

# From Person to Party – the Fundamental Problem of Social Private Law

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## 1 Introduction

The thesis that will be advanced in this article is that the fundamental problem of social private law is that it is a part of a private law system of goals, intentions and technical solutions that mean that in this system everything that originates from social distinctions will always be repressed and peripheral.<sup>1</sup> The concepts, “party” and “party autonomy” will be chosen as clear expressions of that which is privileged in the system. The purpose of the study is to try to determine what is repressed in the system and based on that propose a perspective that could challenge the present hegemony, namely, to consistently presuppose citizenship, rights and substantive equal treatment when social private law is discussed.

## 2 Methodological Point of Departure

In *On the Genealogy of Morality*, Nietzsche launches a method that he calls historical genealogy.<sup>2</sup> He uses this method to analyze the area of morality, for example, to study the history of the concept. In this context, he says something that to begin with can seem to be paradoxical, namely, that “that which is definable is only that which does not have any history”.<sup>3</sup> Ordinarily, one assumes that it is not possible to understand a concept, even historically, before one has defined it.

Nietzsche takes punishment as an example when he analyzes the history of a concept. The method he develops can be described as semiotic, which not the least is apparent when he uses such words as “sign”, “chains of signs” and “semiotic” itself. He holds that when it has to do with a “phenomenon” such as punishment, it is important to distinguish between its origin and its end utility.<sup>4</sup> This is because, that which exists, is always put into use for new ends. In such an historical process he instead puts foremost spontaneous and formative forces that provide new interpretations, new determinations. In the case of punishment, he states that we must distinguish between two sides of it. Firstly, there is the relative *permanent*, namely the use, the act, the procedures etc. and that which is more *fluid*, namely the intentions and expectations that are linked, for example, to the procedures. He points out that the procedures are often older than the more indefinite meanings and intentions. It is here that what has already been said about that which exists that is always put into use for new ends comes in. He talks about shifts regarding ends that sometimes are barely discernable. In regards to an old concept like punishment, he states, it is a questions of:

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1 For the importance of exception for law, see Agamben *Homo Sacer* Stanford 1998 p. 15 ff.

2 Nietzsche F. *On the Genealogy of Morality* Cambridge 1994.

3 Ibid. p 57. Cf. Foucault *Nietzsche, Genealogy in Aesthetics, method and epistemology* vol 2 New York 1998 p. 369.

4 Nietzsche op. cit. p. 54 f.

... not just one meaning but a whole synthesis of ‘meanings’: the history of punishment up to now in general, the history of its use for a variety of purposes, finally crystallizes in a kind of unity which is difficult to dissolve back into its elements, difficult to analyze and, this has to be stressed, is *undefinable*.<sup>5</sup>

Two things of what has been stated will be of special importance when the fundamental problem of social private law is discussed, namely that:

- That which exists is always put into use for new ends, is utilized for new intentions which mean a new interpretation, adjustments, by which the “intention” hitherto will by necessity be neglected or completely disappear.
- Development as a concept, “thing” or a use does not go through a process, development or a progression towards an end.

Thus, when I use the concept “development” below, I do not mean some form of evolutionary improvement or progress.

### 3 From Human Being to Person

The abstract concept of the individual that is used in law today is historically a relatively recent creation. What was central to the development of this concept was the idea that each individual, regardless of social position etc., really was a legal subject (rättssubjekt). Thus this development took place in contrast to the idea that a person’s legal position was determined by his or her belonging to a certain group of persons.<sup>6</sup>

An important stage in the development of the modern theory of the legal person and the creation of the autonomous individual was Kant’s concept of *private autonomy*. Kant namely connected autonomy to free will. By doing so, he did not make any difference between different kinds of people, as one did in the estate society, but instead drew the line between rational beings and beings without reason, i. e. between humans and animals. Regarding the latter, he said that they determined their activities “through the influence of foreign causes”.<sup>7</sup> Kant argued against the objectification of humans during the Enlightenment. He claimed that a morally free person must be able to make decisions and act against his passions and desires and in accordance with moral right. What he wants to create is a moral freedom. Furthermore, he argued that every individual was enveloped in a sphere of autonomy within which the individual will should be allowed to operate and develop freely. Therefore, society should be so

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5 Ibid. P. 57.

6 Peterson C. *Fredrik Schrevelius och den moderna personteorins upptagande i svensk civilrättsdoktrin* in *Rättsvetenskap och lagstiftning i Norden Festskrift tillägnad Erik Anners* Stockholm 1983 p. 141 and Björne L. *Brytningstiden: Den nordiska rättsvetenskapens historia Del II* Lund 1998 p. 349 ff.

