

CHAPTER 15

COUNTER-RIGHTS: ON THE TRANS-SUBJECTIVE POTENTIAL OF SUBJECTIVE RIGHTS*

Gunther Teubner
Frankfurt am Main

ABSTRACT

In contrast to current versions of critical theory which in their attack on liberal-capitalist societies develop a more or less vague vision of a socialist society, Christoph Menke, - Frankfurt School third generation - in his brilliant monograph, Kritik der Rechte, Suhrkamp 2015 (A Critique of Rights) fights on two-fronts. He directs his critique not only against liberal-capitalist formations with their conglomerates of societal power, but also against socialist-communist formations with their totalising aggregation tendencies. Against both, he attempts to formulate a theory of the authentic political judgment, which is based upon “counter-rights” in a “new law”.

In the face of obvious deficiencies of both formations, this is a remarkable attempt to develop utopian ideas in politics and law. Building on these ideas, the author suggests is to go beyond individual counter-rights on which Menke focuses exclusively, and to articulate genuinely social counter-rights in three dimensions – in the communicative, the collective and the institutional dimension. What is more, they need to be developed in two directions. One direction is the attribution of counter-rights to collectives, organisations, social movements, networks, functional systems, not as substitutes for individual rights to resistance

* Translation into English by Malte Frøslee Ibsen. I thank Vagios Karavas and Anton Schütz for their helpful comments.

but as their supplements. The other direction is the pluralisation of counter-rights which Menke defines in a unitary manner. Counter-rights will need to be developed with a high degree of variation if they are supposed to overcome motivation constraints in various media of communication.

Keywords: Counter-rights, subjective rights, collective rights, institutional dimension of constitutional rights, sociology of affects, Christoph Menke.

I. CHRISTOPH MENKE'S CRITIQUE OF SUBJECTIVE RIGHTS IN MODERNITY

In his influential book, *Critique of Rights*, Christoph Menke has refined the time-honoured theory of subjective rights in important respects.¹ The following reflections build on his theory, but modify it with the argument that, after the transformations of late-modern society, the political relevance of subjective rights lies not so much in their role as individual entitlements. Rather, they have developed a trans-subjective potential in three dimensions – in the communicative, the collective, and the institutional, dimension. If this potential is to be realised, a liberation of the, as Menke calls it, “pre-conceptual affection” of subjective rights in law, politics and society will be required.

In some respects, Menke bases his analysis on Niklas Luhmann, who has offered the most significant recent theory of subjective rights; Menke moves, however, beyond Luhmann at crucial points. Luhmann has attributed subjective rights a central role in the historical process of functional differentiation, but, in the end, he has described them merely as transitional phenomena on the path to a fully self-referential legal system and has denied them a relevant societal function, as soon as law has achieved its present-day autonomy.² This claim can only be upheld, however, if one assumes – as Luhmann does – that subjective rights have lost their quality of sources of law today.³ As soon as one regards, in the sense of legal pluralism, private ordering as an authentic legal order, only subjective rights – and, in particular, corporate-law-mediated property — can be viewed as its legal source and win an independent societal function, which, in times of transnationalisation, is even independent of state law.⁴ It is subjective rights that, for Menke, represent law's central contribution to the

¹ Christoph Menke, *Kritik der Rechte*, (Frankfurt aM: Suhrkamp Verlag, 2015); English translation: idem, *Critique of Rights*, (Cambridge: Polity Press, forthcoming).

² Niklas Luhmann, *Ausdifferenzierung des Rechts: Beiträge zur Rechtssoziologie und Rechtstheorie*, (Frankfurt aM: Suhrkamp Verlag, 1981), p. 96 et seq.

³ Ibid., p. 65 et seq.

⁴ On the quality of subjective rights as legal sources, see Pasquale Femia, “Transsubjektive (Gegen)Rechte,

constitution of late-capitalist societies, particularly to the establishment of societal power outside of the state. At the same time, he argues that subjective rights, if they are to play an emancipatory role, need to be transformed into “counter-rights”. He offers crucial impulses for their critique and develops institutional imagination for what he calls a “new law”.

He is likewise in debt to Jürgen Habermas for many insights, but he undertakes an important correction of his discourse theory. To be sure, in contrast to Kant, Habermas allows the empirical “interests” of the participants as the point of departure for a rational discourse, which universalises these interests to justified norms. However, he also leaves these interests more or less unanalysed and focuses exclusively on procedural conditions of communicative rationality.⁵ Menke criticises this as a mere proceduralisation, and stresses, by contrast, a new kind of materialisation, an orientation towards what he calls “material drives and forces”, towards the “natural, arational”.⁶ Menke foregrounds the other side of political judgment: instead of merely taking the procedural conditions of normative judgement into consideration, as Habermas does, he emphasises the materiality of a “pre-conceptual affection”,⁷ in which he invests his hopes for emancipatory effect. He thus re-orientates attention towards the affective, emotional, arational dimension of judgment in a “process of reflective transformation of sensible, affective evidence”,⁸ of which theories of rational argumentation take no account.

Menke’s critique of the welfare state represents another original contribution to the analysis of late-modern societies.⁹ Although he fully recognises massive conflicts between liberal and welfare state conceptions of law, he sees both captured in a *circulus vitiosus* of mutual failure: their critique only ever applies to the relations of domination of the other side, and, on their own, both, again and again, revert themselves into domination. This vicious circle ultimately derives from their common origin, from the *bourgeois* form of subjective

oder die Notwendigkeit die Wolken in einen Sack zu fangen”, in: Andreas Fischer-Lescano, Hannah Franzki and Johan Horst (eds), *Gegenrechte: Recht jenseits des Subjekts*, (Tübingen: Mohr Siebeck, 2018), pp. 343-356, at 349; on the legal character of transnational norms of private governments, see Gunther Teubner, “Global Bukowina: Legal Pluralism in the World Society”, in: Gunther Teubner (ed), *Global Law without a State*, (Aldershot: Dartmouth Gower, 1997), pp. 3-28.

⁵ Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, (Cambridge MA: The MIT Press, 1996).

⁶ Menke, note 1 above, p. 158 et seq.

⁷ Ibid., note 1 above, p. 337 et seq.

⁸ Ibid., note 1 above, p. 377.

⁹ Ibid., note 1 above, p 281 et seq.

rights. A possible “new law” can only arise when this circularity of liberal and welfare state rights is broken.

