



[Original articles]

Law at the Edge of Reason: Violence and the Paradox of Rights in Christoph Menke

O Direito na Fronteira da Razão: Violência e o Paradoxo dos Direitos em Christoph Menke

Vanja Grujić^{1 2}

¹ Universidade Federal de Pernambuco, Recife, Pernambuco, Brasil; ² Institute for Philosophy and Social Theory, Universidade de Belgrado, Sérvia. E-mail: vanjagrujicoves@gmail.com. ORCID: <https://orcid.org/0000-0002-3480-2883>.

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Abstract

This paper analyzes Christoph Menke's critique of subjective rights as a theory of the paradoxical relation between law and violence in modern liberal democracies. It reconstructs this critique through three guiding metaphors that structure Menke's account of modern law: law as violence, law as domination, and law as paradox. Through these figures, Menke shows how bourgeois law appears formally detached from the state and the economy, while the violence that sustains it persists within the very form of law itself. The analysis demonstrates how the liberal promise of equal rights generates a paradox in which the same legal form that proclaims equality simultaneously reproduces new forms of social domination. In reconstructing Menke's genealogical critique, the article also raises a critical question concerning the limits of grounding the transformation of law solely in the self-reflection of legal form. By situating Menke's work within the tradition of critical theory and poststructuralist genealogy, the paper argues that the paradox of rights should also be understood as a site of political contestation in which the relation between law, violence, and equality remains open to transformation.

Keywords: Christoph Menke; critical theory; law; violence; subjective rights.

Resumo

Este artigo analisa a crítica aos direitos subjetivos desenvolvida por Christoph Menke como uma teoria da relação paradoxal entre direito e violência nas democracias liberais modernas. O texto reconstrói essa crítica a partir de três metáforas orientadoras que estruturam a concepção de direito moderno em Menke: o direito como violência, o direito como dominação e o direito como paradoxo. Por meio dessas figuras, Menke mostra como o direito burguês aparece formalmente desvinculado do Estado e da economia, enquanto a violência que o sustenta persiste na própria forma do direito. A análise demonstra como a promessa liberal de direitos iguais gera um paradoxo no qual a mesma forma jurídica que proclama a igualdade reproduz simultaneamente novas formas de dominação social. Ao reconstruir a crítica genealógica de Menke, o artigo também levanta uma questão crítica acerca dos limites de fundamentar a transformação do direito exclusivamente na autorreflexão da forma jurídica. Ao situar a obra de Menke no interior da tradição da teoria crítica e da genealogia pós-estruturalista, o artigo sustenta que o paradoxo dos direitos também deve ser



compreendido como um espaço de contestação política no qual a relação entre direito, violência e igualdade permanece aberta à transformação.

Palavras-chave: Christoph Menke; teoria crítica; direito; violência; direitos subjetivos.



1. Introduction

Among the researchers associated with the first generation of the Institute for Social Research in Frankfurt (the Institute), explicit engagement with the theory and critique of law appears primarily in the works of Otto Kirchheimer and Franz Neumann¹. Scholars of the later “generations”, such as Axel Honneth, Ingeborg Maus, and Jürgen Habermas advanced social theory significantly, emphasizing the central, if not essential, role of law, particularly in Habermas’ legal theory. Christoph Menke appears as the most explicitly interested in the philosophy of law, but differently from his colleagues from the Institute, he orientates his critique in other directions, namely to critique of system theory and poststructuralism, on the way of critical theory of law, or what Fischer-Lescano (2018) defined as the postmodern legal theory as critical theory (pp. 167-192).

For Menke, both idealist and realist conceptions of law should be rejected. The former sees law merely as a normative order of recognition that guarantees every person the same status, while the latter reduces law to a factual arrangement of power that enforces conditions of subordination. In critique of bourgeois subjective rights, Menke departs from Marx’s social critique, towards, as it will be shown in this work, an ontological critique of the relation between politics and law in which the process of giving the form to the subjective rights is performed. Can law become a transformative force toward a more just and equal society? And can the liberal idea of the rule of law and equal rights serve as a starting point for rethinking politics? These questions proceed directly from Menke’s critique and guide the present study.