7 Kant I. *Gundlegun zur Metaphysic der Sitten* 1785 p. 97 f.

constructed that every individual within his or her sphere of autonomy should be able to freely develop and operate. Will should not be bound to a certain kind of authority or be controlled by foreign causes. As far as Kant is concerned, the argument in favor of free will takes place mainly against the ideas of the Enlightenment. Therefore the question can seem to be between causal thinking and a completely free attitude. However, in order to have a deeper understanding of the questions that Kant raised, it can be worthwhile to recall the ideas of the Enlightenment in this area. The latter is best done based on the Enlightenment critique of the medieval idea of the “I” which in the medieval worldview is defined in relation to a cosmic order.<sup>8</sup> A human being’s body, the “micocosmos”, the body; for example, the head with two eyes, two ears, a nose with two nostrils and a mouth, was held to be a direct reflection of the macrocosmos, which contained in the heavens two propitious, two unpropitious, two shining heavenly bodies as well as Mercury.<sup>9</sup> It was held that there was a correspondence between the micro- and the macrocosmos. Nature provided form and order. What the Enlightenment did was objectify Nature.<sup>10</sup> The medieval idea that the world had an inherent “meaning” that gave meaning even to the “I” was rejected.<sup>11</sup> The modern subject of the Enlightenment defined itself. According to Taylor the existence of the self was demonstrated while there was uncertainty about everything else, yes, even including the existence of God.<sup>12</sup> Developed further, this way of reasoning and perspective, for the Enlightenment, led to a new form of freedom. The subject was no longer bound by its external order.

Kant’s criticism of the Enlightenment was not aimed at this new form of freedom, where the subject was no longer constrained, but instead at the depreciatory view of the importance of the will.

The creation, the autonomous individual, demanded equal treatment from society and a clear demarcation between public and private. Let us immerse ourselves in the question of equal treatment.

Legal constructions, for example, the autonomous individual, can be regarded as a form of technology; technology in a transferred meaning to society. The thesis will be advanced below that such technologies can be connected to the question of hegemony and a dominating group’s way to universalize its perspective and make it the completely natural way to see something, so that other views appear as anomalies, exceptions.

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8 Taylor C. *Hegel* 1975. p. 5.

9 Ibid. p. 4.

10 Wennström *Rättens individualisering* Uppsala 2005 p. 86 ff.

11 Taylor op. cit.

12 Ibid.

## 4 Equal Treatment

According to Weber, modernization means a rationalization and bureaucratization of society.<sup>13</sup> If one sought for religious answers and solutions to social and political problems during previous epochs, during the mature, modern era, legal and bureaucratic answers and solutions were given to such problems. Furthermore, rationalization and bureaucratization support the formalization of law and society. In addition, formalization requires, among other things, equal treatment.

The original form of the idea of equal treatment can be found, for example, in the first article of the French National Assembly's Declaration of the Rights of Man and the Citizen from 1789. "Men are born and remain equal in their rights. Social differences may only be based on the general interest."

The first sentence of the article is interesting in regards to equal treatment. I will return to the second sentence in order to discuss special treatment, which is something that is highly relevant to the idea of social private law.

However, if we keep to the idea of equal treatment, the idea expressed above is a mirror image of Kant's ideas concerning the autonomous person. If we link this entire matter to rights, then we find ourselves on the level of social and political rights, when we talk about equal treatment. It could be said that civil and political rights, for example, the right to own property and the right to vote, are based on the autonomous, abstract, concept of the individual that was created in its present form some time in and around the French Revolution. Let us see how the "development" from human being to person and the idea of equal treatment was incorporated into the field of jurisprudence in the early nineteenth century.

## 5 From Human Being to Person in Private Law

Savigny is said to be the one who incorporated Kant's concept of *private autonomy* into jurisprudence. This statement is both true and false, because what Savigny did was to bring together Kant's ideas with ideas from his own time, i. e. the Romantic period. What is typical for the Romantic way of looking at humankind is expressivity. This means that a human beings realization as a person expresses something. Realization is not predetermined, as in Aristotle's idea of a realization of the "I" in analogy, for example, with a tree that develops from an acorn, but instead the realization becomes determined as this is fulfilled. The idea that a human being expresses something with his or her life also results in a view that every expression of "humanity" is unique. Savigny expresses the matter thus:

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13 Cf. Turner C. *Modernity and Politics in the work of Max Weber* London New York 1992 p. 7 – 32 and Whimster (ed), Lash S. (ed) *Max Weber, Modernity and Rationality* 1987.

Man stands in the middle of the external world and the most important element for him in his surrounding is contact with those who are like him in their nature and vocation.<sup>14</sup>

A point of departure from which to understand this view can be the critique of Kant's concept of the person, for example, as it was formulated by Jacobi.<sup>15</sup> According to Jacobi. Kant had undermined the importance of the concept of "I" by remaking it in the form of an abstraction and by doing so had also ignored its original meaning. Jacobi argued, like Fichte, Schiller and others, that there is no "I", without a "you". In his opinion, Kant had replaced the "I" with nothing but an illusion.