In contrast to received versions of critical theory, which always aim at a critique of liberal-capitalist societies and most often towards a more or less vaguely developed vision of a socialist society, Menke wages a battle on two fronts. His critique is not only directed at liberal-capitalist formations with their intra-societal tendencies towards a concentration of power,¹⁰ but just as much at socialist-communist formations with their totalising, tendencies of political aggregation.¹¹ Menke goes beyond both of these alternatives and seeks to formulate a theory of authentic political judgement, which, in the light of the obvious mal-developments of both alternatives, represents a remarkable attempt to work on political utopias. If one also takes into account his implicit critique of the post-structuralist quietists, the “avant-gardists of the standstill”,¹² then Menke is actually fighting a battle on three fronts.

However, most provocative of all should be Menke’s ideas of a “new law”.¹³ His argument is characterised by multiple surprising twists and turns. His striking point of departure is Nietzsche’s ideas about the slave rebellion against domination. Then, in a first turn, Menke does not follow Nietzsche in his negative evaluation of the slave rebellion, but reverts it into its opposite. A right to remain passive, a right not to participate, and a right to be taken into account in decision-making, are invested with extremely positive connotations by Menke. In a next turn, he insists that the passivity of the slave mentality, which does not seek to rule over others, should not be deemed to be completely feeble. Rather, it is precisely in the suffering of passivity that Menke uncovers the emancipatory “force of pre-conceptual affection”, the force of sensitive receptivity, in which the subject suffers its obstinate affection. Menke understands the “passivity of the sensible” “dialectically as a force, as unrest or as negativity”. In a third turn, he finally cuts himself loose from the, at first remarkably one-sided, emphasis on the “arational” affective receptivity, and argues for a “materialist-dialectical mediation” of the pre-conceptual with rational normative argument, a mediation from which authentic political judgement is supposed to emerge. The mediation does not aim to rationalise affection, but rather, by contrast, to unfold the power of the arational against the rational – indeed, he insists that the “sensible feeling ... must be effective

¹⁰ Ibid., note 1 above, p. 177 et seq.

¹¹ Ibid., note 1 above, p. 339 et seq.

¹² Ibid., note 1 above, p. 159 et seq.

¹³ Ibid., note 1 above, p. 369 et seq.

against its rationalization”. “Counter-rights”, which release such a political judgement, need to be institutionalised in politics, law and society.¹⁴ Only when such counter-rights have been established is a political self-government of social practices possible. Counter-rights need to be established in such a way that “they simultaneously must include everyone as capable of judgment while granting the powerless the right to be taken into account”.¹⁵

II. TRANS-SUBJECTIVE DIMENSIONS OF SUBJECTIVE RIGHTS

Now, my contribution does not amount to criticise Menke’s theory, but rather suggests that the theory be re-directed towards trans-subjective rights. Both Menke’s critique of existing rights, as well as his ideas for the counter-rights of a new law, need to be developed in this non-individualist direction. Menke attributes subjective rights almost exclusively to individual human beings, as was usual in the early phase of capitalism. Occasionally, he relates constitutional rights to social practices, but even then, he ultimately relativises them by referring back to individual actors.¹⁶ Neither subjective rights for collective actors, characteristic of late capitalism, appear in Menke’s argument, nor institutional guarantees for social practices – arts, science, education for example – as existing subjective rights, or as counter-rights in a “new law”.

Menke’s individualistic conception of subjective rights is intimately connected with his critique of the dark side of capitalism, inspired Marx and Foucault. For Menke, subjective rights represent the central mechanisms of domination in *bourgeois* society, which oscillate between exploitation and normalisation.¹⁷ In contrast, inspired by Luhmann and Derrida, I want to emphasise three non-individual dimensions of subjective rights based upon a critique of the dark side of functional differentiation, which I have described elsewhere in greater detail.¹⁸ In the language of systems theory, this will cast a new light on the “reification” of the individual will, criticised by Menke: firstly, in the dimension of inter-individual

¹⁴ Ibid., p. 381 et seq.

¹⁵ Ibid., p. 400.

¹⁶ Recent ambitious critiques of subjective right’s reference to the mere individual can be found in Dan Wielsch, *Zugangsregeln: Die Rechtsverfassung der Wissensteilung*, (Tübingen: Mohr Siebeck, 2008), and Vagios Karavas, *Körperversfassungsrecht: Entwurf eines inklusiven Biomedizinrechts*, (Zurich: Dike, 2018).

¹⁷ Menke, note 1 above, p. 177 et seq.

¹⁸ Gunther Teubner, *Constitutional Fragments: Societal Constitutionalism and Globalization*, (Oxford: Oxford University Press, 2012), p. 78 et seq. Specifically on the supplementary relationship between the social critiques of Luhmann and Derrida, idem, “Economics of Gift – Positivity of Justice: The Mutual Paranoia of Jacques Derrida and Niklas Luhmann”, (2001) 18 *Theory, Culture and Society*, 29-47, and idem, “Dealing with Paradoxes of Law: Derrida, Luhmann, Wiethölter”, in: Oren Perez and Gunther Teubner (eds), *On Paradoxes and Inconsistencies in Law*, (Oxford: Hart Publishing, 2006), pp. 41-64.

communication, secondly, in the dimension of collective action, and thirdly, in the dimension of communicative media. This should not only give a greater depth of focus to the analysis and critique of subjective rights in late-modernity, but also expand the prospects for possible counter-rights in a future law.

III. SUBJECTIVE RIGHTS REFERRING TO THE “REIFIED WILL”

III.1. Communication: Socialised Will

Menke consistently understands subjective rights only as referring to individual consciousness, to the “empirical wills” of individuals as “facts”, as “something given”, which is determined through its legal form.¹⁹ Against that, one should make clear that the alleged individual wills, to which subjective rights are supposed to refer, cannot be what is meant here. The will of subjective rights is always a socialised will, even in simple social interactions. Indeed, the will of the “individual” is nothing more than a phenomenon produced by social communication, which is only subsequently attributed to “persons”, *i.e.*, to mere semantic artefacts, which are, in their turn, only generated by communication. Such a communicative will is therefore necessarily “reified” in relation to the inner life of the individual people concerned.²⁰ This is not only a sociological insight – lawyers, too, speak of an objectified will, which is opposed to the “inner will” as an intra-psychological phenomenon, and which is, instead, interpreted in a typified way from the horizon of the other, from the needs of social interaction.²¹ Menke, however, seems to locate the will, understood as “something given”, in individual consciousness and action. In any case, it remains unclear whether he also identifies other manifestations of will. If so, where? In the intention of the speaker – and only there? In the understanding of the recipient – and only there? In the intersubjective meaning? In the signification produced by autonomous communication, detached from the individuals’ intentions? Or in the juridical re-construction of the will, in the reference of subjective rights?

