Franz L. Neumann's Struggle with Marxism

El debate de Neumann con el marxismo

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Abstract

In his research on *The Governance of the Rule of Law* (1936), Franz L. Neumann (1900-1954) claims that nineteenth century liberal capitalism had transformed into an Era of monopolistic capitalism in the twentieth century. This, according to him, led to the disintegration of the rule of law and the rise of authoritarian rule. This article revisits Neumann's critical legal theory and discusses his Marxist theory of decay. The author claims that by revising the schematic Marxist opposition, we can open up pathways of renewing Neumann's dialectical theory of law.

Keywords: *Franz L. Neumann; Legal-Form Theory; Karl Marx; Marxism; Critical Theory; Second International; Monopoly Capitalism; Rule of Law; Democracy; Crisis.*

Resumen

En su investigación sobre *El gobierno del Estado de derecho* (1936), Franz L. Neumann (1900-1954) afirma que el capitalismo liberal del siglo XIX se había transformado en el siglo XX en una Era de capitalismo monopolístico. Esto, según él, llevó a la desintegración del estado de derecho y al auge del gobierno autoritario. Este artículo revisa la teoría legal crítica de Neumann y analiza su teoría marxista sobre la decadencia. El autor afirma que, revisando la esquemática oposición marxista, podemos abrir caminos para renovar la teoría dialéctica del derecho de Neumann.

Palabras Clave: *Franz L. Neumann; Marxismo; Teoría Crítica; Segunda Internacional; Estado de derecho; Democracia; Crisis.*

Neumann's Life and Work in the Context of Critical Theory

Franz Leopold Neumann (1900-1954) is one of the few legal theorists in the context of Critical Theory. He was born in 1900 in the little town of Katowice on the Prussian-Polish border as a son of lower-middle class Jewish parents.[1] After finishing school, Neumann began his studies in legal sciences in Breslau and at the University of Leipzig in 1918. Whilst too young to have fought at the front lines of *World War I*, he actively participated in a socialist workers and soldiers' council in Leipzig, thus taking active part in the revolution of 1918 and the founding of the *Weimar Republic*.[2] After his first degree, he moved to Frankfurt where he became a member of the social democratic party and continued his academic work as an assistant to the famous socialist legal theorist Hugo Sinzheimer.[3] As early as 1923, Neumann published his first dissertation on the relationship of the state and punishment, laying a foundation of his Marxist legal theory.[4] In 1928, Neumann moved to Berlin with his comrade and close friend Ernst Fraenkel, where they opened up a lawyer's office focusing on defending workers' rights in the field of the newly founded labor law.[5]

In this period that lasted until 1933, Neumann was engaged in many legal cases he commented in articles. Therein, he developed and emphasized his socialist perspective on the legal struggle for workers' rights and the transformation of the *Weimar Republic* into a socialist state through reformist strategies. This work was abruptly terminated by the collapse of the *Weimar Republic* and the rise of *National Socialism*. After the National Socialist party came to power in February 1933, the new regime immediately began its attacks on the trade union apparatus by persecuting socialists and communists. With his imminent arrest in May 1933, Neumann was forced to flee into exile. He arrived in London where he was able to begin a second research project under the supervision of the political scientist

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[1] Söllner, Alfons, "Franz L. Neumann. Skizzen zu einer intellektuellen und politischen Biographie", Alfons Söllner (ed.), *Franz L. Neumann. Wirtschaft, Staat, Demokratie. Aufsätze 1930-1954*, Frankfurt am Main, Suhrkamp, 1978, p. 9.

[2] Idem.

[3] Idem.

[4] Neumann, Franz L., *Rechtsphilosophische Einleitung zu einer Untersuchung über das Verhältnis von Staat und Strafe*, Dissertation, Not Published, 1923.

[5] Söllner, Alfons, *Skizzen zu einer intellektuellen und politischen Biographie*, op. cit., p. 9.

Harold J. Laski and the sociologist Karl Mannheim on the *Governance of the Rule of Law,* which he published in 1936.[6] Due to dire economic prospects, he then moved to New York, where he worked as a legal counsel at the *Institute of Social Research*, which had been moved into exile by Theodor W. Adorno and Max Horkheimer.