This paper reads Menke’s critique of law through three guiding metaphors: law as violence, law as domination and law as paradox. Methodologically, this approach adopts a reconstructive reading that treats metaphors as analytical devices through which the immanent tensions of Menke’s critique of law can be articulated. Examining law as domination highlights another form of social domination that is presented in the relation between the political subjects who grant rights and the subjects of rights. In modern liberal democracy this relation is transformed into a paradox between the good intentions and the

¹ Their most important political-legal texts can be found in Scheuerman (1996). To these, can be added Erich Fromm’s doctoral thesis on the Jewish Law (Fromm, 1989).



bad consequences of the politics of equal rights. However, these transformations remain conditioned with the first relation - the differentiation in the process of giving the form to law, which binds it to the violence. The task of critique, it seems, is to trace the opening of the gap within the form of law. This way, the process of differentiation in the form of law mirrors the contradiction between normativity and facticity, between the legal and the political, between law and life.

To that end, this paper begins by analyzing the process through which the form of law appears. It approaches this process by examining how legal form is constituted through violence, insofar as it remains bound to the paradox of its own formation. This violence persists hidden within law, in its relation to its negation, to the non-law. This remnant, the “other” of law - the non-law that is not-law and that is by force brought into the law, stands at the center of what may be called the ontological or formal violence of law. Menke explores this dynamic in the process of giving form to equal rights, particularly in the declarations brought by the emerging bourgeois governments of the 18th century, which will be explored in the second part of this paper. At this point, his guiding questions for critique are very clear: why and how did bourgeois subjective rights become detached from equality in the liberal model of democracy? And can this model be transformed through the political critique of law centered around processes of “naturalization” and “neutralization”?

Finally, his proposal - the speculating performance with these questions, will be explored in the last part of this work as an initial deconstruction of Menke’s critical method. Rooted in what Karl Marx called “true criticism,” together with the negative power of Hegel’s philosophy, Menke encountered the poststructuralists’ genealogical focus on tracing a process back to its very beginning, to its point of emergence, in order to understand how it operates. He seeks to reveal not simply the historical development of law, but the paradoxical structure through which the legal form constitutes itself. In this sense, his critique aims to illuminate the limits of liberal democracy while opening the possibility of rethinking the form and function of law in relation to justice, equality, and social life. While the paper primarily reconstructs Menke’s critique of subjective rights, it also raises a question concerning the limits of grounding critique solely within the self-reflection of legal form.



2. Law as paradox of violence

Menke identifies two mutually exclusive claims about law: law is the opposite of violence, and law is a kind of violence. At the foundation of law lies a paradox that cannot be resolved through appeals to “justified violence”. This paradox, as it will be shown, is the paradox of form, which reveals itself between internal and external violence. The latter Menke illustrates within the philosophy of tragedy, where law in its operativity cannot detach itself from the pre-political violence of revenge. Another, internal violence, Menke finds in the violence of the curse of the tragic heroes like Oedipus, who by the process of de-subjectivization, judges and condemns himself. Oedipus “appropriates the legal verdict and thus makes himself the property of law. He is identified by the legal verdict” (Menke, 2010, p. 8). In other words, violence does not disappear with the law, it continues to exist bound to the object of law in its paradox. Menke (2010) argues that law does not only judge, but “it wants the perpetrator to sentence himself” (p. 11), and such “self-condemnation (...) is precisely the violence that prevailed prior to the establishment of the law” (Menke, 2008a, p. 82). Through this necessary violence and subsequent exclusion, law gives a new identity to the social actors, which is the main violence, wrapped in the tragic conflict, and in some way justified by it.

This aligns with Hegel’s reading of tragedy, in which a fall of the hero is justified in the sacred sacrifice of ethical pathos in the name of the coming freedom (Grujić, 2018, pp. 31-39). Hence, tragedy simultaneously produces and requires a paradox. Hegel’s reading of *Antigone* as the tragedy of law is based on the conflict of the equally justified positions in which none is right or wrong. That is why Antigone is both innocent and guilty - innocent due to the claims to her social, unwritten law, and guilty due to her *hamartia* of not seeing the fall of polis as a necessary sacrifice in the dialectics of the modern state. For Menke, modern law reenacts this tragic structure, institutionalizing paradox through bourgeois subjective rights. A paradox which splits the law between subjects that are at the same time integrated in law and left outside the law: “[w]e can read (...) as its answer to the tragic experience of the relapse of law into mythical, fateful violence. The answer of modern law to tragedy is to re-enact tragedy in itself” (Menke, 2010, p. 15). A modern tragedy of law might appear in a form of depoliticized structures where subjects do not act by reason of ethical pathos, but only by following their own passions and external circumstances.



