

# Introduction

What makes modern law modern? Liberal ideals form the most common set of answers to this question, and include the primacy of individual rights, the rule of law, the separation of state from religion, the market economy, and political equality. Some liberal theorists assume the a-historical and universal validity of these ideals and do not reflect on their relation to history. Others, while acknowledging the historical and political context in which these ideals emerged, limit their historical analysis to one predominant framework, that of progress and enlightenment. Liberal theorists, whether explicitly or implicitly, commonly think of modern history as the linear progression of Western society toward better and more rational forms of self-government, law and politics.

The articles compiled in this volume were presented at an international conference at the Tel Aviv University Faculty of Law in December 2005. They were written by scholars from the United States, Germany, Finland, England, Canada and Israel. Though varied in content and method, the contributions share a common critical perspective on liberal theory and its conception of the relation of Western politics and history to law. "Critical Modernities: Politics and Law beyond the Liberal Imagination" raises two interrelated questions. First, how can one think of contemporary law and politics without adopting the liberal understanding of Western politics either as the best of all possible worlds, as Fukuyama's "end of history" would have it, or in the more sober, but equally congratulatory phrasing of Isaiah Berlin, as the least evil of all political regimes? The second question follows from the first, but adds an additional layer of complexity. Rather than questioning a specific understanding of modernity, it raises a question regarding the very centrality of "modernity" to political and legal discourse. Why and how does "modernity," as a concept and a time frame, play such a central role in our understanding of law and politics?

The liberal conception of modernity is embedded in a familiar narrative of progress, a narrative structured around a number of constitutive tensions. Perhaps the most general (and persistently troubling) of these tensions is between power and reason. According to the liberal conception, the story of modernity is the story of reason circumscribing power, and the primary tool for doing so is law. The commonplace idea of pre-modern absolutist regimes being reined in by legality is at once the most fundamental aspect of the narrative, and the most susceptible to undermining criticism, most

glaringly regarding imperial, colonial, and neo-imperial power. But despite the potential for such criticism, the liberal belief in a sharp divide between pre-modern absolutism and the modern state bound by its own legality supplies a firm point of departure for understanding modernity. Positing legality, or the rule of law, as the principal mode for subjecting power to reason leads directly to a related tension — between law and politics. In order for law to perform its function in ensuring the primacy of reason over power, law must remain pure of politics, imagined as the realm of pure will. Thus, for the liberal imagination, law's formality, its autonomy from *external* influences, becomes almost an obsession. Each of the major contenders for external influence in turn becomes a pole in a new tension: between law (or the state) and religion on the one hand; and between law and economic interests, on the other.

These various tensions can then be woven into the story of the rise of the individual and his rights: as against the State, law will provide him with the freedom of religion; it will ensure that he is not subject to political favoritism by guaranteeing equality before the law; it will above all ensure his political-civil rights (some procedural, some substantive). On the level of society, modernity will ward off superstition, sloughing off tradition in favor of critique. As against others in society, law will arm the individual with rights to pursue his own happiness: it will guide his transition from status to contract, replacing the arbitrary will of the feudal lord with rights generated through consent in the marketplace. The expansion of these rights is the progress encapsulated in modernity.

Liberals will argue about the extent to which particular regimes live up to the liberal ideal, about the extent to which there is an evolutionary movement in all societies, and about whether such evolution is susceptible to serious setbacks. But for the liberal, the progressive movement defines modernity. The articles in this volume do not participate in these particular debates. Instead, they seek to question whether this narrative of modernity itself is adequate, either as an account of history or as the background to understanding modern law. Some of them challenge the very notion of progress and law's ability to bring it about; others destabilize the liberal understanding of individual freedom and autonomy as reflecting a condition of liberty from external forces or as the ability to act upon one's potential; a few rethink the modernist conception of secularism and more particularly the ability of modern law to be secular at all. The following synopsis of the articles draws on these tensions, attempting to reproduce, but also to continue, the dialogue that began during the conference.

Martti Koskenniemi's article, which opens the volume, addresses a tension within contemporary international law between two opposing understandings

of the rule of law, the "constitutional mindset" and the "managerial mindset." Koskenniemi's article shows how recent changes within international law manifest a worrisome shift from the former mindset to the latter. The article details these changes as three interrelated processes: "deformalization," "fragmentation," and the rise of "empire." For Koskenniemi, the conflict that international law is facing is not between the rule of man and the rule of law, but rather an internal tension within the "rule of law" itself, between different mindsets. Under the "managerial mindset," the rule of law has become an ad-hoc ("fragmentation") instrument ("deformalization") in the service of dominant interests ("empire"). To this bleak transformation of contemporary international law, Koskenniemi contrasts the hope of a "constitutional mindset." He shows how despite the growing domination of the "managerial mindset," the "constitutional mindset" may still emerge whenever international law is transferred from the hands of politicians and bureaucrats to the hands of international lawyers.