In this period, Neumann began research on his third book *Behemoth*, an in-depth analysis of the structure and practice of National Socialist rule.[7] With its publication in 1942, Neumann's work at the Institute ended mainly due to financial reasons. He then transferred to the American foreign intelligence agency *Office of Strategic Services* in Washington. Alongside with other exiled Marxist intellectuals such as Herbert Marcuse and Otto Kirchheimer, Neumann was part of the research branch investigating the stability of Nazi-Germany. Only a few years after the allied victory over Germany in 1945, Neumann became a professor for political science at *Columbia University* in New York where he started his studies on a general theory of democracy and authoritarian rule.[8] Alas, due to a fatal car crash in the mountains of Switzerland in 1954, he was never able to systematically elaborate on these thoughts. However, his essays, books and lectures form an inspiring panoramic insight into the development of a scholar struggling with Marxism from the beginnings of his political work as early as 1918 to his death in 1954 – a struggle, which up until today, remains somewhat of an unresolved mystery. This article hopes to shed some light on a few questions concerning this mystery.[9]

Neumann's work has only sporadically been subject to scholarly debate on Critical Theory. Roughly speaking, his writing experienced three main waves of attention: first in the 1960s with the surge of the New Left;[10] second in the course of the 1980s;[11] and most recently in the 2000s.[12] In all of these engagements, Neumann's crucial text *The*

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[6] Ibid., pp. 10-22

[7] Ibid., p. 26.

[8] Ibid., pp. 29-36.

[9] Ibid., p. 48.

[10] Marcuse, Herbert (ed.), *Franz L. Neumann, Demokratischer und autoritärer Staat. Studien zur politischen Theorie*, Hamburg, Europäische Verlagsanstalt, 1967.

[11] Söllner, Alfons (ed.), *Franz L. Neumann, Wirtschaft, Staat, Demokratie. Aufsätze 1930-1954*, Frankfurt am Main, Suhrkamp, 1978. Söllner, Alfons, *Neumann zur Einführung*, Hannover, SOAK Verlag, 1982. Perels, Joachim (ed.), *Recht, Demokratie und Kapitalismus. Aktualität und Probleme der Theorie Franz L. Neumanns*, Baden-Baden, Nomos, 1984. Erd, Rainer, *Reform und Resignation: Gespräche über Franz L. Neumann*, Frankfurt am Main, Suhrkamp, 1985.

[12] Fisahn, Andreas, *Eine Kritische Theorie des Rechts. Zur Diskussion der Staats- und Rechtstheorie von Franz L. Neumann*, Herzogenrath, Shaker, 1999. Iser, Matthias/ Strecker, David (eds.), *Kritische Theorie der Politik. Neumann. Eine Bilanz*, Baden-Baden, Nomos. 2002. Buckel, Sonja, *Subjektivierung und Kohäsion. Zur Rekonstruktion einer materialistischen Theorie des Rechts*, Weilerswist, Vellbrück, 2007. Scheuerman, William E., *Frankfurt School Perspectives on Globalization, Democracy, and the Law*, London, Routledge, 2008. Salzborn, Samuel (ed.), *Kritische Theorie des Staates. Staat und Recht bei Franz L. Neumann*, Baden-Baden, Nomos, 2009.

Change in the Function of Law in Modern Society, published in the *Studies in Philosophy and Social Sciences* by the *Institute of Social Research* in 1937, played a prominent role. Therein, he expands a key argument for explaining the fall of the *Weimar Republic* and the rise of *National Socialism*, namely the idea that the capitalist mode of production had qualitatively transformed from a liberal free market system to authoritarian monopolistic capitalism.[13] By tying the rule of law and liberal democracy to what he refers to as competitive capitalism, Neumann states that this transformation caused the decay of fundamental principles of the legal foundation of democracies.[14]

However, within academic discourse on Neumann's writings, neither the problematic theoretical presumptions of this argument have been thoroughly scrutinized, nor has their contradictory relationship to his late work been resolved. With regard to the latter, there has been a general acknowledgement of a theoretical rupture emerging in Neumann's writings as of 1933.[15] This rupture is usually explained in terms of his deep disappointment in the labor movement, caused by its inability to realize a socialist republic and thence prevent the rise of *National Socialism*.[16] As some scholars suggest, this lead him to a *liberal turn*.[17] The proponents of the *liberal turn* hypothesis claim that Neumann shifted away from Marxism and moved towards advocating liberalism. Stuart Hughes, for example, states that Neumann's late "thinking was torn apart between his old Marxism and his new liberal-democratic ideas".[18] Contrary to this assessment, I would claim that this notion is too general.

While it is true that Neumann embraced concepts of liberal democracy in his late work, it does not follow that they stand in opposition to his Marxist critique of capitalism.[19] I would rather state that the persistent narrative of a *liberal turn* rests upon a grave misunderstanding of Neumann's later writings, ignoring his thorough revision of Marx' political and economic theory. This article will develop a different perspective on the analytical rupture, which is to be understood as a deeply am-

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[13] Neumann, Franz L., "Der Funktionswandel des Gesetzes im Recht der bürgerlichen Gesellschaft", Herbert Marcuse (ed.), *Franz Neumann. Demokratischer und autoritärer Staat*, op. cit., p. 55.

[14] Ibid., p. 67.

[15] Söllner, Alfons (ed.), *Franz L. Neumann, Wirtschaft, Staat, Demokratie. Aufsätze 1930-1954*, op. cit., p. 19.