The picture of humankind that Savigny brings forth is clearly expressive. Savigny talks about man, not the subject, and this whole human being can be found in the external world where he himself decides what is important to him and he does that through sympathy, touch, with that which resembles him. What this quotation does not clearly show is the extent of the concept of freedom for Savigny; freedom, however, that requires boundaries. This demarcation and the recognition of the other person's will and domain that goes with it, expressed as the relationship between "I" and "you", is, for Savigny and others, the law. "The rule by which this boundary and by which this domain is determined, is the law."<sup>16</sup>

Savigny speaks mainly about private law. He furthermore claims that not all parts of human conditions belong to law. He names three "classes" or areas, namely, property, friendship and honor.<sup>17</sup> It is only the first area that is completely covered by law, while the second class is completely outside the law and the third is only partially covered by the law, mainly by family law.<sup>18</sup> For Savigny, private law has two components that both have to do with the demarcation of a human being's domain and will, namely property law (rights in *rem*) and the law of obligations. Property law (rights in *rem*) is understood by Savigny in its older meaning as the right "over" something. The law of obligations is associated with the demarcation between a person's will, in the form of an action, in relationship to another / a different person's will and domain.<sup>19</sup> However, the demarcation of a person's free space also has a public side. The family constitutes the boundary to the public domain. Within this domain, there is property, i. e. property that is not only seen as what we today call wealth (*förmögenhet*).

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14 Savigny *System des heutigen Römischen Rechts* vol. 1 Berlin 1840 § 52, p. 331. (My translation.)

15 Jacobi's criticism can be seen in a number of places, in part in his novel, *Allwill*, *Friedrich Heinrich Jacobi's Werke* Leipzig 1812 *passim*, but perhaps mainly in *David Hume über den Glauben, oder Idealismus und Realismus* Breslau 1787 p 63 ff. where the statement that there is no "I" but instead a "you" can be found.

16 Savigny *op. cit.* p. 332. (My translation.)

17 *Ibid.* p. 334.

18 Regarding family law, *ibid.* p 346 ff.

19 *Ibid.* p. 338 ff.

In this way, the starting point for the discussion of the legal concept of person is based on the concept of human being, where the latter has a clear expressive content. As has already been pointed out, Savigny's view contains opinions that "tone down" Kant's abstract concept of the individual by bringing this concept together with ideas from Fichte, Jacobi and others. It is above all the "social dimension" of the "I" that is of importance here, i. e. that the "I" so to say, comes into existence in relation to a "you"; something that is later dealt with and further developed by Hegel.

If, for example, we compare this with Puchta, we see that he also starts with "human being". Concerning "person", he says that this is a creation of the law: .... It makes a human being into a person and determines his or her activity as such.<sup>20</sup>

In this way, a person is an abstraction and only has to do with being a human being as a legal subject of will (*willenssubjekt*).

It might be appropriate to follow Puchta's line of reasoning here in order to understand the link to what has been said above concerning the idea of equal treatment and its central role in thinking from the French Revolution and onwards during the early nineteenth century. Puchta was active in a period before the "bureaucratization" of private enterprise has begun, to borrow a phrase from Weber. Puchta therefore speaks mainly about a human being as a person, as a legal entity. If we look at his division of law, we see that his point of departure is that human beings have different "personalities" and therefore can act in different ways, mainly as individuals or in a group. Regarding the latter, he mentions the family, a people and the church.<sup>21</sup> From this can be derived a division of legal relations into property, family, public and church law. The law is therefore divided into private law (property and family law), public law and church law. According to Puchta, private law is the primary concern of the law and the most important condition is the human being "taken as an individual".<sup>22</sup> He holds that the determination of how a human being "stands" as an individual and his or her relationship to other people is the most important task of the law. The influence from Savigny, for example, can be clearly seen here. Just as Savigny, Puchta emphasizes that this task of the law does not include the entire human being, and all attendant relations, but instead that it is only those relations that are linked to a person's free will and needs that are interesting. (In this context, one should not see "needs" in a modern, psychological sense, but instead as a more material need.) In this manner, private law is something extremely practical for Puchta. It has to do with such matters as acquiring things, conducting "business" etc.<sup>23</sup>

Thus, the rights this deals mainly with are civil rights.

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20 Puchta G. F. *Institutionen* Leipzig 1865 p. 69.