Jill Frank's article addresses the very same question of the "rule of law" in a philosophical and historical context. For Frank, the liberal concept of the rule of law has created a series of false oppositions between power and law, will and reason, facts and norms. Liberal theorists tend to think of the rule of law as countering power, and debate whether the rule of law should be based on the will of the people (majoritarian democracy), reason (deliberative democracy) or facts (political realism). By turning to Aristotle's discussion of politics, Frank shows how law should not be opposed to power and that the different conceptions of the rule of law are not necessarily in opposition. In Frank's view, the Greek world opens for us moderns new ways of thinking about the relation between politics and law beyond the liberal imagination, or, as Frank puts it, not beyond but within the liberal imagination as long as "liberal" is understood in its original sense as a generous and free imagination.

The rule of law is one central characteristic of liberal politics. Its normative justification lies in the liberal wish to separate law from politics. The separation of law from politics is, however, only one fundamental line of demarcation drawn by liberalism. Others include the separation of law from religion or church from state, and law from economic interests. The insulation of modern law from other spheres, or sub-systems, of the social world is the central theme of Gunther Teubner's article on contract law. The article begins by documenting the disintegration of the modern contract into three mutually exclusively spheres of interaction. The contract is a legal promise, an economic transaction and a productive social agreement. Through a close examination of the case of expert contracts, Teubner explains why the only way to harmonize contract theory and solve the

expert contract dilemma is paradoxically by accounting for the inherent impossibility of making contract law whole.

Marianne Constable, like Teubner, is concerned with the "system-like" feature of modern law, with one crucial difference. While for Teubner, the notion of "system" has become synonymous with modern law, for Constable it is the basis for critical appraisal. Constable examines "cyber-lawyering" and the legal regulation of the use of computer software to replace lawyers in giving legal advice. Her article shows how Texas solved this problem, not by setting a certain standard of software proficiency, but rather by requiring manufacturers to add a disclaimer stating that the software program was not a substitute for consulting a lawyer. For Constable, this demonstrates how, rather than distinguishing right from wrong and preventing undesired outcomes, law in this and in many other cases has become a system of regulating communication, which is both created and evaluated by the legal system itself. For Constable this raises the question not only of the possibility of justice, but of the possibility of critique, since within legal systems critique itself may become no more than one further self-produced and self-evaluated communication.

A related discussion of the modern moment in law may be found in Roger Berkowitz's article on eighteenth-century German philosopher Gottfried Wilhelm Leibniz. Berkowitz returns to Leibniz in order to reflect on one of the basic questions of contemporary jurisprudence, "What is the ground of law?" This question is commonly debated in terms of the tension between positive law and natural law. But Leibniz, who according to Berkowitz set the philosophical foundations of modern law, shared neither Austin's positivism, which grounds law in the will, nor Aquinas's naturalism, which grounds law in reason. In Leibniz's thought, the only truly modern ground of law is science, the validity of which lies not in empirical findings but rather in a particular way of understanding. Berkowitz then points out that the very formulation of the question of law as a search for ground reveals the groundlessness of modern law, its endless search for grounding, and its ever growing dependence on science as its ground. Berkowitz concludes by demonstrating how the turn to social sciences in contemporary legal academics is a fulfillment of Leibniz's project, though unbeknownst to itself.

One central line of demarcation drawn by liberal theorists is between law and religion. Liberal theorists often discuss this problem as the institutional separation of church from state, but the liberal demand for the "secularization" of politics has much deeper significance. Several articles in the volume attempt to challenge the liberal notion of secularization and show in different ways how notions of transcendence are still operative

within modern law, contrary to any attempt to separate religion and politics. Adi Ophir's article, "The Two-State Solution: Providence and Catastrophe," discusses the tension between two fundamental characteristics of the modern state. The first is its power to bring about catastrophes, including its reluctance to save its citizens from catastrophes; namely, the power of the state to bring about death. Ophir traces the catastrophic nature of political sovereignty to its theological roots, and claims that the modern state is the legitimate heir of divine sovereignty. Ophir juxtaposes the providential power of the state with its catastrophic powers and its power to care for welfare, and suggests that the latter form of politics has a different genealogy and it is only in modern times that the two forms have become indistinguishable.

