
Critique as (preceding) Political Autonomy

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ABSTRACT

In spite of its authority to claim facts, law is by no means neutral. Deeply imbued with economic and ideological interests, opportunistic goals and hidden motives, its function to guarantee political autonomy has been deeply compromised. This observation, systematically explored in Critical Legal Studies, is the point of departure for this essay. In asking how (a greater degree of) political autonomy may be achieved, it puts forward an understanding of autonomy along three conceptual distinctions: As (1) self-governance of the individual and the community (Personal and Political Autonomy), (2) as self-governance bereft of external and internal constraints (External and Internal Autonomy), and (3) self-governance as the absence of constraints and the capacity to exercise governance (Negative and Positive Autonomy). The main argument is that critique is not only the prerequisite but also the essence of political autonomy. In discussing four authors that have vitally contributed to the enterprise of the critique of law (Marx, Nietzsche, Weber, Freud), it attempts to disentangle the ways in which critique is essential for disposing of self-instituting capacity. I propose a reading that does not engage with the differences between their theories but stresses their commonality. While distinct in their analysis of the constraints responsible for the lack of political autonomy, their desire for the individual's liberation of (economic, ideological, despotic, subconscious) forces provides a common ground. Therefore, their critique can be understood as an enterprise deeply indebted to Kant: Not as a rejection of Enlightenment but as an effort to transform it from within.

Introduction

To understand how the critique of law is relevant to the question of political autonomy in modern political philosophy, the two terms need further specification. What is the critique of law? What is political autonomy? The critique of law as a 'project'¹ has, very broadly speaking, come to realize that the law as a system and discourse is not an autonomous sphere of society but inextricably bound to a political process.² This implies the notion that no legal principle has an independent, transcendent derivation but is made by humans on specific terms in the context of specific circumstances, with specific interests and preferences.

The enterprise of critique of law, the insight that 'law is not just law', has taken very different forms. A common starting point can, however, be seen in the shift away from the perception of law as something that is god-given or directly derived from nature as part of the larger project

of enlightenment. Accepting that law is not the deduction of the will of god opens up the possibility to reflect upon what law ought to be (normative jurisprudence) in addition to what law is (analytical jurisprudence). Questions on the goal or purpose of law can, hence, enter the discussion. One of the first proponents of this is Bentham, who wants law to be useful; another stance is put forward by Kant who sees law as the means to guarantee freedom or autonomy in a society.

This objective, autonomy, is the common denominator of all critique of law, as I would like to argue: however different in their attempts, achieving (a greater degree of) autonomy is what all critics of law try to do. Whether by exposing law as a political project that serves the interests of the ruling class (Marx), demonstrating that values and norms are determined by specific events (Nietzsche), calling for a regime that is not dependent upon despotism (Weber) or demonstrating in how far humans are constrained by

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¹Referring to the critique of law as a project, allows to account for the fact that it is a complex undertaking that entails various interrelated tasks and operates with certain costs and limitations.

²This is concisely explained by Taylor, who posits that "as an institution, law attempts to incorporate the needs and goals of the diverse interests that make up society; this is inevitably a political process. Both the definition and the achievement of legal principles are the results of political struggles, both historical and contemporary. [...] Just as legal reasoning, so are legal principles products of practical reason and political processes" (Taylor 1982: 184).

the unconsciousness (Freud) – the goal is always, whether explicitly or implicitly, autonomy.

The common ground of these accounts is that they see law as the instrument to achieve self-governance. This is the common denominator that emerges out of the several strands of critique of law. That a critique of law precedes political autonomy, is the hypothesis put forward. Understanding political autonomy both on a collective level (as the means to realize self-governance of the community by the community in establishing law as a derivative of the will of the political community as the legitimate source of law), as well on an individual level, as the prerequisite of self-governance, this paper will briefly discuss four authors and conclude with a discussion on critique and self-governance, asking to what extent these may be concurrent or mutually dependent.