[16] Fisahn, Andreas, *Eine Kritische Theorie des Rechts. Zur Diskussion der Staats- und Rechtstheorie von Franz L. Neumann*, op. cit., p. 167.

[17] Jay, Martin, *The Dialectical Imagination. A History of the Frankfurt School and the Institute of Social Research, 1923-1950*, Berkeley/Los Angeles/London, University of California Press, 1991 [1976], p. 201. Coser, Lewis A., "Franz Neumann (1900-1954): Marxist on the Way to Liberalism", Lewis A. Coser (ed.), *Refugee Scholars in America: Their Impact and Their Experiences*, New Haven/London, Yale University Press, 1984, pp. 197-201. Iser, Matthias/ Strecker, David (eds.), *Kritische Theorie der Politik. Neumann. Eine Bilanz*, op. cit., p. 17.

[18] Erd, Rainer, *Reform und Resignation. Gespräche über Franz L. Neumann*, op. cit., p. 24.

[19] Iser, Matthias/ Strecker, David (eds.), *Kritische Theorie der Politik. Neumann. Eine Bilanz*, op cit., p. 17. Salzborn, Samuel (ed.), *Kritische Theorie des Staates. Staat und Recht bei Franz L. Neumann*, op. cit., p. 14.

biguous and contradictory process. Rather than grasping Neumann's late work as being torn apart between Marxism and Liberalism, the rupture is discussed as an expression of his struggle with traditional Marxist concepts. This struggle puts him in close allegiance to the effort of other proponents of critical theory such as Theodor W. Adorno and Max Horkheimer, who similarly adhered to traditional Marxist arguments in their early concept of ideology.[20]

This ambiguous and contradictory process roughly develops as follows: By the means of a critical reconstruction of Neumann's legal-form theory, we can identify the roots of Neumann's ambiguous relation to traditional Marxism as early as his first doctoral thesis in 1923. In the course of his ongoing reflection on traditional Marxist concepts, which is heavily reinforced by the collapse of the socialist movement and the *Weimar Republic* and the rise of *National Socialism*, Neumann does indeed gradually shift towards liberal democracy. However, this shift proves to be an explicit critique of the anti-liberal identity theory of democracy as it was put forward by Jean-Jacques Rousseau, which Neumann adhered to in his early writings. In this respect he also struggled with his traditional Marxism, but only to revisit Karl Marx' political and economic theory, opening up a path to link his legal-form theory to the dialectical theory of Marx.

In order to plead for re-visiting Neumann's work in the sense of this linkage, this article first reconstructs core elements of Neumann's legal theory. In a second step, it will present key arguments in his theory of the decay of the *rule of law* and democracy scrutinizing his construction of *liberal competitive capitalism*. Based on this sketch, this article points at some crucial flaws in the construction of *liberal capitalism*, leading Neumann's departure from his earlier interpretation of Rousseau and his evolutionary understanding of capitalism. In a brief outlook, this article wraps up by shedding some light on a possible pathway to relate to his political theory with regard to the analysis of contemporary authoritarian tendencies of democracies, pleading for continuation on the path that Neumann had partially laid bare.

A brief sketch of Neumann's Legal-Form Theory

In sharp contrast to *natural law* doctrines and most *social contract* theories, Neumann developed elements of a materialist approach to modern law as of his first doctoral thesis in 1923. Whereas *natural law* doctrines tend to derive the *rule*

[20] Sassmannshausen, Felix, "Revisiting Concepts of Ideology", *Pólemos. Materiali di filosofia e critica sociale* (1/2016), Roma, Stamen, 2016, pp. 187-203.

of law from private property as an ontological category, Neumann criticizes this notion. Based on the philosophy of Jean-Jacques Rousseau, he rather claims that private property is a product of historical appropriation that incorporates social power.[21] He thus adheres to Rousseau's idea that the historical act of appropriation of private property marks an "original sin" in the history of humankind, bringing forth a specific legal-form.[22] Based on Marx' critique of political economy, Neumann describes the ability of legal persons to possess private property and to freely sign contracts in order to exchange commodities (capital and labor alike) as a fundamental precondition of capitalism.[23] Based on this materialist notion of law, Neumann focuses on the question of how the categories of the formally free and equal legal person and the contract are socially and historically conceivable.

Neumann's argument is grossly built along the following lines: in order to be able to sign contracts and exchange commodities (capital and labor alike), legal persons have to be socially constituted as being formally free and equal. In this sense, formal freedom and equality are abstract but real preconditions of capitalism.[24] Alternatively, as Marx put it, it is the sphere of circulation in which "freedom, equality, property and Bentham" are realized.[25] We can then grasp Neumann's concept of the legal person in terms of the Marxist philosopher Alfred Sohn-Rethel as being "real-abstract" categories.[26] However, according to Neumann, private property does not only constitute individuals as formally free and equal legal persons. It simultaneously brings forth a double character of the modern subject because, through the surge of private property (of means of production), human society is split into two contradictory principles: labor and capital. This constitutes social inequality and unfreedom between the classes.[27] This two-fold characterization of modern subjects, of being simultaneously free and equal legal persons on the form-side and unequal and unfree members of class on the side of societal content, stands

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[21] Neumann, Franz L., *Die Herrschaft des Gesetzes*, Frankfurt am Main, Suhrkamp, 1980 [1936], p. 153.

