

Reason after its Eclipse: On Late Critical Theory

by Martin Jay.

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Formwandel der Verfassung: Die postdemokratische Verfasstheit des Transnationalen (*The Changing Form of the Constitution: On the Post-democratic Composition of the Transnational*)

by Kolja Möller.

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by Darrow Schecter

Martin Jay has written some excellent books about the Frankfurt School that are contributions to critical theory in their own right. *The Dialectical Imagination* (1973, 1996) and *Marxism and Totality* (1984) are just two examples. His most recent book, *Reason after its Eclipse: On Late Critical Theory*, falls short of the standards set in those earlier works. Jay is not alone in narrowing down critical theory to the Frankfurt School. Nor is he the only thinker to conflate late critical theory with the works of Habermas (Honneth, Menke and Wellmer are briefly discussed, but rarely in any detail). To put the matter bluntly, there is far more to critical theory than the Frankfurt School, and there is a lot more to late or contemporary critical theory than Habermas. There is little point in this review in engaging in a long disquisition qualifying what does and what does not count as critical theory. But Jay should really have either addressed other currents of critical theory, or entitled his book *The Second Generation and Communicative Reason: Habermas and the Frankfurt School*, or something broadly along those lines. Writing a book analysing other currents of contemporary Critical Theory would surely have turned out to be a considerably larger project. But the problems in Jay's rather brief account indicate that it would be well worth undertaking.

By contrast, Kolja Möller's *Formwandel der Verfassung: Die postdemokratische Verfasstheit des Transnationalen* (*The Changing Form of the Constitution: On the Post-democratic Composition of the Transnational*), offers an insightful look into a range of diverse currents within Critical Theory today. Like Jay, Möller relies on Habermas to show how and why Critical Theory is still very relevant to the study of late modern society. But Möller goes well beyond the limits of Jay's book. His work skilfully references debates connected with the Bremen based journal *Kritische Justiz*, and he draws on

the findings of the researchers involved in the 'Normative Orders' research cluster at the University of Frankfurt as well. Möller is one of a number of contemporary critical theorists to shift attention away from the fate of reason and the degradation of the public sphere in late modernity. Instead, he investigates the implications of 'the post-national constellation' for the study of democracy, constitutional law, and the global dimension of conflict in what Luhmann refers to as the world-society (*die Weltgesellschaft*). He also builds on some of the ideas developed by Franz Neumann in Neumann's 'The Change in the Function of Law in Modern Society', written in 1937, now available in William E. Scheuerman (ed.), *The Rule of Law under Siege: Selected Essays of Franz L. Neumann and Otto Kirchheimer* (1996).

In that influential piece Neumann anticipates the theory of *Verrechtlichung* by showing that the close link between citizens and the legislature, once mediated by the public sphere in Habermas' famous account, cannot be taken to be a constitutional constant in the era of monopoly capitalism and technocratic management of the economy. In principle, the nexus between the citizenry and the legal process helps safeguard the democratic content of law, and, ensures too that the law can be changed in step with social change. Like Marx in the *Eighteenth Brumaire*, Neumann notes that in times of crisis, the state executive is well positioned to usurp some of the key legislative functions of the parliament, such that government by law quietly passes over into government by executive decree. Whilst the background to Marx's analysis is the disappointing aftermath of 1848 in France, i.e., Louis Bonaparte's coup in 1851, and the background to Neumann's is the National Socialist colonisation of the Reichstag shortly after 1933, Möller focuses on contemporary instances where laws are passed with little or no official legislative input from the democratic basis of society. One notable example is the EU resolution stipulating that member states must enact plans to reduce and eventually eliminate their budget deficits. What this promulgation does, in effect, is drastically to curtail the possibility of political choice in what are meant to be democracies. It is not particularly polemical to observe that democracies with limited scope for political choice, and practically no realistic chance of comparing and testing significantly divergent political alternatives, are only *formally* democratic. The fact that the democratically elected Syriza government has been forced to go back on most of its reform plans indicates that the legislative link between the citizens and government is not the real key to late modern democratic politics. It is apparently far more important to have a well functioning economy, or, to be more precise, it is more important to have an economy that is *coded* to function in very specific ways and according to very particular definitions of growth and efficiency. The emphasis on formalism and coding raises