If subjective rights refer to the “will” of the subject, then this reference is, in itself, so indeterminate that it actually remains open to all possible formations of the will – for

¹⁹ Menke, note 1 above, p. 177 et seq.

²⁰ The best theoretical account of the strict double-sidedness of consciousness and communication in Niklas Luhmann, *Social Systems*, (Stanford CA: Stanford University Press, 1995), p. 103 et seq., & 278 et seq. The theory of objective interpretation proceeds from a different basis; see Ulrich Oevermann, *Strukturprobleme supervisorischer Praxis: Eine objektiv hermeneutische Sequenzanalyse zur Überprüfung der Professionalisierungstheorie*, (Frankfurt aM: Humanities Online, 2001).

²¹ In lieu of many others, see Klaus F. Röhl und Hans C. Röhl, *Allgemeine Rechtslehre: Ein Lehrbuch*, (Cologne: Vahlen, 2017), § 78.

formations that are “reified” or authentic, repressive or emancipatory, liberal, communist or dialectically mediated. Even Menke’s “pre-conceptual affection” is potentially present in the reference of subjective rights, implying that the Menkeian “new law” is already potentially available. On closer inspection, what remains of the law’s reference to the will is therefore not actually a question of the “form” of the law, but rather a question of the “form” of society, namely, how this will is understood in social communication under contingent historical circumstances, which, in its turn, influences the legal construction of the will.

III.2. Collective Actors: “Will-formation” of the Juridical Person

The contrast to the individual will is most clearly seen in the case of formal organisations and other collective actors. As is well known, the law not only invests individuals but also corporate organisations and collective actors with subjective rights, even with constitutional rights, something which has significantly contributed to establish these organisations as centres of private power.²² Subjective rights have lost their sole reference to individuals in tandem with the rise of corporate organisations. Menke does not at all address this collectivist transgression, which characterises today’s organisation society –and he fails to do so even for civic associations, labour unions and political parties. But since collective actors actually have become legal subjects endowed with subjective rights, we must ask the question: Which “wills” do subjective rights refer to? If it is only an aggregation of the members’ individual preferences, as sternly decreed by methodological individualism in economics, then one gets lost in the Arrow paradox.²³ Therefore, one must take account of the supra-individual “collective” dimension of organisations’ rights – a dimension that can only be understood if one allows that organisations can, in themselves, have their own “will”, intentions, preferences, interests, rationality and their own capacity for action. All these organisational properties arise from complex communicative processes within the organisation, and are distinct from their members’ individual preferences as well as from their mere aggregation.²⁴ Thus, in the organisations of contemporary political economy, a “reification” takes place which is more drastic than in the interaction of individuals.

²² For a critical analysis of the historical development of corporate actors and private government, see Joshua Barkan, *Corporate Sovereignty: Law and Government under Capitalism*, (Minneapolis MN: University of Minnesota Press, 2013).

²³ Kenneth J. Arrow, “Social Responsibility and Economic Efficiency”, (1977) 21 *Public Policy*, 303-317.

²⁴ For an extensive treatment, see Gunther Teubner, “Enterprise Corporatism: New Industrial Policy and the ‘Essence’ of the Legal Person”, (1988) 36 *The American Journal of Comparative Law*, 130-155.

III.3. Communicative Media: Motivational Imperatives

Finally, in the institutional dimension of subjective rights, social institutions – arts, science, education, economy – appear as quasi-legal subjects.²⁵ In this dimension, subjective rights become “subject-less rights”, and the institutions become “subjects without rights”.²⁶ The social institutions mentioned here are mere ensembles of norms, and are clearly distinguished from the above-mentioned organisations, because they are neither formally organised nor are they able to act on their own as collective actors. Accordingly, the law does not personify these institutions as the bearers of rights; instead, constitutional rights, in an institutional form, guarantee the autonomy of certain social domains of action against politics and other expansionary domains of action. Freedom of art not only invests the individual artist with a right, but also protects the autonomy of art as a communicative process, which includes the production of works of art, their reception, critique and dissemination. The same is true of freedom of speech, freedom of science, freedom of communication media, and freedom of association.²⁷ To be sure, this institutional dimension is somehow important to Menke, since he is unfailingly concerned with the constitution, the critique and the reformation of social domains of action, but he does not theorise the crucial role of subjective rights in these processes.²⁸ He understands institutions at best as normative frameworks for individual

²⁵ For recent ambitious analyses of the institutional dimension of constitutional rights, see Thomas Vesting, Stefan Koriototh and Ino Augsberg, *Grundrechte als Phänomene kollektiver Ordnung: Zur Wiedergewinnung des Gesellschaftlichen in der Grundrechtstheorie und Grundrechtsdogmatik*, (Tübingen: Mohr Siebeck, 2014).

²⁶ For a critique of the individualistic bias in the concept of subjective rights and an emphasis of their trans-subjective dimension, see Andreas Fischer-Lescano, “Subjektlose Rechte”, in: Andreas Fischer-Lescano, Hannah Franzki and Johan Horst (eds), *Gegenrechte: Recht jenseits des Subjekts*, (Tübingen: Mohr Siebeck, 2018), pp. 377-420. He takes up the concept of subject-less rights, of the institutions, which are not themselves bearers of rights but are indirectly protected through basic rights, and generalises it for all situations traditionally grasped within the concept of subjective rights. Pasquale Femia distinguishes in a way similar to this text between traditional subjective rights and trans-subjective rights, but he differentiates these in discursive rights and collective rights, on the one hand, and “rights without rule”, on the other, with whose help energies for ecological interests are activated; Femia, note 4 above. Malte Gruber discusses how adequate procedures for the effectiveness of trans-subjective rights might be developed; see Malte-Christian Gruber, “Fluide Zivilverfahren: Zur prozessualen Präsentation von Ermöglichungs- und Gegenrechten”, in: Fischer-Lescano, Franzki and Horst (eds), *Gegenrechte: Recht jenseits des Subjekts*, this note above, pp. 227-248.