[22] Marx, Karl, *Das Kapital. Zur Kritik der politischen Ökonomie*, Berlin, Karl Dietz Verlag, 1962 [1867], p. 741. Mensching, Günther, *Jean-Jacques Rousseau zur Einführung*, Hamburg, Junius, 2000, p. 25.

[23] Neumann, Franz L., "Der Funktionswandel des Gesetzes im Recht der bürgerlichen Gesellschaft", Herbert Marcuse (ed.), *Franz Neumann. Demokratischer und autoritärer Staat*, op. cit., p. 48ff.

[24] Ibid., p. 48.

[25] Marx, Karl, *Das Kapital. Zur Kritik der politischen Ökonomie*, op. cit., p. 189.

[26] Sohn-Rethel, Alfred, *Geistige und körperliche Arbeit. Zur Theorie der gesellschaftlichen Synthesis*, Frankfurt am Main, Suhrkamp, 1973 [1970], p. 41ff.; Neumann, Franz L., "Der Funktionswandel des Gesetzes im Recht der bürgerlichen Gesellschaft", Herbert Marcuse (ed.): *Franz Neumann. Demokratischer und autoritärer Staat*, op cit., pp. 31-81, p. 51.

[27] Ibid., p. 57.

in a historical and logical reciprocal relationship with what Neumann describes as a two-fold character of modern law.

He introduces the form of law and state legislation describing two different levels of analysis.[28] The form of law guarantees free and equal legal persons through the state as a form of "public – abstract – power" on the one hand.[29] As such, the state constitutes itself "relatively autonomous" of social and economic power relations, according to the political theorist Sonja Buckel.[30] Thus both the abstract legal person that has liberal individual rights, as well as the legal-form making the legal person and hence the sphere of capitalist exchange conceivable, are to be understood as real-abstract historical categories that are intrinsically linked to the surge of private property (of means of production).[31] State legislation, on the other hand, can be seen as a "condensation of societal struggles" in which the class antagonism translates into legislation that is bound by the abstract legal-form.[32] This dialectical relationship of modern law forms the first pillar of Neumann's early thoughts on the relationship of the rule of law and capitalism.

Not only with regard to his historical-materialist approach to the surge of private property, also in other respects, has Neumann adhered to Rousseau's identity theory in his early writings. In this regard, he claims that "social equality" is to be understood as the "forming principle of democracy".[33] He thus links the existence of the legal-form and democracy to the factual realization of social equality.[34] With reference to his traditional Marxist analysis, he states that the transformation of a liberal competitive era to monopolistic capitalism brings forth increased social inequality. This assessment then leads Neumann to the conclusion that the formal and general character of law and thus a core democratic principle withers through the

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[28] In this regard, the translation of Neumann's article in the Journal for Social Research *The Change in the Function of Law in Modern Society* is misleading because it does not reflect the dialectical relation between law and legislation that is an important factor in the German title. The more precise translation would read *The Change in the Function of Legislation in the Law of Bourgeois Society*.

[29] Gerstenberger, Heide, *Die Subjektlose Gewalt. Theorie der Entstehung bürgerlicher Staatsgewalt*, Münster, Westfälisches Dampfboot, 2006, p. 517.

[30] Buckel, Sonja, *Subjektivierung und Kohäsion. Zur Rekonstruktion einer materialistischen Theorie des Rechts*, op. cit., p. 237ff.

[31] In face of this, Neumann historicizes the legal-form as the judicial basis of capitalism in accordance to Rousseau and describes it as a "democratic natural law". Neumann, Franz L., "Types of Natural Law", *Studies in Philosophy and Social Science* (8/1939-1940), New York, The Institute of Social Research, 1940, p. 360.

[32] Buckel, Sonja, "Dialektik von Kapitalismus und Demokratie heute", Oliver Eberl / David Salomon (eds.), *Perspektiven sozialer Demokratie in der Postdemokratie*, Wiesbaden, VS Verlag, 2017, p. 35.

[33] Neumann, Franz L., "Rechtsstaat, the Division of Powers and Socialism", Keith Tribe (ed.), *Social Democracy and the Rule of Law. Otto Kirchheimer and Franz Neumann*, London, Hyman, 1987 [1934], p. 73.