Political Autonomy

Very broadly, autonomy may be understood as self-governance.³ It is the central value in the Kantian tradition and, more broadly, modernity. To understand what this term entails, it can be helpful to reflect upon autonomy along the following distinctions: (1) personal versus political autonomy, (2) external versus internal autonomy, and (3) positive versus negative autonomy.

Personal versus political autonomy

Self-governance of an individual versus self-governance of a community

Autonomy can refer to the self-governance of an individual or a group. While the first refers to the autonomy of an individual to act on his or her own terms, the latter refers to the self-governance of a group of persons, a community - short, a political entity.

Acting politically autonomous is then understood in relation to concepts of civil liberties and human rights. This could imply fiscal and institutional independence of another community. A very uncompromised version⁴ of such political autonomy has been put forward by Castoriadis, who calls for a society that produces its own institutions (as opposed to deriving them nature, god or any other transcendental entity). Committed to the Greek ideal of democracy as a fully-fledged direct democracy, autonomy according to Castoriadis is only fulfilled if shared equally between all members: Autonomy is the full realization of the political will by the people, in that they create their institutions, in that “we make the laws, we know

it, and thus we are responsible for our laws and have to ask ourselves every time, ‘Why this law rather than another one?’,” and that, as a result, the collectivity might again take their institutions up and transform them” (qtd. in Ojeili 2001: 230). The dominant strand of ideas of democracy, of course, usually offer much more modest versions: Kelsen, for instance, is readily willing to accept three key compromises to democracy: (1) political freedom as the best proxy to natural freedom (since natural freedom doesn’t exist or would lead to unbearable conditions in a Hobbesian sense) (2) representation instead of full participation, and (3) majority principles in lieu of full consensus.

External versus internal autonomy

Self-governance devoid of external constraints versus self-governance devoid of internal constraints

Usually, autonomy is understood as freedom from external constraints. Another perspective is to understand it as freedom from internal constraints. Internal constraints hindering self-governance could, for example, be the desire to conform to society’s expectations but also certain psychological conditionings determining human action: Freud is the main proponent of that stance. Following his argument, self-governance is constrained due to the overarching influence of the unconsciousness governing the actions. Castoriadis’ vision of political autonomy implies both an external as well an internal, psychological dimension of autonomy as Ojeili elaborates: “Castoriadis was calling for the integration of “the revolutionary signification of psychoanalysis” into socialist theory by 1962, and he became a practicing psychoanalyst in the 1970s. For Castoriadis, psychoanalytic thought, like libertarian politics, has autonomy as its goal. Again, autonomy signifies lucid and deliberate self-knowledge and self-regulation, rather than regulation by another (the ‘other’ in psychoanalytic terms). The end of analysis/the achievement of maturity would mean the ability to live with the Abyss, the clear knowledge of the mortality of that which we create, of our social institutions, and of our own person. This “ethic of mortality” would mean a break from the assumed omnipotence and immortality of the alienated person, from the eternity promised by the ideologies of heteronomous societies, and from the modern phantasm of full rational mastery” (Ojeili 2001: 236). As Doyle specifies, “Castoriadis redefined individual autonomy in Freudian terms, as the creation of a new type of relationship between the conscious and the unconscious as part of an ongoing

³Deriving from Greek, the word autonomy consists of the prefix - auto- "self" and the suffix "law".

⁴As Ojeili points out, “Castoriadis’ project of autonomy contains a robust utopian dimension. Receiving his political inheritance from the broad libertarian socialist tradition, Castoriadis continues to challenge the domination of state and capital and to insist on the liberatory possibilities of direct democracy” (Ojeili 2001: 230).

attempt to draw on the resources of the conscious mind to counter the domination of the alien meanings emanating from the unconscious” (Doyle 2012: 336). In so far, it seems righteous that Doyle speaks of Castoriadis theory as ‘marrying Marx and Freud’.