Finally, Walter Benjamin's text "Critique of Violence" shows us that a violence does not merely describe some normative structure, but it also constitutes it: violence as a means and a principle of law (Benjamin, 1986, p. 277). And this specific law-preserving, threatening violence (Benjamin, 1986, p. 285) is always about law's own power (Menke, 2006, p. 11). A power that is grounded in the law's interest in holding a monopoly of violence, depriving all legal subjects of all kinds of violence. For this reason, when after a conflict a new social order is established, new social conditions are always recognised as a new "law", meaning that "a totally nonviolent resolution of conflicts can never lead to a legal contract" (Benjamin, 1986, p. 288).

At this point, another metaphor helps illuminate the logic of legal form, the one that is not focused on opening a tragic paradox of justified violence, but goes deeper, into the logic of the form of law. In the short book *Ceci n'est pas une pipe*, Michel Foucault is focused on the "obvious mystery", a certain "strangeness" of Magritte's paintings². The relation between the text and the image happens within the mysterious process of naming an obvious and familiar form by placing another form in it — a text, in order to negate the object, revealing the double paradox of Magritte's text. This "sorcery" happens due to the work of a signifiatory apparatus, a calligram, as the moving and definable essence of both paintings. Calligram that is rooted in the defined, secret form that reveals itself in another form, just before it disappears. It takes the form and encloses it in the discourse of the statement "This is not a pipe", thus producing a new subjectivity from which all irrationality and unwanted content is excluded by its activity. Most importantly, before it disappears, it absorbs in itself a shared place between the image and the words, incapacitating its reproduction, and perhaps a new dialogue between the painted and written content. All of this happens under the invisible hand of the painter who first creates a disappearing calligram that allows the movable operation from the form to the discourse, in which the two contents are finally allowed "to multiply of themselves, to be born from their own vapor and to rise endlessly into an ether where they refer to nothing more than themselves" (Foucault, 1983, p. 53).

This mechanism, a performance, can serve us as a metaphor for the relation between modern law and justice. Just as the calligram produces and simultaneously cancels forms, law

² The Treachery of Images (French: La Trahison des images) is the original name of a 1929 painting of René Magritte, a Belgian surrealist, best known as *Ceci n'est pas une pipe*.



absorbs its own negation while shaping social subjects. The first premise of this metaphor is that an “original form” of law existed in which legal questions were inseparable from questions of justice. Accordingly, we cannot talk about an empty place of justice, but of an abandoned, absorbed place. A place that could correspond to Niklas Luhmann’s “outside” of form. For Luhmann, a form defines itself specifically (as any other definition) where the process of “establishing a form is (...) distinguishing” (Luhmann, 1999a, p.16). In order to perform the initial command, which is to “draw a distinction” (Luhmann, 1999a, p. 18), a form obtains two parts that are separated by an established boundary, and that are not equal. Only one of them is the designated side, meaning that the operativity of the form, its practical deployment, can proceed only in it (Luhmann, 1999a, p. 17). This assembles a paradox that can be defined as “a form that contains itself without any reference to an external standpoint from which the paradox could be an observer” (Luhmann, 1999a, p. 18).

Menke observes a similar process in law’s distinction between the legal and the illegal, as the first differentiation within the process of giving form to the law. However, as Luhmann correctly observes, there is also a “second outside” seen as “the outside of the difference between signifier and signified” (Luhmann, 1999b, p. 57). This “formless matter” where “the distinction of law and non-law [*Nichtrecht*]” (Menke, 2016, p. 282) is made, corresponds to the place where Foucault observes the form and discourse in their differences, just before the latter becomes lost in the new subjectivity. For Luhmann, this is a place where the world happens, not at the beginning, not at the end of the paradox, but in between (Luhmann, 1999a, p. 18; Luhmann, 1999b, p. 57).

But for Menke another process is more interesting, when within such “formless form” law absorbs its own negation, transforming the distinction between the law and illegality into a repetition of the distinction between law and non-law (Menke, 2016, p. 282). Such experience of law, allows the relation between law and life to happen, as between the “law and non-law” which is “at once present and absent in law” (Menke, 2016, p. 285). This new paradox is able to open what Menke calls “the gap of law”, a space where the experience of law is possible as something not opposed to life (Menke, 2010, p. 14). According to Menke, it also “demonstrates that the question of the other of law does not dissolve itself as easily as the system theory of form suggests” (Menke, 2016, p. 286). What Luhmann calls “observer”



of the duality of form, Seibert for example interprets as the parasite: “the interpreter that does not permit itself to be excluded” (2014, p. 7).