[34] Neumann, Franz L., "Der Funktionswandel des Gesetzes im Recht der bürgerlichen Gesellschaft", Herbert Marcuse (ed.), *Franz Neumann. Demokratischer und autoritärer Staat*, op. cit., p. 57.

rise of social inequality in monopolistic capitalism.[35] The following chapter gives a brief insight into this theory of capitalist transformation, in order to pinpoint a core theoretical rupture in Neumann's thinking.

The Shift from Liberal Capitalism to Monopolistic Capitalism

By combining the construction of pure types in the sense of the sociologist Max Weber with his traditional Marxist account of the evolution of capitalism,[36] Neumann presents a schematic path of capitalist development in a total of three stages: "autocratic capitalism", "liberal competitive capitalism" and "monopoly capitalism".[37] With regard to the first phase, he states that the historic roots of capitalism lie in the mid-18th century. The main characteristic of this phase was that it ensured the formal freedom of capitalists to compete with each other and their unhindered ability to exploit the working class.[38] Correspondingly, absolutist forms of political power mixed with modern type liberal parliaments, politically reinforcing the economic emergence of the bourgeois class. According to Neumann, this era ended in the mid-19th century with the emergence of the labor movement. It is ousted by the second phase, which Neumann characterizes as "liberal competitive capitalism", dating from the mid-19th to the beginning of the 20th century.[39]

Neumann claims that this phase can best be portrayed as a near convergence of formal freedom and equality and social freedom and equality within the ruling class and between the classes. This assessment is based on two core arguments. First, he depicts "liberal competitive capitalism" as a realization of freedom, equality and competition between mid-sized capitals. On the basis capitalists allegedly competed fairly over the commodity markets,[40] which – according to Neumann – historically constituted the "social basis" of liberal democracy and

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[35] Ibid., p. 60ff.

[36] Söllner, Alfons, *Geschichte und Herrschaft. Studien zur materialistischen Sozialwissenschaft, 1929-1942*, Frankfurt am Main, Suhrkamp, 1979, p. 114.

[37] Neumann, Franz L., "Die Gewerkschaften im faschistischen Deutschland", *Zeitschrift für Sozialismus* (1/1933-1934), Karlsbad, Graphia, 1934, pp. 123-129.

[38] Neumann, Franz L., "Tarifvertrag und Tarifvertragsrecht", Ludwig Heyde (ed.), *Internationales Handwörterbuch des Gewerkschaftswesens*, Berlin, Werk und Wirtschaft, 2009 [1932], p. 1647.

[39] Neumann, Franz L., "Der Funktionswandel des Gesetzes im Recht der bürgerlichen Gesellschaft", Herbert Marcuse (ed.), *Franz Neumann. Demokratischer und autoritärer Staat*, op. cit., p. 55ff.

[40] Neumann, Franz L., "Über die Voraussetzungen und den Rechtsbegriff einer Wirtschaftsverfassung", *Die Arbeit* (10/1931), Berlin, 1931, p. 591.

the rule of law.[41] Second, Neumann describes the emerging labor movement as being confronted with mid-sized businesses. Due to this, he claims, it struggled with capitalists that only had limited power over the labor market.[42] Through collective bargaining, the labor movement was able to achieve decisive victories and minimize social inequality and thus forming the basis for mass-democracy.[43] What Neumann thus in essence describes is a state of capitalism on the verge of the 20th century, in which social forces were more or less in balance. Freedom was, as he claims, "factual freedom" and the members of society interacted as nearly equals – at least on a collective basis.[44]

By leaning on Rousseau and defining the core principle of democracy as "social equality", he concludes that this phase is to be characterized as a historic alliance between liberalism, democracy and capitalism.[45] However, on Neumann's account, this phase of liberal and democratic capitalism ends with the emergence of monopolistic capital at the beginning of the 20th century.[46] Due to the intrinsic dynamics of competition, capital was forced to concentrate and monopolize.[47] The subsequent rupture in the balance of powers within the capitalist class on the one hand and between monopolists and workers on the other had devastating consequences with respect to the realization of social equality, both within the capitalist class and between the classes. Consequently, the contractual basis of capitalism became obsolete in the monopolistic era and compromises between the classes were no longer attainable: monopolists now dictated both the labor and commodity market alike.[48] Based on this process of concentration of capital in the hands of few trusts and cartels, Neumann concludes that the social foundation of democracy and the rule of law was suspended; the *Weimar Republic* had thus collapsed long before the *National Socialists* came to power.[49]

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[41] Neumann, Franz L., "Die Herrschaft des Gesetzes", Frankfurt am Main, op. cit., p. 160ff.

[42] Neumann, Franz L., "Über die Voraussetzungen und den Rechtsbegriff einer Wirtschaftsverfassung", *Die Arbeit*, op. cit., p. 591.

[43] This mainly accounts for male workers, which implies a gender-blindness in Neumann's theory.

[44] Idem.