Positive versus negative autonomy

Self-governance as the absence of constraints versus self-governance as the capacity to exercise governance

Usually autonomy is conceptualized negatively as the absence of constraints. Interpreting it positively could mean to conceptualize it as the capacity to act in exercising social or group rights as a means of self-governance of political autonomy. Either way, regardless of the specific definition, autonomy is an ideal rather than a reality.⁵ Perhaps it is only Kant who believed in the possibility of its full realization, committed to the idea of emancipation from religion and superstition, tradition, and despotism. Most of his successors explain why it can’t be realized – without, however, losing the hope to at least increase its degree, with law as key to this endeavor.

The Critique of Law

Marx

So how committed is Marx to autonomy? Marx contributes to the enterprise of the critique on law by showing in what ways law is subject to economics. The law’s claim to objectivity is rejected by Marx in showing how law is not the law of and for all but the result of and serving very particular interests. According to Marx, law is little more than the reflection of economic inequalities in society with law as a mirror of dominant economic interests (also cf. with Taylor 1982: 158). In order to realize political autonomy, Marx wants to overthrow this order.

Nietzsche

Nietzsche’s contribution to the ‘project of the critique of modern law’ lies in the ‘discovery’ of the arbitrariness of

norms, values, morals. He discredits the law’s claim to objectivity by unveiling that every norm, value or moral is bound to specific events – including law.

Questioning that ‘something can emerge out of nothing’ on a very basic level, he raises awareness for the fact that moral values have historically emerged rather than being given (by god or any other metaphysical entity). With Nietzsche god is dead and meaning is exclusively created by the individual; laws are human-made, to some extent random, determined by specific events, power battles and ideologies.⁶ A critique of law in that sense acknowledges that law, as anything else, is subject to a certain ‘narrative’, the result of a distinct genealogy. Autonomy is looked for by equipping the individual with the ability to look behind the facade of supposedly neutral norms and objective law. In that sense, Marx and Nietzsche have something in common: Both unveil how the irrationalist tendencies of law is in fact, in spite of its authority to claim facts: Marx in demonstrating how law is by no means the result of a rational procedure but imbued with the interests of the dominant class, Nietzsche by exposing how the values underlying law are random to a large extent. Self-governance is increased in that Nietzsche opens up the possibility to trace the genealogy of norms and, by explaining it, making it available to every one.

Weber

What is Weber’s contribution to the ‘project of the critique of law’? Weber has a very special standing in the critique of law. Both aware of the critique of Marx⁷ and Nietzsche, who expose the irrationalist nature of law, he is deeply committed to saving the individual from despotism in a Kantian sense by advocating for legal formalism. Legal formalism here refers to a strict distinction between law-making and law-finding, interpretation and application.

Weber, from his perspective as a sociologist acknowledges that the idea of what law is, is normatively grounded but sees a way out of this dilemma⁸ in applying deductive rigor and developing an increasingly rational⁹ technique in procedure to law. From a theoretical point of view, the general development of law and procedure may be viewed as passing through the following stages: first, charismatic legal revelation through ‘law prophets’; second,

⁵Foldvary for instance, stresses that autonomy is a matter of degree of self-governance (see Foldvary 2011: 853).

⁶“His [Nietzsche’s] fundamental claim, one that needs, he says, to inform all kinds of historical research, is that the origin of the development of a thing and its ‘ultimate usefulness’ are altogether separate. This is because what exists is ‘continually interpreted anew [...] transformed and redirected to a new purpose’ by a superior power” (Ansell-Pearson 2006: 19)

⁷Weber’s theory is highly informed by Marx. For his meticulous engagement with Marx, Weber has often been seen as an internal critique of Marxism.

⁸One could argue that Weber is Hegelian in that he acknowledges that there are dilemmas or contradictions that impede coherence but does equally believe that these can be overcome.