²⁷ Paradigmatically, on the freedom of science, according to the German Federal Constitutional Court: “Art. 5 Abs. 3 Satz 1 GG determines that science, research and teaching is free. Hereby, according to wording and meaning, an objective foundational norm is established, which regulates the relationship between science, research and teaching to the state [...] At the same time, this constitutional determination guarantees a right of freedom to anyone, who is active in these domains.” (BVerfGE 35, 79 [112]).

²⁸ Social theory (Constant, Simmel, Luhmann) has systematically uncovered the reciprocal enablement of individual freedom and the autonomy of communicative contexts of meaning, juridically speaking between the individual and institutional dimensions of rights. On a comprehensive treatment of this theme, see Cornelia Bohn, “Twofold Freedom and Contingency”, (2018) 22 *Simmel Studies*, 45-78.

action. Why does Menke concede subjective rights to individuals alone and not to institutions, only human beings and not social systems, only actors and not discourses, only the subjective spirit and not the objective spirit? And does something akin to the will of functional systems of society exist, which can be distinguished from both individual wills and organisational wills, to which subjective rights refer?

At this point, the third dimension of the “reification” comes to the fore. As discussed above, the individual will is already socialised in everyday interaction, just as in formal organisations, albeit in a different fashion. But the social will is also profoundly formed by functional systems. It thus degenerates to the shrunken will of *homo oeconomicus, juridicus, politicus, medicalis*, which, as a social phenomenon, re-constructs only a partial aspect of individual will-formation and effectively filters out the rest. The legal reference to the will of the subject is thus always already tied to the stern conditions of a single, highly specialised functional system. Accordingly, subjective rights refer to nothing but social pre-formed categories of individuality: “preferences” or “interests”, “desires”.²⁹

The reference of subjective rights to the empirical fact of the will must therefore always also be understood as a reference to the rationality and normativity of one of the great functional systems. This, ultimately, is the meaning of the institutional theory of constitutional rights: the autonomy of the social systems of art, science, education, economy. This is why the double-sidedness of individual and institutional (collective) constitutional rights – as advanced by Carl Schmitt, but even more importantly by Helmut Ridder – is so important. And just as important is the double-sidedness of the subjective rights in private law, since they not only protect individual interests but also social institutions, as Ludwig Raiser, in particular, has shown.³⁰ The “will” of subjective rights is thus always directed towards the binary code of one of the functional systems, limited by its programmes, oriented towards its rationality maximisation and motivated for acceptance by the communicative medium in question.

²⁹ For a treatment, which is critical towards a one-sided economic functionalization of subjective rights and for their compatibilization with scientific and artistic meaning, see Dan Wielsch, “Über Zugangsregeln”, in: Michael Grünberger and Nils Jansen (eds), *Privatrechtstheorie heute: Perspektiven deutscher Privatrechtstheorie*, (Tübingen: Mohr Siebeck 2017), pp. 268-285; Wielsch, note 16 above.

³⁰ Carl Schmitt, „Freiheitsrechte und institutionelle Garantien der Reichsverfassung“, in: idem (ed), *Verfassungsrechtliche Aufsätze aus den Jahren 1924-1954*, (Berlin: Duncker & Humblot, [1931] 1985), pp. 140-178; Helmut Ridder, *Die soziale Ordnung des Grundgesetzes*, (Opladen: Westdeutscher Verlag, 1975); Ludwig Raiser, “Rechtsschutz und Institutionenschutz im Privatrecht”, in: idem (ed), *Die Aufgabe des Privatrechts*, (Kronberg/Ts.: Athenäum Verlag, 1977), pp. 124-144. For a critical treatment, see Rudolf Wiethölter, “Privatrecht als Gesellschaftstheorie? Bemerkungen zur Logik der ordnungspolitischen Rechtslehre”, in: idem (ed), *Festschrift für Ludwig Raiser*, (Tübingen: Mohr & Siebeck, 1974), pp. 645-695.

Indeed, in systems-theoretical terms, these communicative media – money, power, law, truth – are actually what is crucial for the third dimension of the social “reification” of “will”. This relationship between the communicative media and “will”, to which subjective rights refer, is not immediately comprehensible. Nevertheless, the contribution of communicative media lies precisely in creating the *motives* (!) for the acceptance of communication in their respective spheres of validity. Communicative media serve the “function of rendering expectable the acceptance of a communication in cases where rejection is probable”.³¹ In this way, the communicative media pre-form the “will” to which subjective rights refer. To be sure, the motivational power of communicative media is not directed towards mental states, but towards motives as social constructs – and this is our concern at present – which come with an assumption of different, albeit corresponding, states of consciousness. Communicative media thus form social motives and exercise an indirect influence on intra-psychological will-formation. The responsibility for falsifying authentic will-formation – which Menke criticises in the contemporary political economy as “reification”, “fact”, “something given”, “empiricistic”, and “positivistic” – therefore lies with the motivational force of communicative media, more so than with socialisation of the will through interaction or organisation. More precisely: the “pre-conceptual evidence” that Menke is looking for is blocked because, from the beginning, communicative media replace the initial evidence with a one-sided formation of motives controlled by either power, money, law or knowledge. In the perspective of media theory, subjective rights refer to a will to power, will to money, will to truth. To be sure, on the surface, subjective rights celebrate the autonomy of the individual human being, but, in reality, they compel the individual into Max Weber’s “iron cage of the future”, here understood as the overpowering motivational compulsion of communicative media which are one-dimensionally oriented towards their rationality maximisation. But, in contrast to Marxian accounts, will-formation is not exclusively subject to the profit imperative of the capitalist economy, but also just as much subject to the power imperative of politics, the knowledge imperative of science, the innovation imperative of technology, the news cycle imperative of information media, the standardisation imperative of the law.

If one sees the socialisation of the individual will in these three dimensions – the communicative interaction dimension, the collective actor dimension and the communicative media dimension – then it becomes possible to determine why and in what respects the

³¹ Niklas Luhmann, *Theory of Society*, vol. 1, (Stanford CA: Stanford University Press, 2012), p. 190.

reference of subjective rights to the “nature of the will” not only implies the reification of the private will of the individual, as Menke describes,³² but also the reification of social norm formation, which is generated through the mere positivity of communication, of both the collective and of the media. It is therefore no exaggeration to suggest that, even though individuals officially remain the subjects of subjective rights, their secret subjects in late modernity are instead social processes of interaction, of organisation and of the communicative media.