21 Ibid. p. 48.

22 Ibid. p. 49.

23 Ibid. p. 50.

## 6 From Person to Party

Weber describes the development of private law as a journey with an increasingly formal, legal, abstract treatment of problems in the form of logical and methodic rationality.<sup>24</sup> Therefore, the contract is important for him. When one mentions “contract”, it is important to illuminate the concept of “party”, which differs considerably from the concept of “person” that is found in Savigny and Puchta. If one wishes to understand this shift from having an interest in a person to having an interest in a party, it can be of interest to study the jurisprudence of interests. Therefore, let us study Jhering, who is often described as a Social Darwinist. Haeckel describes the spirit of the times within which Jhering’s ideas took place as a sobering up from Kant’s harmful influence, and he gives all credit to biology for this rescue.<sup>25</sup> We can trace this scientism grounded in biology in the following quotation from Jhering:

To defend oneself and one’s own is the highest law for all organic life and expresses itself in the instinct of self-preservation in every created being. For human beings, the question not only deals with their physical environment, but also their moral existence, for which law is a condition.<sup>26</sup>

Humans are compared with other beings. Gone is the division between humans as natural beings and spiritual beings, which, for example, was the position of Puchta. Nor is there any relational thinking concerning man in relation to his surroundings, which Savigny argued. If we scrutinize the quotation above more closely, we see that it is based on the assertion that: “All organic life has the instinct of self-preservation.” The basis for the demarcation between individuals thus becomes essentially “biological”. By doing so, a naturalistic filter is placed on law, so that the arguments that, for example, Savigny gives for demarcations which either have to be reinterpreted based on this “filter” or rejected as untrue. This represents a shift from a humanities directed interpretation of attacks on a person’s sphere to a view inspired by the natural sciences. It is important to point out that this is not a question of biology in a real sense, but instead a biological theory and language used far beyond its actual domain.

What we see is a development within law and jurisprudence away from a division between human being and person, where the person was the legally relevant “parts” of the human being and to a view where physical persons are placed in opposition to legal persons.<sup>27</sup> Physical persons in Jhering’s model of the law also become dependent on the state in a different way than in the

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24 Weber M. *Economy and Society* vol. 2 Berkeley 1978 p 641 ff. Cf Turner S.P and Regis A. F *The Lawyer as Social Thinker* London and New York 1994 p. 136 ff.

25 Haeckel E. *Människoproblemet och Linnés Herredjur* Stockholm 1908 pp. 41 and 43.

26 Jhering R. *Striden för rätten* Stockholm 1941 p. 23 (my translation).

27 Olivecrona K *Studier över begreppet juridisk person i romersk och modern rätt* Uppsala 1928 pp 42 -51. Also cf. Torpman J. *Rättssystemets lärande* Stockholm 2002 p. 55 ff which however constructs his presentation on Gierke and Olivecrona, which, among other things, results in it’s being said that Savigny has a “fiction theory” regarding people.



theories of Hegel, Puchta and Savigny.<sup>28</sup> Two facts support this; firstly, the fact that “the entire human being” is the object of the law, and secondly, that the development of law takes place through legislation. Savigny’s view, for example, as we have already seen, was that large parts of a human’s life lay outside the domain of the law. His skepticism regarding legislation was in part due to a different interpretation concerning how law had been developed than the one Jhering would adopt. However, Jhering emphasizes the importance of legislation by saying that “the law is a concept of power”.<sup>29</sup> In doing so, Jhering also expressed a clear monocentric view of the law. He says that other factors than legislation have limited force; it is only legislation that can:

... demolish the dams that prevent the stream from taking a new direction. Only the law, i. e. the intention of the state, to these actions referred to in particular, and therefore it is not accidental but instead a deeply rooted necessity in the essence of the law that all invasive reforms in procedural or substantive law can be referred to laws.<sup>30</sup>

This form of rational, bureaucratic “law steered” law together with other transformations creates another view of contractual relations. Physical persons become a form of legal entity that can be compared with other legal entities, such as legal persons. The will is no longer a “moral will”, as it is for Kant, or an “expressive will”, as it is for Savigny, but instead a “party will”; concepts that have been made increasingly more abstract and have received their final form in legal clauses of different kinds, and in principles, interpretation maxims, doctrines etc. In other words, they do not spring from the form of demarcation between one person’s domain and that of another, where the person is the “legal” part of a human being.

When we speak of equal treatment, this form of abstraction entails an even purer form of equal treatment when a legal person and a physical person can be placed on the same footing in a comparison, for example, when it is a question of requirements for autonomy in a contractual relationship. If for Savigny, Hegel and others, autonomy was based on respect for the other person and ideas of dignity, it is more a question here of non-interference i.e. that both parties should function as free and independent legal entities in relation to each other.<sup>33</sup>

The idea of equal treatment therefore can not be concluded, for example, from, the above quoted article in the Declaration of Human Rights from 1789. Instead one could say that equal treatment has been formalized, has become a formal value. The above leads to the question of special treatment.

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28 Jhering R. *Geist des römischen Rechts* Leipzig 1907 p. 107 and Jhering op.cit 1941 p. 11. “all intrusive reforms in ... substantive could be referred to laws”.