⁹“Weberian substantive legal rationality is rational in the sense that it appeals only to rationally calculable factors (no oracles or trial by battle). It may also be rational in the sense that it decides according to a rule (derived from one of the extra-juristic normative orders of the society), or it may proceed ad hoc” (Kennedy 2003: 1072).

empirical creation and finding of law by legal honoraries, i.e. law creation through cauterized jurisprudence and adherence to precedent; third, imposition of law by secular or theoretic power; fourth and finally, systematic elaboration of law and professionalized administration of justice by persons who have received their legal training in a learned and formally logical manner. From this perspective, the formal qualities of law emerge as follows: arising in primitive legal procedure from a combination of magically conditioned formalism and irrationality conditioned by revelation, they proceed to increasingly specialized juridical and logical rationality and systematization, sometimes passing through the detour of theoretically or patrimonially conditioned substantive and informal expediency. Finally, they assume, at least from an external viewpoint, an increasingly logical sublimation and deductive rigor and develop an increasingly rational technique in procedure" (Weber 1992: 882).

The impartiality that Weber demands is targeted at law-finding and interpretation.¹⁰ The role of the jurist is, hence, that of a mechanical operator of legal logic, a neutral agent, whose preferences are left out of the process.

To some extent, Weber thereby manages to reconcile the 'irrationalist' strand of critique (Marx, Nietzsche) with Kant and Bentham. He acknowledges that there have been unequal power relations at work in reading Marx and taking him seriously¹¹ but also rejects that economic forces have been decisive alone¹². He stresses that ideas matter (Nietzsche) and, nevertheless, hopes for the better in rationalizing, 'enlightening' things (Kant), believing that law is a useful tool for that (Bentham). My argument follows Feldman's interpretation of Weber's theory of law here, who contents the notion that Weber's theory of law is not fundamentally inconsistent, as often argued but instead,

as a sociologist building on neo-Kantian metaphysics, Weber explores the inconsistencies that are inherent within Western society itself, including its legal systems.

While it remains contested, in how far Weber was an adherent to democracy, his theory certainly allows to set off for new shores. It is Kelsen, a student of Weber, who becomes the advocate of democracy: Significantly influenced by Plato, and relying on Rousseau in believing that a state of nature would be unbearable, he calls for a neutral law devoid of ideology. The state is in consequence little more than a conglomerate of law whose focus is to preserve a neutral judicial order. To some extent, Kelsen, hence radicalizes Weber in that he tries to neutralize everything. However, his argument lags behind Weber's since his axioms remain quite weak: While Weber acknowledges that there is something irrational to sciences (some sort of spark of inspiration), Kelsen rejects this and instead relies on some sort of hypothesis of a fictitious "Grundnorm", from which all other norms are deducted. He also discredits the validity of philosophy. Given these rather weak assumptions, it may come as no surprise that Kelsen did never rise to the prestige of Weber, who hopes to save the individual from the arbitrary and tyrannic reign of despotism, by formalizing procedures. By formalizing procedures, he hopes to spare the individual of the arbitrary and tyrannic reign of despotism.¹³

The solution he proposes is that of an increasingly rationalized, predominantly bureaucratic mode of organizing society¹⁴, in which it is formal procedures rather than the sentiment or preferences that constitute order to save the individual from domination and oppression.¹⁵

¹⁰"Weber's ideal type of substantively rational legal thought succumbs, in his theory, to LFR because LFR is superior both in that it provides calculability for the addressees of the legal order and because it permits a sharp separation between norm formulation and administration, whether the formulator is an absolute monarch or a parliament" (Kennedy 2003: 1074).

¹¹"We shall only recall that the great differences in the line of development have been essentially influenced first, by the diversity of political power relationships, which, [...] have resulted in very different degrees of power for the imperium vis-à-vis the power of kinship groups, the folk community and the status group; second by the relations between the theoretic and the secular powers, and, third, by the differences in the structure of the 'legal notables' significant for the development of a given law, differences which also were largely dependent upon political factors". (Weber 1992: 883).

¹²"Economic conditions have [...] everywhere played an important role but they have nowhere been decisive alone and by themselves" (Weber 1992: 883).