IV. COUNTER-RIGHTS OF A NEW LAW

Why is Menke so forgetful of society when theorising subjective rights? The motive for his (almost) exclusive concentration on the individual must, in the last instance, be the hope that he relies on the role that “pre-conceptual affection” will play in a new law. As already mentioned, Menke’s “counter-rights” aim at releasing the affective energies. Only when the “right of passivity” empowers this affection – in its dialectical mediation with normative argumentation – can authentic political judgement be realised.³³ However, Menke locates this affective power exclusively in the consciousness of individual human beings and not – in opposition to consciousness – in autonomous social communication. In Menke’s work, social communication, at most, fulfils the role of a public order, which determines the normative framework for the release of pre-conceptual affection.

But here one must ask does social communication not itself contain the wholly different potentialities for pre-conceptual affection which we are used to finding in individual consciousness?³⁴ The challenge here is to connect up with Émile Durkheim’s advances in this direction and to give his, not psychological, but strictly sociological, formulations of “*colère publique*”, “*conscience collective*” or that of norms as “*faits sociaux*” a theoretical form, which is defensible today. One has to recognise that also affective communication – just as much as cognitive or normative communication – has selective effects and can create affective horizons,³⁵ as “affective own worlds”.³⁶ The question that must be addressed to

³² Menke, note 1 above, p. 266 et seq.

³³ Ibid., p. 337 et seq.

³⁴ Émile Durkheim, *The Division of Labor in Society*, (New York: Free Press, [1883] 1933), p. 79 et seq., & p. 154 et seq. For a remarkable attempt to establish affective communication as independent in relation to affective mental states, see Paul Reinbacher, “Sozialkapital als affektive Struktur sozialer Systeme”, (2017) 43 *Swiss Journal of Sociology*, 15-36; Paul Stenner, “An Outline of an Autopoietic Systems Approach to Emotion”, (2005) 12 *Cybernetics and Human Knowing*, 8-22.

³⁵ Reinbacher, note 34 above, p. 24.

³⁶ Luc Ciompi, “Ein blinder Fleck bei Niklas Luhmann? Soziale Wirkungen von Emotionen aus Sicht der

Menke's theorem of pre-conceptual affect is does not sociality in itself unleash a pre-conceptual, affective force, which realises a social surplus of affectivity beyond affectivity in consciousness?³⁷ To be sure, this pre-supposes that "cognition and emotion, rationality and feeling, sense and affect are not only treated at the individual level, but also in the collective dimension as correlative concepts".³⁸ In particular, the socialisation of the will in the three different dimensions also changes the view of a "new law", which promises to release new affective potentials not only in individual consciousness, but also in social communication.

At this point, we must clarify, in more precise terms, the meaning of "pre-conceptual affection", before it is identified as an independent communicative occurrence and not merely as a mental state. Here, we need to make reference to the legal paradox, as discussed by Niklas Luhmann and Jacques Derrida. It is not sufficient to understand "pre-conceptual affection" in communication merely as a social equivalent for individual emotions. Substantially, it is a veritable matter of squaring the circle. It is a matter of the compatibility of the incompatible, which – impossible as it may be – is nevertheless realised in the present context: it is a matter of the (in-) compatibility of law's experience of its environment and law's experience of the world. In more precise, system-theoretical terms, one must make a tripartite distinction between (1) law's internal environment as a self-construction within the law, (2) law's external environment, and (3) the world as the background for any possible observation, which the observation can nevertheless not observe itself. The external environment of the law (2), against which the law closes itself through legal operations, cannot be directly experienced via these operations. But the external environment of the law (2) can be experienced indirectly as the re-entry of this environment within the self-descriptions of law, and it appears as enacted environment (1). This is law's inner environment, law's reality construct of its environment. The world (3), however, is the blind-spot of the law/non-law-distinction, its invisible unity, its paradox³⁹ – and this very difference between the world (3) and law's external environment (2) is neglected by Menke when he

fraktalen Affektlogik", (2004) 10 *Soziale Systeme*, 21-29.

³⁷ For a preliminary sketch of this communicative power, in particular in the case of *pouvoir constituant* in constitutional pluralism, see Teubner, note 18 above, p. 61 et seq.

³⁸ Reinbacher, note 34 above, p. 17.

³⁹ Luhmann, note 31 above, p. 83 et seq.

discusses Luhmann's systems-theoretically conceptualised environment of the legal system.⁴⁰ He misses Luhmann's point that:

“... for a systems-theoretical concept of the world, this means that the world is the totality of what constitutes system and environment for each system.”⁴¹

At this point, the squaring-the-circle-problem re-appears: the law is able to react only indirectly to its external environment (2). It does so only with law-specific distinction in its internal environment (1). It remains, however, inescapably exposed to the world (3), although it cannot observe the world (3) via its law-specific distinctions. In the law, this squaring problem is intensified through the compulsion to make decisions. One either ignores the world through *stare decisis* in the received legal distinctions, or one exposes oneself to the decision-making problems of being exposed to the world-experience.

Now, there appears to be a connection at this point between, on the one hand, a world so understood (3), which, as a paradoxical unity of law's distinction/designation, cannot be observed, but which, at the same time, is the basis for all legal distinctions, and, on the other, the “pre-conceptual affection” which experiences a pre-reflexive evidence. The question is, while a mediated access to the external environment (2) through irritation and re-entry producing an internal environment (1) is, at any rate, possible, whether there also exists a “genuine” access to the world (3), which can never, to be sure, be produced by means of distinction and designation, but can, perhaps, be produced in affection, meditation, art, mystical experience, and non-linguistic communication? “Pre-conceptual affects” would then not merely be a sensitive opening towards the external environment (2), emphatic experience of the other and suchlike, but would rather be a pre-conceptual experience of the world (3), an immediate experience of the world not yet carved out by distinction and designation. While Luhmann warns against losing oneself in such paradoxes and recommends that one hides the world-paradox between ever-new distinctions, Jacques Derrida demands that one exposes oneself to such paradoxical experience and brings this experience back into the legal argument.⁴² A theory of justice would have to be grounded in such an oscillation between the

⁴⁰ Menke, note 1 above, p. 112.

⁴¹ Luhmann, note 31 above, p. 89.