points about Luhmann and systems theory that are treated with admirable clarity in Möller's book, and which merit a quick word of explanation below. But before doing so it is important to bear in mind that what Marx and Neumann regard as crises have very subtly become part an informal constellation of legal, political and economic relations that structure the horizon of what is widely taken to be normal rather than exceptional or transitional. Wendy Brown and Giorgio Agamben analyse these phenomena. It is possible to regard this notion of an informal constellation as a development in the theories of passive revolution and hegemony, and indeed, Möller makes explicit reference to Gramsci at various points in his book.

Luhmann consistently emphasises the point that feudal societies are stratified in ways that feature vertically articulated, naturalised caste, class, and clan distinctions, where class is an extension of caste. By comparison, modern societies are functionally differentiated along horizontal lines. This means that whereas pre-modern societies tend to be characterised by the relative unity of legal, political, pedagogical, military, religious, economic, and aesthetic spheres, modern societies tend functionally to differentiate these operations according to discrete codes such as legal/not legal, government/opposition, etc. The analytical implication for those who adopt a similar approach to sociological enquiry is that there cannot be an organic link between law and politics; the ideological implication that has informed a number of prominent liberal democratic currents of theory and practice is that the religious, economic, aesthetic, etc., politicisation of law will violate the formally codified, positive character of post-traditional law, and undermine the neutrality of the judiciary as well. That is, certain liberals can claim to think in harmony with sociological modernity to the extent that direct political control of the economy (command central planning) is likely to be as bureaucratic and inefficient as religious law is likely to be oppressive and intolerant. By the same token, proletarian science is not likely to fare much better as science than strictly military education is likely to fare as education. This point is not lost on critical theorists writing prior to Möller; moreover, the critical theorists generally seem to be far more aware than liberals of both the emancipatory potential and the risks of differentiation. Walter Benjamin notes that modern industry and mechanical reproduction release aesthetics from the constraints of religious belief and traditional hierarchies, albeit at the risk of thorough commercialisation. Habermas identifies the differentiation of system and lifeworld as the precondition of rational, reflexive lifeworlds. But he hastens to add that it is this very differentiation that raises the possibility of a colonisation of communicative lifeworld rationality by instrumental systemic rationality. In other words

there has always been a markedly dialectical dimension to the critical theoretical assessment of functional differentiation. It is a sensitivity that acknowledges the affinities between differentiation and alienation, but which is simultaneously wary, as Adorno undoubtedly was, of embracing re-unification as the solution. The problem spotted by certain critical theorists and liberals alike is that re-unification is likely to mean oppressive centralisation predicated on the existence of a collective subject and/or authoritarian dogma. Instead of settling for liberalism or embracing the highly problematic idea of post-alienation unity in 'the multitude', Möller charts an independent course.

He retains select aspects of the Marx-Luhmann synthesis found in the works of Gunther Teubner, Hauke Brunkhorst and Andreas Fischer-Lescano, without, however, abandoning Marx and Gramsci on political economy, education and culture. If the French, Russian, Chinese, and Cuban models of revolution are comprehensive, it may be because they address problems of general statehood within nationally defined, territorially demarcated contexts. General statehood has already been secured in many parts of the world; it may be faulty and susceptible to subversion by the military or clergy, depending on the context, but it is stable for the most part. In a global epoch marked by extensive functional differentiation, it may well be that what is now required is a war of position seeking a constitutional overthrow of neo-liberalism. This can no longer be achieved through a war of manoeuvre that takes on all social systems at once in what could only be a highly centralised and ultimately unsuccessful state – even if a political party somehow managed briefly to seize power in the name of the revolution. This prompts Möller to suggest that instead of centralising the means of production or subordinating the judiciary to political aims, it may be possible to re-code the economy, law, justice, education, etc., thereby preserving a number of the manifest advantages of formalisation and positivism, whilst also challenging the rampant inequality and debilitating depoliticisation inherent in the specifically neo-liberal version of functionally differentiated late modernity.

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