¹³"The law is drawn into antiformal directions, moreover, by all those powers which demand that it be more than a mere means of pacifying conflicts of interest. These forces include the demand for substantive justice by certain social class interests and ideologies, they also include the tendencies inherent in certain forms of political authority of either authoritarian or democratic character concerning the ends of law which are respectively appropriate to them; and also the demand of the 'laity' for a system of justice which should be intelligible to them; finally, as we have seen, anti-formal tendencies are being promoted by the ideologically rooted power aspirations on the legal profession itself" (Weber 1992: 894).

¹⁴"Weber saw the state as a territorially-defined, established political and bureaucratic order that enjoys a monopoly of the legitimate use of force. And it is the conviction that this political and bureaucratic order is autonomous form wider social and economic forces that is at the heart of Weber's analysis" (Jackmann 1993: 62).

¹⁵What happens if this bureaucratization is fully installed, is covered by Arendt, who has termed the *Niemandsherrschaft* – a type of regime in which nobody can be held responsible anymore.

Freud

How does Freud criticize law and try to foster autonomy? Freud unveils two aspects that are vital in those terms. First, that there is a sub consciousness that the individual has no or very little access to, and, second, that this sub consciousness has a massive impact on the actions of humans.¹⁶ This inevitably results in a high degree of suspicion towards the actor: Judges, as well as any other actors, are to a large extent driven by hidden motives.

Freud is discrediting law's claim to objectivity by demonstrating that it is the id rather than anything else that accounts for decisions, while the ego (and law) shrink to a plaything of forces. However strong this external psychological critique of legal substance is, it does leave some hope for autonomy. The way to self-governance here is the discovery of the hidden motives that drive actions. By rationalizing these unconscious forces behind actions, i.e. tracing their origins, the individual increases his or her room for maneuver.

Conclusion: The Critique of Law as a Prerequisite to Political Autonomy

The goal of discussing Marx, Nietzsche, Weber and Freud was to show, in how far all concerned with autonomy in some way or another: Marx aims to realize autonomy by liberating the individual of oppressive economic forces, Nietzsche by liberating it from the oppression of presumably transcendently derived values, Weber by saving it from oppressive political forces and Freud by attempting to rescue the individual from the id that determines the action. This is at the core of all their analyses, tracing what the oppressive forces are (economics, values, despotism, the unconsciousness) and, in a second step, getting them out of the way to emancipate the individual and achieve self-governance.

At the center inevitably remains Kant's idea of enlightenment as the human's emergence from nonage.¹⁷ While Kant attributes an entirely different reason to this nonage (some sort of self-imposed laziness that can be easily overcome through the will), the four discussed authors see obstacles to freedom in historically emerged societal structures, i.e. economic forces (Marx), values (Nietzsche), unformalized structures (Weber) or the psychological constitution (Freud). Also, the proposed resolutions to achieve autonomy, differ. However, the first

step of all analyses remains the same: Critique. Challenging the assumption that legal reasoning is "distinct, as a method for reaching correct results, from ethical and political discourse in general, [that] law is an autonomous system of rules and concepts" (Kennedy qtd. in Taylor 1982: 160) is the first step to more self-governance.

In unveiling that neither the state or the law have been, nor are neutral, value-free arbiters, independent of and unaffected by social and economic relations (see Taylor 1982: 160), allows imagining a law where equality is increased by balancing these unjust power relations. Accepting that law involves subjective choice and is imbued with values, opens up the possibility of establishing law that contributes to a more humane, egalitarian, and democratic society. Put differently, acknowledging that the claim of law to realize self-governance has failed, allows thinking of a law that could reinstate self-governance. While this may seem contradictory (How can something that regulates limits (choices) enforce greater freedom?), it does not have to be as convincingly explains elaborating on Kant: "Autonomy has typically meant a certain independence from constraint, so how then can a meaningful conception of autonomy be constituted by the constraints of moral duty? The answer to this question is that these constraints are themselves a product of self-legislation; autonomy is not inconsistent with constraints per se but rather with constraints imposed on an agent by someone else. In the case of Kantian personal autonomy, this self-legislation has two facets. First, the imperfect duties of self-perfection and beneficence are creations of our own pure practical reason: maxims inconsistent with these two duties cannot be universalized (as they lead to a contradiction in will) and therefore violate the first formulation of the categorical imperative, which itself follows from our autonomous will" (Robert Taylor 2005: 615-616). Critique is, hence, the decisive step for change.¹⁸