⁴² Jacques Derrida, “Force of Law: The Mystical Foundation of Authority”, (1990) 11 *Cardozo Law Review*, 919-1046.

self-transcendence of law and the re-immanentisation in the legal doctrine of subjective rights.⁴³

With regard to Menke, one would have to ask, besides this – not wholly unknown – form of experience in our inner life, whether communication, collective action and the communicative media could not also mediate an independent “arational”, affective access to the world. If Menke postulates a subjective counter-right to pre-conceptual evidence of experience (as a pre-condition for political judgement), could this be interpreted as a right to the “world” in the above-sketched sense (3)? A right – individual, but also collective – to experience the world (3) “before” it was dissected through distinction and designation? A right to expose communication to the world, to exposing it to the paradox of distinction and designation? A right to passivity, non-participation, receptivity, which would markedly distinguish itself from the conventional subjective right? More concretely, would concept-less experience be supported not only, as is customary, by a subjective right to freedom, which is, in reality, only granted within the framework of social systems imperatives, such as market imperatives or scientific imperatives, but rather through an – individual, but also collective – right to suspension of both legal imperatives as well as that of social systems imperatives?

Such counter-rights would allow access to the “world” through concept-less intuition, but they would also enable a normative judgement, which frees itself from judgements one-sidedly controlled by money, power or science. Here, the analogy to Kant’s analysis of aesthetic judgement comes to the fore, as suggested by Menke and others, which, as such, represents nothing less than a squaring of the circle in its mediation of affect and reason. And it is not only jurists but indeed all professions that are haunted by this squaring problem, at least those from which judgement is expected under the imperatives of decision-making - assisted by, and simultaneously abandoned by, science – in situations of *non-liquet*.

The counter-rights would thus not only be positioned against the individual will of *bourgeois* subjective rights, but also, and first and foremost, against those social structures which “reify” the “wills”, the “interests”, the “preferences”, and the “needs of the patients” to “given facts”. If the counter-right to political judgment/judgement is to be strengthened

⁴³ On this view of justice, see Gunther Teubner, “Self-Subversive Justice: Contingency or Transcendence Formula of Law?”, (2009) 72 *Modern Law Review*, 1-23, available at SSRN: <http://ssrn.com/abstract=1416033>. For an intriguing discussion, see Ino Augsberg, “Gerechtigkeit als Transzendenzformel”, in: Lars Viellechner (ed), *Verfassung ohne Staat*, (Baden-Baden: Nomos, 2019 (forthcoming)).

against these socialised “inherent rights” then one would have to determine specifically for each social domain how, and at which point, a new law could institutionalise counter-rights. In my view, constitutional rights would be the most adequate legal category in this regard – not in their traditional effect against the state, however, but rather in their horizontal effects against social constellations of power. Completely in line with Menke, such constitutional rights would be oriented towards enabling authentic political judgement, distinguished according to the social context in question.⁴⁴ Since the threats to constitutional right differ from context to context, the counter-rights in organisations would have to be differently arranged than counter-rights in interaction or in various functional systems. Counter-rights would then not only be a matter of unleashing “pre-conceptual affection” in individual consciousness, as Menke imagines, but also in the above-mentioned three dimensions of sociality: communicative, collective, and medial. What could this mean for each dimension?

IV.1. Affective Communication

Does this exist – pre-conceptual affection as a purely communicative phenomenon in interactions? And not only in the more common understanding that communication releases psychological effects in the participating individuals, or that it “transfers” affects from one individual to the other, but rather in the strict sense that communication, as such, produces independent and markedly different formations of meaning?⁴⁵ To be sure, the communication of pre-conceptual meaning seems a contradiction in terms, since this would imply communication by way of the linguistically non-communicable. It seems counter-intuitive to insert counter-rights at this point, since law ultimately communicates linguistically through the reference of subjective rights to the will. That is to say, law produces information about the law as well as about the will by means of concepts.

⁴⁴ On the contextualization of basic rights in different social domains of action, see Gunther Teubner, “The Anonymous Matrix: Human Rights Violations by ‘Private’ Transnational Actors”, (2006) 69 *Modern Law Review*, 327-346, at 338 et seq; Isabell Hensel and Gunther Teubner, “Horizontal Fundamental Rights as Conflict of Law Rules: How Transnational Pharma Groups Manipulate Scientific Publications”, in: Kerstin Blome, Andreas Fischer-Lescano, Hannah Franzki, Nora Markard and Stefan Oeter (eds), *Contested Regime Collisions: Norm Fragmentation in World Society*, Cambridge: Cambridge University Press, 2016), pp. 139-168.

⁴⁵ This is the central challenge to which the sociology of emotions must respond, if it is to offer an independent contribution relative to psychological theories of emotions. On this, see Reinbacher, note 34 above. Also theories of the sense of justice, which thematize only the emotions of the participating human beings but not the affective dimension of legal communication as such, must answer to this challenge. In opposition to Luhmann, who wants to drive emotions out of communication and limit them exclusively to psychological experience and there to an “immune function of the psychological system”, Parsons is much more sensitive to the independence of communicative affects, when he identifies “affects” with a sociologically and symbolically generalized medium of the system of action; see Luhmann, p. 274 et seq; Talcott Parsons, *Social Systems and the Evolution of Action Theory*, (New York: Free Press, 1977), p. 214 et seq.

But it is similar to the case of aesthetic communication in literature: the aesthetic message of its words cannot be found in its content, but rather in what cannot be verbally communicated, and yet it is found precisely in that which can be co-communicated in words, which goes beyond what can be said.

“Art functions as communication although – or precisely because – it cannot be adequately rendered through words (let alone through concepts).”⁴⁶

It needs to be emphasised again that the communication of concept-less affects is in no way reduced to its effects on individual emotions, that is releasing affects in psychological processes. Instead, what matters is the specific signification that communication of affects creates, in distinction to individual feeling. The difference of consciousness and communication implies that – like communication in literature – a genuine communication of the linguistically non-communicable takes place *beside* the communication of content. The difference in interaction between action and suffering emphasised by Menke is not only characteristic of human consciousness, but precisely also of social communication.⁴⁷ Accordingly, counter-rights must not only be directed to individual feeling, but with equal intensity also to the social communication of pre-conceptual affects.