Similarly, for Giorgio Agamben this paradox refers to the “non-law” as the place where the relation of law to life, of law to justice is possible. Or better put, where the experience of law is enabled through the formless content that is not firstly violently taken inside the law, in order to be excluded from it as the “non-law” (Grujić, 2019). A place that does not belong to the law, and which in the process of its placement and its negation becomes illegal, and thus transformed into the law. Or, in the words of Menke (2016), “[b]y knowing itself, the law knows of non-law” (p. 284), that in its juridical operativity defines the non-juridificability.

This exclusion, however clear, is not obvious. That is why, in the core of law, in its *capital*, Jacques Derrida observes the difference between Law and the laws, between singularity and universality of Justice and Law. And here we can bring another metaphor that Derrida finds in Franz Kafka’s essay “Before the Law”: the singularity of law that is grasped in the figure of a man sitting on the gates of law, *before* Law, while its universality remains out of his reach, *in* the law. For Derrida (2018), Kafka’s story “names or relates in its way this conflict without encounter between law and singularity that paradox or that enigma of the being-before-the-law” (p. 29), a conflict based on an antagonistic, but unrevealed relation. A relation that finally happens in the space of encounter without encounter, a space that is absorbed by the singular form of law. Menke calls this place “the formless worlds, the world as non-form, whose absence is presupposed in the operating of law, is present in law as absent [as a] background noise” (Menke, 2016, p. 285). To think with Luhmann, a place where “what cannot be distinguished but can only be brought into a form by making a distinction” (Luhmann, 1999b, p. 57). Or in the words of Foucault - “there are two pipes” (Foucault, 1983, p. 16), two forms - the one that creates the calligram, and the relation to the one that is lost in the operativity of that calligram.

Finally, the question of the gap of law for Menke should not be thought of within the paradoxes of sovereignty and decisionism. Instead, it is the moment when the self-reflection or materialization of law can happen, as “the step in which law expresses (...) that it can refer to itself only in such a way (...) that it refers to itself in contrast with non-law, or to non-law as the other of law” (Menke, 2016, p. 287). And this process can be understood as “self-



alteration or self-externalization” (Menke, 2011) of law that allows it to refer to the non-law without the process of violent “inclusion-exclusion” into and from itself, as the matter, the formless, which is constantly being “brought into a form” (Luhman, 1999b, p. 57; Menke, 2016, p. 283). It is important to notice that this process cannot commence with the external stimuli, but as an internal impulse, and it cannot be understood in the terms of liberalism as the self-limitation of law.

The other of law for Menke does not have normative, but operational, effective power, and referring to it through the self-reflection process of law, is the way to overcome subjectivity of bourgeois positivist law, to materialize and reach the “form of right”. The re-opening, the re-shaping of the gap of law, finding its “form-gap” means enabling the experience of law where life can relate to law autonomously, and where its arguments appear as arguments of life and as such, have the power to intervene in the form of law. For Menke, a recognition of subjective rights by positive law is the example of such materialization, when the paradox of law and violence was confronted with a new paradox.

3. Law as domination: contradiction and subjective rights

In *Critique of Rights*³ Menke attempts to address the “form of right”, from a somewhat different perspective. The main task of this book is to explore the founding ideas and moments of the liberal democracies, reaffirming the need for their radical critique since “any step forward that is not radical will reinforce the forms of domination that define the liberal democracy, as it now exists, from within” (Menke, 2023, p. 280). The main justification for such critique rests on the argument that liberal democracy paralyzes political and social changes by strengthening its reformability, which now ought to be taken against it. And this reformability is largely enabled by the politics of human rights, which stand in the centre of his critique.

The bourgeois revolutions of the eighteenth century represent attempts to use declarations of equal rights to abolish traditional forms of domination understood as forms

³ Originally published in German (*Kritik der Rechte*) in 2015; English translation in 2020.



of inequality (Menke, 2023, p. 283). Menke further explores these rights as the rights to “judge *for* someone else *about* his or her life” (Menke, 2023, p. 283). In this sense, the equality of all individuals presents itself as realised in the new normative mechanism, the equal rights, a declaration that had already puzzled Marx. Menke takes that “puzzle” and unfolds it into two moments: the first relates to the grounding contradiction with the form of bourgeois rights on which modern law is based, while in the second moment this process is put into relation with the social form of law, opening a gap within the form of equal rights where the new forms of domination in modern liberal democracies can be criticized. The contradiction in the form of right thus needs not to be seen as a puzzle to be solved. Rather, it can be approached as the paradox of rights in modern liberal democracies, or as Menke calls it, their “tragic irony of rights” (Menke, 2023, 297).