Autonomy, that is "the recognition and acceptance of humanity's responsibility for its own norms, values and laws, as its self-instituting capacity" (Doyle 2012: 335), has an internal and external dimension of which both are vital for political autonomy, as the essence of democratic praxis. On the collective or external level, it entails that law ensures self-governance by deriving its legitimacy derived from the will of the people. This is, however, not enough, since self-governance does also entail freedom from internal constraints. As Doyle seizes: "Modern autonomy involves a lot more than self-government. It

¹⁶It can be argued that Freud is here quite close to Marx: Both attempt to display the underlying forces of society (interest of the bourgeoisie; motives of the unconsciousness) that constitute the order behind the facade.

¹⁷Translations of the term *Unmündigkeit* Kant originally are a little bit tricky here; while some have translated it with 'political immaturity', the term nonage seems more appropriate.

¹⁸As Dworkin points out, critique is "a second-order capacity of persons to reflect critically upon their first-order preferences, desires, wishes, and so forth and the capacity to accept or attempt to change these [...]" (qtd. in Robert Taylor 2005: 605).

consists in historical self-production [...]” (Doyle 2012: 341) [...] This self-production is achieved by tracing what has produced the self by means of self-knowledge that results in self-direction. In other words, an awareness of the structures, ideas, forces etc. that have impacted and produced the self in order to potentially liberated oneself from these forces.

It is political freedom that is the most important feature of democratic societies, inspiring modernity dating back to Kant’s perception of enlightenment and it is the overarching task of critique to unveil all the oppressive, disabling conditions hindering the self-governance of individuals as a crucial step to change them. The critique (of law), is hence the prerequisite of political autonomy. It is important to note that the critique of law hasn’t stopped with Freud. Foucault and Adorno, for instance, have equally engaged in questions of political autonomy, departing from an analysis of the obstacles that stand in its way. However different their approaches, the concern remains a deeply Kantian one.¹⁹ Autonomy and critique are deeply intertwined in their theories: As well as Foucault, Adorno believes that effective resistance to a society that ‘governs’ us consists, in the first instance, in critical reflection on how society limits our capacity for autonomous thought. (also cf. with Cook 2013: 975). This critical reflection is the basis of autonomy in that it precedes ways to emancipate oneself from these limits.

As Adorno puts it, in rejecting Marx’s claim that the point is to change the world rather than merely to interpret it, “one reason why the world was not changed was probably the fact that it was too little interpreted” (qtd. in Cook 2013: 975). Critique itself is ‘a comportment, a form of praxis’, “more akin to transformative praxis than a comportment that is compliant for the sake of praxis’ precisely because it involves resistance” (qtd. in Cook 2013: 975). In this sense, critique does not only precede political autonomy but is the essence of it.

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¹⁹Given Foucault’s criticisms of Kantian and Enlightenment, as well as Adorno’s and Horkheimer’s analysis of the enlightenment as yet another mystification, it may come as a surprise to label their attempts as Kantian. However, while they reject the transcendental as the origin of enlightenment, writing from a standpoint of deep disillusionment, both of their works do aim to enforce political autonomy by pointing to its obstacles. As well as for the other authors discussed, I do want to propose a reading of Kant and his successors that does not engage with the differences between their theories but stresses the common aim of political autonomy. The discussed theories are, thus, no total critique of Enlightenment beliefs and values but are better understood as attempts to transform them from within (also cf. with Hendricks 2008). Against the background that shows that the enlightenment has failed, the critiques do not give up on Enlightenment but take up the thread in various ways to nevertheless come to self-governance.