A great potential of such counter-rights for affective communication would lie in simple social relations of a more private character – that is, in everyday communication beyond institutionalised politics and other functional systems.⁴⁸ Here, pre-conceptual affects are spontaneously communicated, be they linguistically or non-linguistically. It is not without reason that the opinion polls of authoritarian states – as well as in the corporate world – take such a keen interest in private affective communication for purposes of social control. Indeed, it is not without reason that these relations are often targeted by massive technologies of manipulation, political propaganda and, in particular, corporate commercials. Nor is it without reason that massive technologies of control and censorship have recently been developed on the Internet against the dissemination of privately communicated moods and emotional states. This shows that counter-rights against state and corporate modes of

⁴⁶ Niklas Luhmann, *Art as a Social System*, (Stanford CA: Stanford University Press, 2000), p. 19; see, also, p. 52 et seq.

⁴⁷ Menke, note 1 above, p. 350 et seq.

⁴⁸ For a focus on the potential for resistance in private everyday communication, see Nofar Sheffi, "Resistance as Contract Law-Making", *Manuskript Frankfurt*, 2016; in a like manner, Grahame F. Thompson, "The Constitutionalisation of Everyday Life?", in: Eva Hartmann and Poul F. Kjaer (eds), *The Evolution of Intermediary Institutions in Europe: From Corporatism to Governance*, (Basingstoke: Palgrave, 2015), pp. 177-197.

disciplining of both the emotional life of the individual and affective communication in simple social relations must be all the more robustly institutionalised.

IV.2. Collective Actors

The communicative power of pre-conceptual affection is probably most clearly expressed in its collective dimension.⁴⁹ Not only must individuals be equipped with counter-rights, as Menke suggests, but also collective actors, since it is only the latter that give counter-rights political potency in organised protest and increase the chances of their enforceability in legal processes. One of the most important challenges for the “institutional imagination” (Roberto Unger)⁵⁰ of a new law is how to conceptualise collective counter-rights, so that not only political programmes can be developed, but also pre-conceptual affection can be articulated within social movements, organisations, associations, labour unions and NGOs, so they can produce collective political judgments/judgements in mediation with conceptual determinations. Here, it is not only a matter of constitutionally protecting individual motives, but rather also of enlarging the social spaces for collective will-formation in procedures tailored for the purpose.

Protest movements are paradigmatic candidates for collectively articulated affective communication. In their early phase, at any rate, protest movements are, to a large extent, characterised by spontaneously articulating affective grievance, discontent, accusation, engagement and belonging, without developed theories or explicit programmes of political action. These are explicitly not articulated as surges of individual emotions, but rather as the affects of a collective actor, which, as a social movement, can unfold considerable communicative power.⁵¹ Protest movements are the perfect example of the “slave rebellion” in its present collective form, which Nietzsche criticised and whose productive potential Menke has now once again uncovered. To express publicly the suffering of injustice, instead

⁴⁹ Mascareno speaks from the perspective of organizational sociology of the ability of certain collective actors for systemic compassion in contrast to individual affects within organizations Aldo Mascareno and Camilo Drago, “Nothing more than feelings? De la compasión individual a la compasión sistémica en las organizaciones modernas”, (2016) 3 *Economía y Política*, 85-117. He draws on Grahame Thompson, *The Constitutionalization of the Global Corporate Sphere?*, (Oxford: Oxford University Press, 2012), p. 80 et seq., who distinguishes between four types of organizations, cynics, bottom-feeders, enthusiasts, ethical producers. In the latter two types, collective affective communication may play an important role (Examples: Novo Nordisk, Lefrage, fair commerce, Eco-corporations, financial co-operatives).

⁵⁰ Roberto M. Unger, “Legal Analysis as Institutional Imagination”, (1996) 59 *Modern Law Review*, 1-23.

⁵¹ On this point, see John Markoff, *Waves of Democracy: Social Movements and Political Change*, (New York: Routledge, 2015); Niklas Luhmann, *Theory of Society*, vol. 2, Stanford CA: Stanford University Press, 2013), p. 154 et seq. On the relationship between social movements and their psychological environment, see Luca Tratschin, *Protest und Selbstbeschreibung: Selbstbezüglichkeit und Umweltverhältnisse sozialer Bewegungen*, (Bielefeld: Transcript, 2016), p. 154 et seq.

of developing political alternatives, to articulate grievances without conceptualising them, to demonstrate passivity against the development of political alternatives, to claim the right to institutional non-participation, to avoid taking on political decision-making functions, to demand concern for their concerns from the rulers – all of these typical characteristics of the slave rebellion today point not to individual actors, but rather to collective protest movements. This includes their symbiosis with the news media that has effectively enabled their social and political successes, but which is precisely not supported by conceptually developed political objectives as much as on sheer affective communication.

And even though the actors of institutionalised politics usually reject all this as a naïve, un-political, un-thought-out and irrational form of politics, it is precisely such affective communication that needs to be supported by collective counter-rights. In fact, and even more radically, one cannot limit the scope of counter-rights to pre-conceptual collective affects to “progressive”, “left” or “emancipatory” protest movements, as they must also be extended to “reactionary”, “right”, “community-seeking” movements, if this collective affective potential is not to be subject to political censorship from the outset. Here, the counter-rights of a new law must also unfold their effectiveness, even against considerable opposition from a public sphere, which – even though it understands itself as “critical” – is all too willing to proceed to administrative bans against “populist” movements. To be sure, it must also be emphatically emphasised that such extensive tolerance towards radical affective communication, from whatever side it arises, can only be realised according to the extent to which a self-confident law is able to forbid manifest violence and to enforce this ban effectively through manifest counter-force.⁵²

IV.3. Communications Media

Finally, counter-rights would also be needed in the institutional dimension to protect the integrity of social domains of action against the expansive, indeed, even totalising, tendencies of other social domains of action. Institutional basic rights would have to be effective against the motivational imperatives of highly selective communicative media: seduction through money, negative sanctions of power, binding demands of law, scientific truth claims and technological feasibility fantasies. Counter-rights are thus directed against the “structural violence” (Johan Galtung),⁵³ which radiates from any communicative media. They are

⁵² Menke, note 1 above, p. 406, explicitly ascribes to the new law the right to enforce legitimately counter-rights with force.

⁵³ Johan Galtung, “Institutionalized Conflict Resolution: A Theoretical Paradigm”, (1965) 2 *Journal of Peace*

directed against one-dimensional motivational imperatives and seek to liberate political judgement from these restrictions. They allow an access to the “world” through “pre-conceptual affection” and thus enable a different kind of normative judgement, which liberates it from the one-sidedness of conceptual determinations controlled by money, power or science.