The main argument is clear: equality understood as autonomy to dispose over equal means of action, stands in contradiction to the form of equal rights. In other words, equality does not logically follow from equal rights; it does not mean rights, it only gives form to the rights (Menke, 2020, p.1; Menke 2023, p. 284). This process of giving form, as explained above, includes different moments of exclusion and inclusion, it is dialectical, negative, and never neutral. Its main outcome is another form of domination, which needs to be deconstructed beginning from its first differentiation process: between the political subject that proclaimed those rights and the social or private subjects, “between the basis and the content of rights” (Menke, 2020, p. 2).

For both Menke and Marx, at the center of this process is the depolitization of the political community, or as Menke calls it “the *naturalization of the social*” (Menke, 2020, p. 3). The separation between law and life in the process of giving the form to bourgeois rights is revealed in the critique of subjective rights, which naturalize subjects by removing ethical choices from the definition of life: “Subjective rights address us neutrally: as if our will were not about good or bad, not good or bad willing, but *mere* willing; as if we wanted not the good life, but *bare* life, life stripped of its ethical form” (Menke, 2023, p. 294). Similarly, for Marx, when the bourgeois revolution introduced equal rights as a new legal mechanism, this amounted to affirming the subordination of the social, communal sphere to the individual sphere. In this way, civil society appeared as the natural basis of bourgeois society, independent of any political process.



However, for Menke, in his critique of bourgeois law Marx failed to incorporate what he calls “the social form of law” (Menke, 2017a), remaining focused instead on private bourgeois law (namely, property and contract law) as the foundation of the capitalist mode of production and, therefore, of social domination. The new model of social domination produced by the social form of law, Menke finds in Francois Ewald’s writings on the eighteenth-century welfare state (Ewald, 1986), as well as in Foucault’s analysis of normalization processes in the modern governments (Foucault, 2009). In this way, Menke seeks to move beyond the capitalist foundation of domination toward the processes of normalization in what Foucault defined as “governmentality”: “social rights *express* the social domination of normalization in the legal formation of equal recognition” (Menke, 2017a, p. 125). A form of domination distinct from and external to capitalism.

Although Menke claims to overcome functionalist or juridical readings of law (Menke, 2017a, p. 117), following structuralist marxists, namely Étienne Balibar and Nicos Poulantzas, he nonetheless focuses on the functional unity of Marx’s critique. This tendency is evident in his critique of Marx’s rigid “legal-theoretical premises”, where he points out, for instance, that Marx failed to recognise the practical role in the class struggle, since the fights for the workers “rights” remained in the scope of bourgeois private law, thereby obscuring new forms of domination (Menke, 2017, p. 126). In doing so, Menke sidelined certain important theoretical interventions Marx made, particularly concerning new social movements⁴.

The main critique of the functionalist approach to marxism is that it disables and denies the importance of the empirical, historical moment as a necessary factor in confirming social domination, thus failing to understand capital as a changeable and historically dependent category. Contrary to the structuralist views, capital is primarily seen as a *process* and not a *structure* because it manifests itself as a tendency to put an end to the previous ways of production, and as a historical necessity, based on its own contradictions, to move to a new way of production. Its natural appearance that is neither confirmed nor questioned in the history or social reality, is what Marx tries to analyze through historical and dialectical

⁴ Regarding the lack of Marx’s theoretical sensitivity towards new social movements, in one footnote in “Law and domination” Menke does note that “this rigorous explication of his legal-theoretical premises in *Capital*” (Menke, 2017a, footnote 16, p. 137) does not correspond to Marx’s analysis of revolutionary movements, such as Paris Commune.



materialism, where the relation between social determinism (and not class determinism) and social change is formed⁵.

However, in the critique of Marx's separation of subjective rights from democratic equality, Menke manages to introduce a different critical perspective: "He [Marx] fails to see how political equality and subjective rights are connected precisely *by* their contradiction" (Menke, 2023, p. 285). This contradiction opened the gap between the bourgeois form of rights and subjective life (or subjective will), between normativity and facticity. More importantly, this process can be traced ontologically, to the underlying violence of the constitutional processes in which political unity is constituted, where "the unformed and unformable remainder" appears "as its own other ... [and is] recognized merely in its facticity or even necessity, but not in its *right*: The remainder has no right" (Menke, 2023, p. 289).