[45] Neumann, Franz L., "Die soziale Bedeutung der Grundrechte in der Weimarer Verfassung", Alfons Söllner (ed.), *Franz L. Neumann. Wirtschaft, Staat, Demokratie. Aufsätze 1930-1954*, op cit., p. 574.

[46] Neumann, Franz L., "The State and Labor in Germany", *The Contemporary Review*, (146/1934), London, The contemporary Review Company, 1934, p. 713.

[47] Neumann, Franz L. (Pseudonym: Leopold Franz), "Die Gewerkschaften in der Demokratie und in der Diktatur", Alfons Söllner (ed.), *Franz L. Neumann. Wirtschaft, Staat, Demokratie. Aufsätze 1930-1954*, op cit., p. 175.

[48] Neumann, Franz L., "Über die Voraussetzungen und den Rechtsbegriff einer Wirtschaftsverfassung", *Die Arbeit*, op cit., p. 592.

[49] Idem. Neumann, Franz L., "Der Funktionswandel des Gesetzes im Recht der bürgerlichen Gesellschaft", Herbert Marcuse (ed.), *Franz Neumann. Demokratischer und autoritärer Staat*, op cit., p. 60.

Based on this brief sketch, we can summarize that Neumann's diagnosis is strongly determined by his traditional Marxist account of the shift from liberal to monopolistic capitalism. In this regard, his theory of decay of the rule of law and democracy rests upon two core implications. First, he links the existence of formal equality and freedom to the realization of social freedom and equality in accordance with his Marxist interpretation of Rousseau. Second, he describes the shift from liberal to monopolistic capitalism in terms of traditional Marxism as a qualitatively new era, subsequently transforming the forms of political power. In his late writings, Neumann ceased to refer to this evolutionary development of differing capitalist eras. Albeit he never explicitly accounted for it, we have to assume that he distanced himself from this traditional Marxist understanding of societal change. In order to shed some light on Neumann's struggle with Marxism and to revisit his late legal-form theory, the following chapter discusses some problems concerning both implications of his theory of decay.

Problems concerning Neumann's Theory of Decay

The first problem is related to the construction of *liberal capitalism* as such. Neumann's early understanding of Marx' *Capital* is strongly influenced by the Marxist interpretation of the *Second International*.[50] Within this current of the socialist movement, a predominant way of thinking about the first few chapters of *Capital* was to read them as a description of an evolutionary historical development of capitalist society.[51] The idea was thus that the simple form of commodity exchange expounded by Marx was in fact a historical account of the formation of capitalism itself.[52] Neumann derives this notion of *liberal capitalism* from this dominant form of understanding Marx. In this sense, his socio-economic construction of a transformation from liberal to monopolistic capitalism is built along the same lines, leading him to a theoretical over-determination of his historical account.[53]

This assertion is supported by current findings in social and economic history, showing that the idea of an egalitarian liberal capitalism is to be understood as a

[50] Schäfer, Gert, "Ein Intellektueller an der Seite der Arbeiterbewegung. Über einige Motive im politischen Denken von Franz L. Neumann", Joachim Perels (ed.), *Recht, Demokratie, Kapitalismus*, op cit., p. 38.

[51] Elbe, Ingo, *Marx im Westen. Die neue Marx-Lektüre in der Bundesrepublik seit 1965*, Berlin, De Gruyter, 2010, p. 91.

[52] Ibid., p. 565.

[53] More recent interpretations of Marx' Capital have emphasized the intrinsic logic within the structure of Marx' argument, stressing that capitalism never actually existed as a simple form of exchange. Ibid., p. 88ff.

backward projection for two reasons. First, as the economic historian Jan-Otmar Hesse points out, it was not until the mid-20th century, that reliable data analyzing the structure of capital in its early stages became available and technically assessable.[54] Until then, many assertions on the functioning of 18th and 19th century capitalism were based on theoretically derived educated guesses. Second, contrary to Neumann's account of a balanced capitalist class, the formation of early capitalism in its phase of colonialism and industrialization was heavily dependent on monopolies and cartels such as the *Dutch East India Company*, the *British East India Company*, big coal and iron trusts and railroad stock companies.[55] Consequently, monopolies as dominant forms of capital cannot be understood as qualitatively new phenomena, fundamentally re-structuring the principles of late 19th and early 20th century capitalism.[56] They are rather to be understood as manifestations of capitalist crises in general.[57]

The second and more theoretical problem regarding Neumann's theory of decay touches upon his presupposition of the relationship between content and form within both the *rule of law* and democracy. As described, Neumann's argument, in essence, rests upon the assumption of a causal relation between social content and abstract form. He describes this as a positive causality for the era of liberal capitalism and as a negative causality in the phase of monopolistic capitalism. However, this causal relation is inconsistent for two reasons.