29 Jhering op.cit. 1941 p. 15.

30 Ibid. p. 11.

## 7 Social Distinctions – Special Treatment

I will begin with a principle that has been interpreted and reinterpreted throughout history, namely, equity and the division between formal and substantive justice.<sup>31</sup> It is usually pointed out that formal justice, in the form of “like cases should be judged alike” usually requires exceptions, clarifications, i. e. substantive justice. A slavish following of “equal treatment” in individual cases can namely end in an “unjust” result. The basic idea when departing from formal justice is that the departure should be factually (objectively) warranted.

A concept that is important to notice when this is being discussed is individuation, i. e. that which “makes” someone an individual. The concept is used both within psychology to describe the development of a human being into an independent person and also within different parts of the social sciences, for example, sociology, to describe other aspects of what makes a person an individual besides the purely psychological. When distributing the “benevolence” of the welfare state and in order to obtain the egalitarian goals it rest on, it is necessary that it is possible to identify the recipients of this distribution. Such individuation is usually described in the following way: “a bureaucratic procedure that uniquely identifies individuals for the purpose of social administration and control”.<sup>32</sup>

It is possible to find legal individuation in all laws from private to public law that restricts the “autonomies of parties”, for example, in favor of the protection or redistribution of burdens. Individuation in this sense therefore means distinctions and special treatment in relation to the idea of equal treatment found in autonomy. Turner says:

The egalitarian provisions of social rights involves an individuation of the population in order to achieve adequate administrative and bureaucratic conditions for social justice. The spread of bureaucracy is associated with the growth of individuation as the state attempts to provide some supervision of the distribution of welfare. The development of universal franchise, the modern health system, equal provision of education and a social infrastructure for urban society required both a stable bureaucracy and a detailed form of individuation.<sup>33</sup>

Bureaucratic legal individuation, however, does not necessarily have to have its point of departure in “benevolence”, but instead is used just as often to discipline and control.<sup>34</sup> A drastic example of this is the view of the “mentally deficient” from the late nineteenth century up until the middle of the last century. The modern society here displays, as all societal phenomenon has a

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31 See further Wennström B. *Rättens kulturgräns* Uppsala 2002 p. 70 ff.

32 Abercrombie quoted by Näsman *Individualization and Institutionalization of Childhood in Today's Europe* in Childhood Matters Qvortrup J (ed.) London 1994 p. 166.

33 Turner B. S. *Citizenship and Capitalism* London 1986 p. 121.

34 Turner, op. cit p. 122 speaks about the paradox of bureaucratic individuation: “First, it makes the social and political surveillance of large numbers of people possible; it is thus obviously a threat to individual autonomy .... Secondly, individuation provides a uniform basis for individual development and contributes to the creativity and individuality of the person”.

tendency to do, to be Janus faced. Individuation, based on legal, bureaucratic grounds, for example, does not need to mean the same as individualization, but instead can very well result in collectivization by the “individual” being treated primarily on collective grounds. “Employee”, “consumer”, “disabled” and similar concepts can be examples of legal individuation that have a tendency to collectivize instead of individualize.

The first article in the French Assembly’s Declaration of the Rights of Man and the Citizen from 1789 that was quoted above, states in the second sentence the fundamental form for permitted individuation (*social differences may only be based on the general interest*). This can be compared with what was stated above concerning objective reasons in a departure from formal justice.

Furthermore, it can be said that civil and political rights, for example, property rights and the right to vote, are based on the abstract concept of the autonomous individual, while social rights in the form of social protection of different kinds are based on legal individuation. In order to make such an individuation, it is generally held that there must be objective reasons.<sup>35</sup> The question that should be asked because of this is whether an affirmation of difference can result in a dangerous kind of relativism.

“Objective reasons” therefore relate in a special way to individuation and equal treatment. Equal treatment can namely be discussed on a number of different levels, for example, the constitutional level, the level of law, of administration etc. The autonomous individual is an expression of equal treatment on the general level as, for example, it is expressed in a constitution i. e. that all legislation etc. is and should be social, ethnic and gender neutral. However, a society that only knows general equal treatment, as was ascertained above with reference to Turner, can not achieve very much through legislation and administration. This applies not the least to the welfare state. In this manner, “special treatment” can be a means to achieve stated goals such as equality, social justice etc. Equal treatment can also be discussed on a lower level after a certain amount of individuation, “special treatment” has taken place. The EC directive regarding the equal treatment of men and women is an example of this. For example, only by identifying two sexes, as is done in the EC directive, and talking about the equal treatment of men and women, indicates that it is a question of a different form of “equal treatment” than that on a general level of abstract individuals. Therefore, when equal treatment is discussed, it is of the greatest importance to ascertain on what level, so to say what level of