The moral intentions of liberal equal rights are insufficient to justify or explain the deep inequality inherent in the liberal model of democracy. Menke illustrates this paradox by deconstructing the notions of constitution, constitutional law, in order to trace their separation from the political. If the formation of political unity is a necessary condition for both state and constitution, and if the latter constitutes that unity normatively, then the process of giving it a form necessarily involves a differentiation in which one part is excluded from the final form. This excluded part, the remainder, the "other" of political unity, is not merely a necessary product, but the negation of its difference within the form itself. Its place in the form is defined only by the contradiction to the other part of the form to which it is different. This, according to Menke, is the operative logic of equal rights that needs to be transformed.

Menke's reconstruction of the paradox of subjective rights reveals an important tension within liberal legality. Yet the strength of this critique also points to one of its limits. By grounding the contradiction of rights primarily in the formal logic of law, Menke situates critique largely within the self-reflection of juridical form. The paradox of rights therefore appears mainly as an internal problem of the legal order, one that can be exposed through genealogical analysis of the legal form itself. As Nancy Fraser (2005) has argued, struggles

⁵ On the other hand, for the structuralist marxists, the social totality is formed by the interaction between different social structures. See Louis Althusser and Étienne Balibar (1970), pp. 197-198.



over rights are inseparable from broader conflicts over redistribution and political representation, which cannot be reduced to the internal dynamics of juridical form.

From this perspective, the paradox of rights cannot be understood solely through the ontological genealogy of legal form. The tension between equality and subjective rights is continuously reshaped by social movements and political mobilizations that contest the meaning and scope of equality itself. The critique of rights must therefore attend not only to the self-reflective paradoxes of law but also to the historical practices through which legal forms are challenged and reconfigured. In this sense, the paradox of rights appears not merely as a structural feature of liberal legality but also as a terrain of political contestation, where the form of law becomes open to reinterpretation and transformation.

4. Critical Theory and the Genealogy of Law

To understand how Menke conceptualizes this paradox of rights, it is necessary to examine the critical method through which his theory of law operates. After the rise of fascism in Europe between the world wars, besides the critique of capitalism, ideology, violence and authoritarianism, the members of the Institute sought to force traditional theory to reflect upon its own methods, preventing it from dissolving into pragmatism and positivism. They did so by criticizing concrete social conditions, a concrete social reality, and not mere ideas:

By criticism, we mean that intellectual, and eventually practical, effort which is not satisfied to accept the prevailing ideas, actions, and social conditions unthinkingly and from mere habit; effort which aims to coordinate the individual sides of social life with each other and with the general ideas and aims of the epoch, to deduce them genetically, to distinguish the appearance from the essence, to examine the foundations of things, in short, really to know them. (...) In philosophy, unlike business and politics, criticism does not mean the condemnation of a thing, grumbling about some measure or other, or mere negation and repudiation (Horkheimer, 2002, p. 270).

Menke's critique of subjective rights is rooted in this understanding of criticism: the above-mentioned questions of justice need to be explored within the social reality, and the transformation of that reality should begin with its radical critique, which is the task for theory. Following this principle, the transformation of the bourgeois system of subjective



rights, their materialization in modern democracies, can only begin with a radicalization of critique, pushing law and its historical meanings to their limits, to the point where its very social existence demands renewed confirmation. The transformative force of critique lies precisely in its capacity to provide another meaning and operativity of law in modern democracies, at the moment when “defending liberal institutions, while necessary, isn’t enough” (Menke, 2017b, para. 4).

However, there are at least two important considerations that must be taken into account when we talk about critique of law. First, critique can itself constitute a form of violence, a theoretical practice with an intent to dominate its object, elevating itself to the status of a new “universal”, something that can be found in the critique of illuminism. This is the case whenever critique presumes to resolve the paradox of law by offering yet another definitive account of what law “is.” In doing so, critique risks reproducing the very gesture of domination it seeks to expose.

Second, as Menke insists, critique itself is a normative, juridical act. To critique is to decide between different options, to distinguish between alternatives, and in this sense critique cannot escape the paradox of law, which depends upon violence in order to ward off violence. Menke captures this bind sharply: “Because its two sides are intertwined, the distinction that characterizes law is indissoluble and hence undecidable: Law cannot be criticized. Law calls for critique, and law undermines critique. One can only think of law critically, and one can not think law critically” (Menke, 2018, p. 210).