The first reason lies in the fact that Neumann remains unspecific and in times contradictory in conceptualizing the legal-form. On the one hand, he claims that it ought to be understood as a real-abstract category in the sense that it objectively constitutes the basis for formal freedom and equality, describing this in terms of functionality for capitalism.[58] On the other hand he adheres to the traditional Marxist view of the general law as a mere disguise of "the true homestead of

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[54] Hesse, Jan-Otmar, *Wirtschaftsgeschichte*, Frankfurt am Main, Campus, 2013, p. 14-15.

[55] Gerstenberger, Heide, *Die Subjektlose Gewalt. Theorie der Entstehung bürgerlicher Staatsgewalt*, op. cit., p. 30. Hesse, Jan-Otmar, *Wirtschaftsgeschichte*, op cit., p. 92. Marx, Karl, *Das Kapital. Zur Kritik der politischen Ökonomie*, op. cit., p. 780.

[56] Marx, in fact, described a two-fold tendency of capital, with centralization and concentration on the one hand and decentralization on the other. Ibid. p. 653-654.

[57] In contrast to Neumann's romanticizing notion of a liberal era, we could thus state that this pure form of capitalism, based on a near balance within the capitalist class and thus factual freedom of competition, in fact never existed. Historically and logically, capitalism rather rests on competition as a formal principle working underneath the social reality of inequality and unfreedom. However, this argument does not question the tendency of capital towards monopolization. It rather links it to the cyclical manifestation of crises in general.

[58] Neumann, Franz L., "Der Funktionswandel des Gesetzes im Recht der bürgerlichen Gesellschaft", Herbert Marcuse (ed.), *Franz Neumann. Demokratischer und autoritärer Staat*, op. cit., p. 50.

power", class domination.[59] Without differentiating the levels of abstraction, this two-fold characterization remains inconsistent, because it implies two contradictory concepts of domination. We rather ought to grasp this notion as a specific double character of capitalist power relations. This entails that on the level of social content, we have to understand capitalism as a form of class domination.[60] With regard to his legal-form theory, however, we have to grasp social power as abstract and impersonal powers. Putting this inconsistency in place within Neumann's legal theory, involves re-thinking it based on his later revision of traditional Marxism.

The second reason relates to this objection. Neumann confuses two different levels of analysis and it is hard to pinpoint their exact interrelation. Whilst the abstract form serves as a negative *condition sine qua non* for the rule of law and democracy, the concrete social content is constituted by social and ideological struggles within this form. It is plausible, as Neumann argues, to assume that these struggles can have a damaging effect on the form, as the emergency decrees, single-case legislation and general clauses in the late *Weimar Republic* prove.[61] However, the legal-form does not only constitute the judicial basis of the sphere of production. It is also the basis of the circulation of money and financial capital. Thus, rather than linking the legal-form and democracy solely to the sphere of production, class struggle and thus the question of social equality and freedom, as Neumann did, we ought to equally link it to the sphere of circulation. Consequently the attacks on the rule of law are not necessarily linked to monopolism and do not automatically lead to a general decay of the form. For this to take effect, we would have to consider two aspects. First, that capitalist crises tend to manifest themselves as financial crises. Second, we have to take the dimension of political culture and the stability of liberal democratic institutions into account. Whilst there is no indication of Neumann's engagement with the first point, he only engaged with the systematic analysis of the second point in his late writings, especially in his essay on *Anxiety and Politics* in 1954.[62] With regard to Neumann's democratic theory, we are confronted with a similar issue.

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[59] Neumann, Franz L., "Zum Begriff der Poltisichen Freiheit", Herbert Marcuse (ed.), *Demokratischer und Autoritärer Staat*, op cit., p. 110.

[60] Neumann, Franz L., "Zur marxistischen Staatstheorie", Alfons Söllner (ed.), *Franz L. Neumann. Wirtschaft, Staat, Demokratie. Aufsätze 1930-1954*, op cit., p. 142.

[61] Neumann, Franz L., "Der Funktionswandel des Gesetzes im Recht der bürgerlichen Gesellschaft", Herbert Marcuse (ed.), *Franz Neumann. Demokratischer und autoritärer Staat*, op cit., p. 60ff.

[62] Even though elements of his more complex analysis of democratic institutions are visible in his essay on the *Change in the Function of Law* in 1937 and in his *Behemoth* in 1942, it is only after 1948 that Neumann systematically integrates this perspective in his work – especially in his essay on *Anxiety and Politics* from 1954.

As stated, he defined "social equality" as the principle of democracy throughout his Weimar writings.[63] Contrary to his conceptualization of the two-fold character of law as early as 1923, it was not until his alleged *liberal turn* that he worked towards a dialectical concept of democracy. In order to do so, he had to revise his adherence to traditional Marxism and Rousseau because they exclusively concerned themselves with the analysis on the level of societal content: the distribution of property and class struggle. Neumann explicitly distanced himself from Rousseau's identity theory as late as 1951.[64] However, due to Neumann's struggle with Marxism, we are confronted with a core task when renewing his political and legal theory. This leads us to a brief outlook on renewing Neumann's political and legal theory.