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35 Cf. Perleman *Justice* New York 1967 p. 86. The principle that factual reasons are required for legal individuation can be found in a number of different places, but one variation of this can be found in the Swedish Constitution, RF chapter 2.12.2 where it states that exceptions from certain expressed freedoms and rights may only be made in order to fulfil acceptable ends. It is further stated, for example, in section 16 of the same chapter and law that discrimination of a citizen on the grounds of sex in law or other regulations is prohibited unless the regulation is part of a striving to achieve equality between women and men. In light of this example, an individuation has taken place in this section from the gender neutral concept of citizen to “women” and “men”, who can even be discriminated against if this discrimination is compatible with the “factual reason” of achieving equality between the sexes. Cf. Lerwall L. *Könsdiskriminering* Uppsala 2001 p. 324 ff. and 415 ff.

abstraction, this is taking place. In discussions of this kind, it is not the least important to keep arguments apart on different levels. For example, to conduct a general argumentation concerning equal treatment that has bearing on a discussion when the abstract individual is being discussed, in a discussion on a lower level, after individuation has occurred, leads in the wrong direction. To be sure, similar cases are to be treated the same, but if “special treatment” is allowed because of “objective reasons” in a law, a court decision, an administrative measure etc., for example, based on sex, many of the general arguments concerning equal treatment become invalid. Therefore, it will be argued below that it is of the greatest importance to identify the different uses of the concept “equal treatment” that are found on the different levels of the law and within public administration. When, for example, the Swedish Constitution speaks about “equality before the law”, one thing is meant; another when the EC directive on the equal treatment of men and women speaks of “equal treatment” and a third when the Swedish school law speaks about “equal access” and “equivalence”. To only focus on general equal treatment can result in a form of a “fundamentalism of rights”, in other words, that all forms of individuation are rejected with reference to “fundamental civil rights” being violated.

The question of special treatment and the objective reasons for these are of the greatest importance when social private law is discussed. Another way to express the question of special treatment is to call it substantive equal treatment. This concept will be used below.

## 8 Citizenship and the Autonomy of Parties

Equal treatment is closely related to alterity and differences between people. Among other reasons, this is because there are differences between people that are brought to the fore by the idea of equal treatment. Also, it can be said that citizenship creates its opposites. As early as in antiquity, we know about those who were entirely excluded from citizenship. Then the barbarian, today perhaps the immigrant; but to these opposites must also be added different forms of immanence i. e. individuals and groups who lack some essential characteristic that is valued for citizenship. However, these immanent individuals and groups are always counted as “one of us”. Examples of immanence in the classical period were slaves, women and children. In order to capture all the nuances of citizenship talk about immanence in addition to talking about being included or excluded from citizenship. As Isin points out, the history of citizenship is above all a history about alterity where we have all the different forms of exclusion, inclusion and immanence.<sup>36</sup> Something clear that appears in historical studies of citizenship is that alterity is changed along with the development of society. Only the narratives about the proud history of the concept of citizenship remain constant. References to earlier periods of greatness in the form of the city state of Athens or the Roman republic namely have functioned throughout history as justifications of contemporary divisions regarding citizenship. What few people

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36 Isin E. *Being Political* Minneapolis 2002 pp. ix and 29 f.

know is that even in Athens there were such narratives about the roots of Athenian citizenship in a bygone heroic time in the Orient.<sup>37</sup> To look backwards and base the present concept of citizenship on a past ideal therefore seems to be that which primarily remains unchanged. In this presentation, I will try to avoid this desire refer back to unchanging ideals.

Why, then, is alterity of such interest as has been hinted at here in a study of citizenship? Levinas has expressed this well when he says that we need a “humanism for the other”.<sup>38</sup> The core of this humanism, for Levinas, is responsibility for “the other”; in his formulation, “the widow, the orphan and the stranger”. He points out that this is a responsibility that is closely connected with one’s own dignity.

If we ascribe to Levinas’ view, the quality of citizenship also becomes dependent on how we relate to its opposites.<sup>39</sup>

As is well known, Marshall spoke about three forms of citizenship: civil, political and social, which represented stages on the path to democratization and the lessening of class differences. For Marshall, civil citizenship was a creation of the struggle of the late eighteenth century for civil rights. Marshall linked political citizenship to the demands for participation that, among others, the labor movement stood for from the nineteenth century to the early twentieth century. Finally, social citizenship is the struggle for social rights from the middle of the twentieth century that Marshall summed up in the following manner as:

The whole range from the right to a modicum of economic welfare and security to share to the full in the social heritage and to live the life of a civilized being according to the standard prevailing in the society.<sup>40</sup>

Thus, for Marshall, social rights are of a different kind than the other two rights, since these rights can not be derived from democratic principles of majority rule, but as Marshall expresses it, are “the right to receive”. In other words, Marshall’s welfare state is based on a form of social ethics, namely, to help the weak and protect the vulnerable from being excluded and becoming weak. Marshall’s theory is a theory for modern society. The greatest weakness of the theory is that it does not look beyond modern society, with the result that social citizenship becomes the crowning achievement of creation regarding rights. In order to correct this deficiency, something more is required than Marshall’s ideas if one is to continue conducting this debate on citizenship in our own time.<sup>41</sup> Let us for that reason add a power dimension to the question of citizenship.