A true critique, therefore, cannot stand outside its object but is implicated within it. If law survives only by turning against itself, then critique must undergo the same reflexive reversal: it must expose its own violence and bring itself before the tribunal it convenes. As Menke concludes: “Just as law consists in turning against itself, so too a critique of law must turn against itself. Thus, if the critique of law seeks to do justice to its object, it must bring itself to trial” (Menke, 2018, p. 211).

To open his theory of law for such critical capacities, Menke goes back to the ideas of the “canonical” critical theory, authors from the first generation of the Institute, rather as a guiding orientation, and not as his central dialogues. He places contradiction at the centre of the relation between law and politics, radicalizing Hegelian negativity as a resource for



rejecting imposed reality and reforming it through speculative reflection.⁶ For Theodor Adorno, this rejection is already contained in difference, in the non-identical, and before any particularity in which any life assumes its form. Therefore, the task of negative dialectics is to put in opposition idealism and negativity in Hegel's philosophy, demonstrating that within the former a reality is never fully considered in its incompleteness, but instead, remains bound to identity. Hence "dialectics holds up to our consciousness as a contradiction" and negative dialectics affirms itself as "a consistent consciousness about the non-identical" (Adorno, 1973, p. 6).

Adorno's refusal to let dialectics collapse into identity or ideology, is precisely what Menke tries to overcome by grounding contradiction to Marx's social critique. Yet, in his critique of law, Menke moves beyond Adorno's non-identical, which risks being trapped in solitary speculation, by opening it toward the political: the possibility of new paradoxes, and in that sense, perhaps a new violence of law. If law cannot be criticized, then the very conflict between its contradicting characteristics - law as opposition to violence and law as the application of violence, becomes the process through which law takes shape. This process is also one of critical self-reflection, a critique of law *within* law: "namely the question of how law might reflect on its aporetic constitution and thereby change itself" (Menke, 2018, p. 211). Through critique of the process by which law acquires its form, we are already conceiving the possibility of another law.

Drawing on Benjamin's critique of law and the first generation of critical theory, Menke develops his central dialogues with systems theory, while his most profound postmodern engagement unfolds with poststructuralism. In this sense, Menke's project can also be understood as extending Benjamin's insight that law is inseparable from the violence that both founds and preserves it, shifting the critique of law from the question of its normative justification toward the analysis of the forms through which law constitutes and reproduces itself.

⁶ Similarly, Marcuse (1955) aimed to show how Hegel's dialectical method is driven by a spirit of contradiction and to highlight the ways in which his critical and rational standards inevitably came into conflict with the social realities of his time, and for that can be understood as a "negative philosophy". In the preface to the third edition, Marcuse (1960) framed the book as an effort to revive the "power of negative thinking," a mental faculty he saw as endangered, rather than simply to revive Hegel himself (para. 1).



Within his critique of subjective rights, Menke's "method" emerges as an amalgam of a critique of the processes of depoliticization (Menke as a critical reader of Carl Schmitt), grasped as the failure of human rights to produce equality; and a critique of new forms of domination in modern democracies (in dialogue with Marx), leading toward a poststructuralist conception of normalization as revealed by genealogical inquiry of a power in the modern European governments. The normalizing effect of law shows that law is a form of normativity that originates in reason, and yet exceeds it: "a normativity on the edge of reason: not without reason, but not – entirely – within reason either" (Menke, 2018, p. 214).

Here, critical theory grounded in Marxist social critique encounters the genealogical method of poststructuralism. However, there is an important intervention that Menke makes regarding genealogical process tracing. Following Marx critique of a vulgar criticism, or as cited above, the criticism Horkheimer highlights as a wrongheaded way of social analysis, Menke traces processes not merely back to their beginnings but to their essence. In this sense, "ontological genealogy" entails a confrontation with the concepts of the modern state, often obscured by moral intentions or capitalist domination, whose limits he seeks to overcome by questioning the very form of bourgeois rights: "True genealogical criticism reveals a contradiction in the modern upheaval of law: it establishes *and* denies bourgeois law. True criticism, which proceeds genealogically, develops a radical objection *to* the existing conditions *out of* the existing conditions" (Menke, 2020, p. 4).

As part of this "true criticism", besides diagnosing different processes of domination, Menke also takes Kantian universalism upside down: instead of talking about the naturalism of the bourgeois state and of the bourgeois civil society, bourgeois law creates the form of liberal rights and makes it a fact rooted in the natural existence of liberalism. Thus, "[t]he form of subjective rights is myth put into practice, the inversion of something that is made into a given" (Menke, 2017a, p. 136). In other words, "the paradox of law both generates the form of subjective rights and simultaneously calls them into question" (Menke, 2008b, p. 86).