Brief Outlook on Renewing Neumann's Political and Legal Theory

Neumann never systematically resolved his struggle with Marxism. This has led to the misperception that his departure from the traditional Marxist theory of decay and Rousseau's concept of democracy is to be understood as a *liberal turn*. In opposition to the proponents of the *liberal turn* hypothesis, this article claims that this struggle with Marxism did not in fact lead to a departure from his Critical Theory of capitalist society. On the contrary, this article argues that both his (self-) critique of the democratic theory of Rousseau and his revision of traditional Marxism opened up a pathway for developing a better understanding of the legal-form and its relation to capitalism, democracy and the rule of law. The brief sketch of Neumann's struggle with Marxism drawn in this article and its implications for renewing his legal and political theory points at three elements in Neumann's late writings that contemporary critical theory ought to systematically engage in.

First: in departing from Rousseau's theory of democracy, Neumann's late writings open up a pathway to conceptualizing a specific double-character of modern democracies with institutions in which societal conflicts and struggles are transformed through political parties into compromises and then into state legislation

[63] Neumann, Franz L., "Die soziale Bedeutung der Grundrechte in der Weimarer Verfassung", Alfons Söllner (ed.), *Franz L. Neumann. Wirtschaft, Staat, Demokratie. Aufsätze 1930-1954*, op., cit., p. 574.

[64] Neumann, Franz L., "Das Arbeitsrecht in der modernen Gesellschaft", *Recht der Arbeit* (4/1951), München, Beck, 1951, p. 1. With regard to the thesis of monopolistic capitalism however, he never explicitly distanced himself from it. However, as the sociologist Helge Pross states, Neumann simply ceased to use it as a frame of reference for capitalist development (Pross, Helge, "Einleitung", Herbert Marcuse, *Demokratischer und Autoritärer Staat,* op. cit., p. 18-19.).

on the one hand.[65] On the other hand, this process is narrowly bound by the institutional logic of the *division of powers,* the legal-form and by rituals and rules that are inscribed in the democratic institutions as representative forms.[66]

Second: Neumann's latest essay on *Anxiety and Politics* written in 1954 forms an important starting point for the contemporary analysis of authoritarian ideological phenomena such as the current surge of the far right. This essay, in which Neumann turns to psycho-analytical categories in an effort to develop a more complex notion of ideology, puts him in close quarters with Theodor W. Adorno and Max Horkheimer, as the political scientist Samuel Salzborn explains.[67]

Third: when engaging with Neumann's legal-form theory, the double character of the rule of law ought to stand at the very core of our efforts. As argued, this double character is constituted by the rule of law as a real-abstract form, whose dynamics develop relatively autonomous of and contain societal struggles on the one hand. In light of Neumann's legal theory, legal processes are to be understood as expressions of societal struggles on the other hand, as the political theorist Sonja Buckel points out, be they feminist, class or other social struggles. [68] In this effort, we have to systematically take into account that Neumann departed from the traditional Marxist concept of an evolutionary development of capitalist society in his late writings. This entails extrapolating a model of Neumann's legal theory through speculative interpretation of the dialectical interrelation between the legal-form as a real-abstract judicial basis of capitalism and its crises.

Neumann's departure from his fixation on the traditional Marxist class-analysis and Rousseau's corresponding theory of democracy thus puts us in place to describe the double character of democracy and the rule of law as a dialectical relationship between real-abstract form and specific societal content. This is where contemporary Critical Theory ought to pick up the thread. It could help us to empirically analyze contemporary authoritarian tendencies of democracies as results of tendencies from within the very core of bourgeois institutions themselves.

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[65] Neumann, Franz L., „Die Wissenschaft von der Politik in der Demokratie", in: Internationale Wissenschaftliche Korrespondenz zur Geschichte der Deutschen Arbeiterbewegung, Berlin, Otto-Suhr-Institut, (4/1989), 1989 [1952], p. 513.

[66] Tanja, Erie, "Goede Politiek. De parlementaire cultuur van de Tweede Kamer, 1866-1940", Amsterdam, 2011, p. 9.

[67] Salzborn, Samuel, „Eine Kritische Theorie des Staates. Franz L. Neumanns Staatstheorie im Kontext der Kritischen Theorie", Salzborn, Samuel (ed.), *Kritische Theorie des Staates. Staat und Recht bei Franz L. Neumann*, op. cit., p. 24.

[68] Buckel, Sonja, "Dialektik von Kapitalismus und Demokratie heute", Oliver Eberl / David Salomon (eds.), *Perspektiven sozialer Demokratie in der Postdemokratie*, op. cit., pp. 28-31.

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