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37 Ibid.

38 Levinas E. *Humanism of the Other* Chicago 2003 p. 29 ff. See also Levinas E. *Tiden och den andre* Stockholm 1992 and *Alterity and Transcendence* New York 1999.

39 See also Agamben op.cit.

40 Marshall T. H. *Sociology at the Crossroads* London 1963 p. 74.

41 Cf. Crouch C., Eder K. and Tambini D. *Citizenship, markets, and the state* Oxford 2001. See also on gender and citizenship, for example in Philips A. *Which Equalities Matter?* Cambridge 1999 p. 23 ff.

It was stated above that legal constructions, for example, that of the autonomous individual, can be regarded as part of a form of technology; technology in a transferred sense to society. I stated furthermore that I would advance the thesis that such technologies can be linked to the question of hegemony and a dominating group's way to universalize its perspective and make it the entirely natural way to look at something so that other perspectives appear as anomalies, exceptions.

A classic picture of the evolutionary concept of the citizen is the one with ever expanding rings on the water. Firstly, citizenship is seen as something only reserved to men of the nobility, in order to expand to other men and then increasingly bigger rings to include slaves, women etc.<sup>42</sup> Isin argues against the evolutionary point of view and uses the concept of "political" i. e. "to be political", in order to describe an alternative way of looking at the development of citizenship. It is here the dimension of power is brought in to the discussion. "To be political" in these studies means to belong to a dominating group in society that with various strategies tries to maintain this dominance when it comes to participating, deciding, choosing among alternatives etc. He argues that for different groups, history is full of moments between "becoming political" and "being political" that contradict the evolutionary picture of ever expanding rings including more and more groups. Instead he describes overlapping, in between forms, holy and unholy alliances, where the striving for dominance has been obvious. In order to capture this, Isin talks instead about aspiring to go from "becoming political" to "being political" and to use strategies and technologies that an aspiring group often borrows from the dominating groups. According to Isin, some of these strategies are solidarizing, competition, alienating and universalizing. By solidarizing is meant different ways of identifying, associating, and joining a group or how the group relates to another group through identification, association or joining. Competition means all forms of battles and efforts from a group caused by the group relating to other groups through actions and arguments, which can either be distinctly deviating from the group in question or in certain instances overlap the group. Alienating consists of those ways that groups use to describe others as deviating and foreign. Universalizing is the terminus of these strategies and means that the group has established itself as dominating. At this point in time, the description of what a citizen is tends to coincide with that which is characteristic of the group. Thus, it appears completely natural to be the same as and included in the dominating group.

Among technologies, Isin includes constructions of law in support of a dominating group. Isin's view coincides with the thesis I have been advancing above concerning "party" and "autonomy of parties" as part of a technology relating to a dominate group. The question I intend to investigate now is whether "party" and "autonomy of parties" is an expression of a technological process and therefore part of a universalizing process has caused other views to be

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<sup>42</sup> See for example Lokrantz Bernitz H. *Medborgarskapet i Sverige och Europa* Uppsala 2004 p. 64 ff. for a presentation of the development of citizenship as clearly evolutionarily oriented.

excluded and thereby be regarded as exceptions. In order to investigate this suspicion, I intend to deconstruct the concept “party” in order to understand, for example, in what way “autonomy of parties” occupies the seat of honor in the discourse of modern private law.

## 9 Deconstruction of the Concept of Party

Step one in this deconstruction should be to determine if the concept “party” is privileged within private law and also to find its conceptual counterpoint. If we begin with the latter, we can ascertain that “it happens what often happens” when legal concepts are to be deconstructed; namely, that the concept has such a strong position that it is not possible to find its opposite in the discourse.<sup>43</sup> Thus, it can be assumed that “party” is a privileged concept within the private law discourse.

Step two in the analysis consists of understanding how the concepts relate to and are associated with other concepts, i. e. finding associative differences from and similarities to other concepts and by doing so reveal in what way the concept dominates. Since this is a question of associative connections within a system, a discourse, where everything is assumed to be interconnected, the differences and similarities we find can, so to say, be either close to or farther away from the “original concept”. Let us start with the list of associative connections given below. (The two columns do not correspond to each other line by line but instead should be read separately.)