Peter Fitzpatrick's article offers yet another rumination on the nature of modernity's secularism and its self-celebrated abandoning of divine authority. Building on Nietzsche's famous aphorism regarding the death of God, Fitzpatrick traces the various modern responses to this event, arguing they reflect the constituting characteristics of modern law: monism (the universalistic language and grammar of law), polytheism (the various ideologies and political theories that law supposedly serves) and catastrophe (the danger that is lurking, according to Nietzsche, in the wake of the death of God and that is to engulf Europe). Drawing on philosophical and historical literature, Fitzpatrick traces the profound religiosity of modern nationalism, along with its deific substitutes: the nation, the sovereign, and the law. Such theological traces — found in Hobbes, Rousseau, Bodin and many others — exemplify the unique break of positive-modern law from earlier legal forms, a break which is at once radical and non-existent, and which renders modernist efforts to establish a unified and organized yet godless world so paradoxical and dangerous, especially in imperial settings.

A different take on the "secularization thesis" is offered in Lior Barshack's article, "Transformations of Kinship and the Acceleration of History Thesis." The article focuses on contemporary changes in the regulation of sexuality and their relation to the concept of "modernity." Relying on psychological and sociological literature, Barshack views secularization as a founding moment in the passage of human societies from the primordial, mythical experience of a unified communal body to a corporate body governed by sexual taboos. This movement, Barshack argues, is accompanied by a transformation from the timelessness of mythical existence to the time-bound experience of history. In light of this relationship between sexuality and temporality, Barshack wishes to understand the relaxation of certain sexual taboos as a product of the changing pace of time in modernity, or as what Koselleck has called "the acceleration of history thesis." Barshack

concludes by explaining why, though sexual regulations have been relaxed, sexual taboos have not, and cannot evaporate. The acceleration of sexuality and history can be carried to the extreme only at the cost of a complete dissolution of social structures.

Countering the notion of secularization and more generally the attempt to understand modernity in light of its relation to the past is Shai Lavi's study of animal law in fin-de-siecle Germany. This article explores the different motivations underlying slaughterhouse reform and shows how activist groups were motivated by different understandings of both politics and animal life. If animals and humans meet in the modern agora, it is not because animals are treated more humanely, as advocates of progress would have it, nor because humans are thought of more as animal-like, as critiques of modernity would have us think. Rather, animals and humans meet on a new plane, on which a transformation of both the understanding of life and of politics takes place. The article concludes by raising some general questions regarding the possibility of using categories from the past, such as religion and secularization, for thinking about the future.

Mark Antaki's article on Hannah Arendt's political writings and historical reflection arrives at similar conclusions, though within a more philosophical context. For Arendt, the challenge of modernity is not the attempt to bridge the gap between religion and secularism, between tradition and modernity, past and future. It is precisely this gap that constitutes modern temporality. Since traditional law and politics were based on the continuity of temporality and the power of authority, the modern break in time gives rise to a crisis in political and legal authority. The attempt to bridge this gap and offer a lasting ground for political power may only bring about the death of politics in the hands of either liberal or totalitarian bureaucrats. Antaki, following Arendt, explores the possibility that judgment in its singularity may serve as an alternative to traditional authority, not by offering a solution to the gap in time or the crisis of politics, but rather by taking these gaps to their radical conclusion.

The two concluding articles in this volume address the relationship between time and law in two different traditions, British liberalism and German metaphysics. José Brunner, in his article on the British liberal tradition, explores this relationship in the thinking of Hobbes, Locke and Bentham. His article shows the ambivalent relation of these thinkers to the problem of law and time. On the one hand, the promotion of human happiness is not transcendental and does not lie outside human experience. Still, time is a central component of the thought of all three thinkers, for without time, there could be no lasting happiness but merely the satisfaction of immediate

needs. Brunner then moves on to discuss some striking differences between the writers.

Philippe Nonet's article focuses on the German tradition and, following Heidegger's critique of metaphysics, offers a very different problematization of the relation between law and time. Within the metaphysical thinking of Hegel and Nietzsche, a distinction is drawn between history as the bare facts studied by historians (*Historie*) and a transcendental notion of history as the living experience of a people (*Geschichte*). The current condition of modern humanity and modern law is measured against a transcendental destiny, which can be achieved through reason (Hegel) or will (Nietzsche). For Heidegger, however, only once thinking moves beyond the horizon of metaphysics can man be saved from his otherwise destinyless age.

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