of the social functions that fulfill their exchange relations). Exchange cannot exist without the normative correlation of entitlement and obligation, which bridges the distance, however minimal, between individual actions. To exchange something is completely different from handing things over at the same time. "It was here," writes Nietzsche on contractual relationships, "that *promises* were made."[53] The breeding of animals that can (and therefore may) promise is thus presupposed. To enter into exchange with someone always already means to recognize the equal normative status of that person (or, in other words, to recognize the other person as an equal). Instead of merely being an individual distinct from me, the other becomes a person equal to me, because she has something at her disposal that I want from her, and I have something at my disposal that she wants from me. Mutual recognition or the equality of persons is the necessary condition for the correlation of rights and obligations in the private legal relationship.

The recognition or equality of persons, however, which is presupposed in exchange, simultaneously exceeds every act of exchange: it is not merely relative, between the two of us, but general. In exchange, the normative status that I recognize in another is based not on *my* act of recognizing *you*, but on the application of a general rule that precedes this act. We are both equally subject to this rule, whose particular cases we thus equally constitute. The exchange relationship is a *private* legal one because it is a matter of the entitlements and obligations in a relationship between *individual* persons (who, as particular individuals, have different motives for entering into it). The exchange relationship is only a private *legal* one, however, because the persons bound to each other by entitlement and obligation fall under a general rule, which confers on

them their normative status as *equal* persons.[54] In a relationship between mere individuals, there are no entitlements and obligations at all. Such a relationship has no normative content on its own. Normativity (in the interactions between individuals) signifies equality, and equality requires generality: a rule or a law [*Gesetz*].

The force of obligation, which first makes one person's claim on another into an entitled claim, is therefore *not* to be explained (as Weinrib believes) on the basis of the "immediate," "direct" relationship between the two parties. In other words, this relationship (and thereby right in the subjective sense) is not autonomous: it is based on right [*Recht*] as law [*Gesetz*] (right in the objective sense).[55] Right as claim cannot be understood at all – claim is not understood as a *right* – without understanding that it is based on right as law. It only achieves its normativity on this basis. Savigny formulates this relationship, in which a basis is established, as follows:

> The decision upon the individual right [C.M.- in the subjective sense] is only possible by a reference of the particular matters of fact to a general rule by which the particular rights are governed. That rule we simply call *law* [Tr. – *Recht*] or law in general: some term it law in a general sense.[56]

One person's rights and claims vis-à-vis another are only possible on the basis of law, that is, on rules that are generally valid. In other words, a person's private rights vis-à-vis another are based on both persons' subjection to law [*Gesetz*]. As the correlational theory demonstrates, rights only exist in the legal relationship, but legal relationships only exist in normative orders whose generality is able to give rise to equality. The normativity of the private legal relationship is thus not autonomous, as the correlational theory claims, but is something that is done, an effect of law [*Gesetz*]. The normativity of the private legal relationship therefore has a political basis. For the relationship between the individual and law [*Gesetz*] is "political" because it is a relationship of membership, in which the individual takes part in a general order. This is the basis of private law. Private law is also called civil law, *ius civile*, because it is the law [*Recht*] of citizens who are equally under the law [*Gesetz*]; private law is political.[57]

If legal relationships between persons, in which rights exist as individual claims, are therefore political insofar as they arise on the basis of right as law, then the question of the form of the rights that individuals have over against each other leads to the political question of the form of the administration of law over individuals. Why does the legal system