The form of subjective rights thereby becomes a "symptom" through which the depoliticizing processes of bourgeois law can be observed. For Menke, this form is "grounded in an internal problem of the political process—in a problem of political normativity itself" (Menke, 2023, p. 288). Drawing on Derrida, Menke insists that deconstruction reveals the undecidable ambiguity between paradox and form: the paradox-generating self-reflection of



law is both formative and dissolutive, embodying what Derrida calls “the essentially political character of self-reflexive law” (Menke, 2008b, p. 86). In this sense, the paradox of law dissolves itself into another paradox, opening the way toward “a politics of paradoxes” (*Eine Politik des Paradoxes*) (Menke, 2008b, p. 95 e ss).

5. Concluding Remarks

The violence implicit in law may manifest itself under various metaphors, and true critique must be capable of penetrating each of them. It is in this regard that Menke’s intervention should be understood, and it is toward this task that this paper has been oriented. His critique of law exposes that modern law is never a neutral framework of rules but is always entangled with forces of tragedy, violence, domination, and paradox. By tracing these figures, Menke uncovers the fractures within the formal structures of liberal democracies, where the promise of equality collides with the realities of political and social power, embodied in the form of subjective rights. One of the central aims of this paper has been to show that the relation between law and violence lies in the very process through which positive law assumes form, and how this form is destabilized and displaced in the emergence of a new form, the “form of rights,” as it appears in the materialization of subjective bourgeois rights.

What Menke defines as genealogical criticism, shows that law is both the product and the generator of its own contradictions. The form of subjective rights at once establishes equality and perpetuates domination, revealing the inherently political character of self-reflexive law. In Menke’s account, law always exists at the edge of reason: neither fully rational nor entirely arbitrary, and it is precisely in this liminal zone that critique becomes possible. By tracing the ontological genealogy of bourgeois rights, he exposes how the legal form absorbs and transforms its own other, opening a space in which law can be both observed and interrogated from within.

Crucially, Menke’s critique does not aim at a vision of a non-violent law, nor does it seek to dissolve the paradox. On the contrary, the paradox of law’s violence is central to its very operativity, echoing Benjamin’s distinction between “law-preserving” and “law-making” violence. Menke invites us to embrace these paradoxes as the dynamics of law’s self-



formation and self-dissolution, its simultaneous capacity to legitimate and to constrain, its potential to transform itself through critical reflection. Critique, in this sense, is not merely descriptive but performative: a speculative practice that anticipates a law capable of thinking itself differently, where justice and life might intersect without being fully subsumed under the structures of juridical form. In this way, Menke gestures toward a “politics of paradoxes”, a reflective horizon where law confronts its own aporias and opens onto new possibilities of political existence. Such a performance, a scene of law giving itself over to the political, may bring it a kind of “relief,” in all the resonances of Benjamin’s *Entsetzung*. Thus the paradox of law is not resolved but confronted by another form of violence, one that interrupts the closure of law’s form and reopens the question of its future. Yet this interruption cannot be understood solely as an internal movement of legal form. As the preceding discussion has suggested, the paradox of rights also emerges through political struggles that challenge the limits of juridical form itself. In this sense, the critique of rights does not merely reveal the paradox of law but exposes the political conditions under which the form of law may become open to transformation.

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Sobre a autora

Vanja Grujić é Professora Visitante do Programa de Pós-Graduação Interdisciplinar em Direitos Humanos da Universidade Federal de Pernambuco (UFPE) e pesquisadora visitante no Institute for Philosophy and Social Theory (IFDT), em Belgrado. Doutora em Filosofia do Direito pela Universidade de Brasília e mestre em Ciência Política pela Universidade de Belgrado. Desenvolve pesquisas nas áreas de filosofia jurídica e política, teoria crítica e direitos humanos, com ênfase nas formações sociais periféricas e semiperiféricas, nas transformações da governamentalidade e nas relações entre direito, corpo e política. Coordena o projeto de pesquisa *Periferia, Corpo e Política* (UFPE). É autora de *Patologias Balcânicas da Modernidade: a questão nacional entre consenso e conflito* (Nomos, 2018) e de *Críticas do Direito: lugares de transformação* (no prelo, 2026), além de artigos publicados em periódicos nacionais e internacionais.

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