### Party

#### *Similarities*

Part  
Side of  
Equal  
Equivalent  
Private  
Independent  
Free  
Abstract  
Construction  
Theoretical  
Impersonal

#### *Differences*

Whole  
Dependent  
Unequal  
Concrete  
Person  
Factual  
Bound  
Unfree  
Weak  
Illuminated  
Substantive

The list could have been made longer, but it is sufficient in this context. The “list” can be read so that the concept “party”, as privileged in the private law discourse, is associated with such things as equality, equivalent, abstract, part etc.. The repressed or excluded things becomes such things as dependence, wholeness, weakness, factual and physical.

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43 Cf. Wennström op.cit. 2005 p. 49.

The autonomy of parties as an expression for a special “technology” in a system constructed for “modern” private law where formal values are given priority, is obvious if we refer back to the section above about the importance of the concept of “party” from conceptual jurisprudence onwards. As opposed to this, social private law to a great extent deals with questions that can be associated with what was given on the difference side of the “deconstruction”; i. e. questions about inequality, factual questions, wholeness, weakness etc.

In other words, there is much that speaks for the suspicion that the concept of the autonomy of parties seen as a technology is part of a universalizing process that has entailed that other views are regarded as exceptions.

## 10 Conclusion and Suggestions

By way of introduction, it was stated that the thesis that would be advanced in this article was that the fundamental problem of social private law is that it is part of a private law system of goals, intentions and technical solutions that mean that in this system, everything that is based on social distinctions will always be repressed and peripheral.

If we refer back to the methodological points of departure in the introduction to this article, a brief account was given of Nietzsche’s genealogical method. Two things were said to be important in this context, namely, the conclusion that:

What already exists is always put into use for new aims, is used for new purposes, which means new interpretations and additions, by which the goals that have applied up until now by necessity will be relegated to insignificant positions or completely disappear.

And, that the development of a concept is not a process, development or progression towards a goal.

Regarding the first point, we have seen this demonstrated above regarding the concepts of “person” and “party”. Ideas and constructions that were already in existence regarding the will, demarcation etc. were reformulated and used for new purposes, which meant new interpretations. Earlier goals, therefore, receive less attention, for example, the expressive ideals celebrated by Savigny disappear or are toned down, when party instead becomes the form of abstraction that is used at the expense of person.

What, then, are the new interpretations and re-interpretations that would have to be made today within the framework of social private law? Above, we saw that during the Romantic period there was a social dimension to the concept of person that was then lost when “a person was made into a party”. Demarcation was for Savigny and others made in the form of respect for the other. Therefore, what is needed is a new interpretation of the concept party based on such a social dimension, where, for example, one can go back and study even Hegelian ideas regarding rights. The basis for these was “mutual respect and equivalence”<sup>44</sup> where the recognition of others’ equal value is central. Such an

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44 Fogelklou A. *Den orättfärdiga rätten* Stockholm 1978 p. 98.



interpretation differs from the non-interference of the autonomy of parties in the form of integrity for the parties in such a way that “mutual respect and equivalence” also includes real, actual respect and not just abstract neutrality or non-intervention.

The other new interpretations and re-interpretation that would need to be made is the one hinted at above in relation to substantive equal treatment. Once again the question concerning what has been said above about autonomy of parties as part of the universalization process becomes topical. “Party” and “autonomy of parties” can be seen as expressions of a monocentric law, a highly formalized and abstract law based on the state steering of norms through legislation. Social private law, on the other hand, is based on different forms of individuations based on a “objective reason” of one kind or the other. If “party” and “autonomy of parties” represent “macropolitics”, then social private law represents “micropolitics”.<sup>45</sup> The latter means that solutions are made dependent on the “site”; the specific; site specific. In terms of perspective, the former stands for a way of attacking problems “from the top down”, while the latter does the same “from the bottom up”.<sup>46</sup> One way of achieving the latter is to begin looking at social private law from a perspective of citizenship in the way that has been described above, so that old concepts such as “party” etc. are recognized as parts of what Isin calls a technology that supports universalization tendencies where a dominating group has made its view the neutral and normal one. The way there, as far as jurisprudence is concerned, goes through revealing, deconstructing, concepts such as reasonable – unreasonable, commitment, interpretation etc. The end goal is to create a social private law where the ends, purposes and technical solutions that are based on social distinctions are no longer pushed aside and peripheral.

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45 My use of the concept is linked more to the traditional way of discussing the concept, i. e. it is based on the view of power that originated with Foucault; not, for example, to Wilhelmsson’s, with reference to the view of Beck that “micropolitics” deals with the activities of citizens and activists, i. e. subpolitics. Wilhelmsson T. *Senmodern ansvarsrätt. Privaträtt som redskap för micropolitik* Uppsala 2001 p. 134.

46 Cf, for example, when intersectionality is discussed by Crenshaw K. *Demarginalizing the Intersection of Race and Sex* in *The Black Feminist reader* Malden Mass. 2000.