While counter-rights would aim to neutralise the motivational imperatives of the highly-specialised communicative media and thus correct for their corruption of judgement, at the same time, they would preserve the cultural achievements of social differentiation, which have their origins in the very motivational imperatives of the communicative media. This is how I understand the meaning of Menke’s two-front battle, which is directed, on the one side, against the realities of capitalist societies, and against communist utopias of collective decision-making, on the other. This explains Menke’s critique of totalitarian socialisation and emancipatory de-differentiation. Instead, what is at stake is the furthering of social differentiation including its different communicative media, which must nevertheless – and this is the crucial point – be bound to their social responsibility through the enablement of authentic judgement.

V. THE POLY-CONTEXTUALITY OF COUNTER-RIGHTS

According to Menke, counter-rights must follow different designs in politics, in law, and in society.⁵⁴ In politics, he aims for counter-rights to passivity, since passivity renders authentic political judgement possible. They should be realised as counter-rights to singularity against the totalising aggregative tendencies of socialisation. In law, by contrast, Menke argues for a differently conceptualised right to passivity, if one wants to overcome the “givenness” of subjective rights. The goal would be the inner politicisation of positivistically “reified” subjective rights. Menke ultimately aims towards an overcoming of the old politics and law through the enablement of dissent in society, which is guaranteed in both spheres through such a right to passivity. This should not be understood as simply a right to establish alternative theories or new ideologies, which would force themselves on life, but rather as a new “form” of judgement formation in politics and in law. Menke’s ultimate aim is a new “politics” in both domains. After all, he develops a political theory of law, and not a theory of autonomous law.

Research, 348-397.

⁵⁴ Menke, note 1 above, p. 372.

In the end, Menke goes beyond the domains of politics and law, and explicitly focuses the counter-rights on society itself.⁵⁵ If society, first and foremost, appeared from the observer's perspective of government in Menke's theory, either as reference of law to the natural or as reference of politics to society, Menke now shifts the perspective. Counter-rights against social power should also be established in society itself, a kind of horizontal effect of counter-rights in parallel to the horizontal effects of established constitutional rights. They appear now as the "good self-government of society", in so far as social counter-rights are to be effective "in the conflict between participation and consideration".

However, the enormous variety of social domains of action remains relatively vague and indeterminate. Most often, Menke speaks in a rather undifferentiated fashion about "the" society or about "social practice" in the singular.⁵⁶ If one wishes to further this train of thought, then one would have to focus more strongly on the central transformations of late-modern society, *i.e.*, not only the functional differentiation of society, but also the differentiation of formal organisations, networks and social movements. Both existing subjective rights and future counter-rights will gain clarity and specificity if they become realised in different social domains and thereby necessarily assume different corresponding forms.⁵⁷ Menke's thoughts point, in a certain sense, themselves in this direction. As already mentioned, he determines counter-rights differently, depending on whether they appear in politics (as a guarantee for singularity) or in law (as a guarantee of the inner politicisation of law). This analysis would need to be carried through for other social domains – for the economy, science, art, the media, medicine – and should uncover highly diverse forms of *bourgeois* subjective rights, on the one side, and future counter-rights, on the other.⁵⁸

Menke's counter-rights should thus be understood as institutionalising reflexivity in law, politics and society. Their task is to enable good judgement – the "process of reflective

⁵⁵ Ibid., p. 396 et seq.

⁵⁶ Ibid., p. 396.

⁵⁷ Here lies the starting-point for demands to consider explicitly different social contexts in their specific form, within which subjective rights are realized (note 16 above), for rights to body fragments; see Karavas, note 16 above. This is also the central thesis of Pablo Holmes on the necessity of politicization of the world society; Pablo Holmes, "The Politics of Law and the Law of Politics: The Political Paradoxes of Transnational Constitutionalism", (2014) 21 *Indiana Journal of Global Legal Studies*, 553-583, at 582 et seq.

⁵⁸ Specifically for such a contextualisation of basic rights, see Ino Augsberg, "Subjektive und objektive Dimensionen der Wissenschaftsfreiheit", in: Friedemann Voigt (ed), *Freiheit der Wissenschaft: Beiträge zu ihrer Bedeutung, Normativität und Funktion*, (Berlin: Walter de Gruyter, 2012), pp. 65-89, at 72 et seq; see, also, Hensel and Teubner, note 44 above, p. 164 et seq.

conversion of sensible, affective evidence”⁵⁹ – in politics and in law, as well as within society. In politics, reflexivity breaks open political routines by privileging the singularity of the individual against the demands of aggregative politics. At the same time, counter-rights institutionalise reflexive politics in law. And reflexivity in society is going to be established by strengthening the irritability of one-dimensional domains of autonomy through their “inner politicisation”.⁶⁰ The particularity of counter-rights would thus be visible in all domains by the fact that they do not simply proclaim alternative political programmes, theories, and ideologies, but instead facilitate communicative irritability, sensibility, feeling, the capacity for suffering, responsiveness, spontaneity, intuition, imagination – also/even mystical experience – against social concentrations of power.

Let me summarise my proposal relating to counter-rights. While Menke conceptualises them for individuals in politics, law and society, one would have to re-think them in three trans-subjective dimensions – the dimensions of communication, collective actors, and communicative media. If law is supposed to react adequately to the transformations of late-modern societies, one would need to develop such counter-rights in two different directions. First, the individual counter-rights would be expanded to include counter-rights for collectives, organisations, social movements, networks, and functional systems, but also for simple social systems – not as substitutes for individual rights, but rather as their co-originary complements. Second, the counter-rights which Menke conceives as unitary would have to be pluralised: as counter-rights against the motivational imperatives of different communicative media, which would need to be arranged differently in different social contexts.

⁵⁹ Menke, note 1 above, p. 377.

⁶⁰ On self-politicisation of law, see Johan Horst, “Gerechtigkeit als dialektischer Vollzug: Das Programm eines Rechts der Gegenrechte”, in: Andreas Fischer-Lescano, Hannah Franzki and Johan Horst (eds), *Gegenrechte: Recht jenseits des Subjekts*, (Tübingen: Mohr Siebeck, 2018), pp. 249-276. Tanja Sheplyakova develops law-specific political-ness and its dependence on procedural elements; see Tatjana Sheplyakova, “Klagen als Ausübung der ‘Gegenrechte’”, in: Andreas Fischer-Lescano, Hannah Franzki and Johan Horst (eds), *Gegenrechte: Recht jenseits des Subjekts*, (Tübingen: Mohr Siebeck, 2018), pp. 205-226.