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BEYOND AND THROUGH LAW: FOR AN ISTITUTING SELF-REFLEXIVE CRITIQUE OF VIOLENCE. A REFLECTION FROM THE ITALIAN EDITION OF RECHT UND GEWALT BY CHRISTOPH MENKE[1]

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Abstract[2]

In this paper, starting from the thematization of the paradoxically inseparable, genealogical relationship between law and violence, I aim to articulate, from the perspective of an institutional juridical-political ontology, an *instituting self-reflexive critique of violence*. In the first section, I will concentrate on the Benjaminian thesis of the faithful character of the violence of law as taken up by Christoph Menke in *Law and Violence*. After having established, in the second section, some methodological coordinates useful to define the approach of legal-political ontology, in the third section, I analyze the

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2. Citations from works not presented in English are the result of my translation.

transition from "authoritarian law" to "autonomous law" (Menke, 2018, p. 33), namely the tragic experience of law. In section four and five, I will address some specific philosophical proposals that have attempted, albeit from very different angles and historical contexts and with very different semantics, a philosophical "relief" of the violence of law. The first critique I will consider is the one that Simone Weil addresses to the concept of the person, i.e., to the subject bearer of law. In the transition to the Weilian impersonal, a *destituting paradigm* (Esposito, 2021) of legal-political ontology begins to take shape. From my point of view, this paradigm finds its most radical interpreter in Giorgio Agamben. The destituting paradigm, although allows one to think in a radical manner about "the beyond" of law, it runs the risk of resulting in a form of political nihilism. In a second moment, moving from the two different readings of Kafka's *Before the Law* proposed by Giorgio Agamben and Jacques Derrida, and thanks to a more general evaluation of their philosophies, I try to bring out the philosophical necessity of a critique of violence that does not remain entangled in the radical but sterile attempt to definitively overcome law in the name of a *justice beyond*, that can never be fully realized, but that is based on a self-reflection of law which, by going to the political genesis of its procedures, deconstructs the faithful violence that resides in itself, without claiming to eliminate it completely. *Beyond and through law*: it is to the rhythm of this formulation that an *instituting legal-political ontology* proposes to criticize the violence of law.

Key words

Law; violence; legal-political ontology; instituting thought.

Resumen

En este trabajo, partiendo de la tematización de la relación genealógica, paradójicamente inseparable, entre derecho y violencia, pretendo articular, desde la perspectiva de una ontología jurídico-política institucional, una crítica autorreflexiva instituyente de la violencia. En la primera sección, me centraré en la tesis benjaminiana sobre la acepción de la violencia del derecho, tal y como la recoge Christoph Menke en *Law and Violence*. Después de haber establecido, en el segundo apartado, algunas coordenadas metodológicas útiles para definir el enfoque de la ontología jurídico-política que considero más adecuado para la tematización de la relación entre derecho y violencia, en el tercer apartado, analizaré, a través de un estudio de la *Oresteia* y el *Edipo Rey*, el paso del "derecho autoritario" al "derecho autónomo" (Menke, 2018, p. 33), es decir, la experiencia trágica del derecho. En la sección cuatro y cinco, abordaré algunas propuestas

filosóficas específicas que han intentado proponer, aunque desde perspectivas y contextos históricos muy diferentes y con semánticas muy distintas, un "alivio" filosófico de la violencia del derecho. La primera crítica que consideraré es la que Simone Weil, en polémica con el personalismo francés, dirige al concepto de persona, es decir, al sujeto portador del derecho. En el tránsito hacia lo impersonal weiliano, comienza a configurarse un paradigma destituyente (Esposito, 2021) de la ontología jurídico-política. Desde mi punto de vista, este paradigma encuentra su intérprete más radical en Giorgio Agamben. El paradigma destituyente, si bien permite pensar de manera radical el "más allá" del derecho, corre el riesgo de desembocar en una forma de nihilismo político. En un segundo lugar, partiendo de las dos diferentes lecturas de *Ante la ley* de Kafka propuestas por Giorgio Agamben y Jacques Derrida, y gracias a una valoración más general de sus filosofías, intentaré destacar la necesidad filosófica de una crítica de la violencia que no se quede enredada en el intento radical pero estéril de superar definitivamente la ley en nombre de una justicia completamente "superior" y que nunca podrá realizarse plenamente, sino que se base en una autorreflexión del derecho que, yendo a la génesis política de sus procedimientos, deconstruya la violencia propria del derecho, sin pretender eliminarla por completo. *Finalmente más allá y a través del derecho* es la formulación mediante la cual una *ontología jurídico-política instituyente* se propone criticar la violencia del derecho.

Palabras clave

Derecho; violencia; ontología jurídico-política; pensamiento instituyente.

The faithful character of violence

The question of the relationship between law and violence, debated since the dawn of Western legal, political, historical, and artistic thought, is extremely complex and wide-ranging. It covers a range of problems from the institution of law in the ancient world — i.e., the transition from the justice of vengeance to the justice of the equal parts of a political society, staged by Greek tragedy, and in particular by Aeschylus' *Oresteia* and Sophocles' *Oedipus Rex* — to the contemporary issues related to the connection, to say it with Jurgen Habermas, "between facts and norms" (Habermas, 2006). The relationship between law and violence thus invests the general problem of the legitimacy of law, namely the *political* quality of the procedures that law itself implements to construct its legitimacy.

In a book entirely dedicated to the bond that conjoint *Law and violence*, Christoph Menke expresses the paradox of their relationship in the most condensed and effective form, placing two antithetical, if not mutually contradictory, statements in tension: 1) "The first observation is that law is the opposite of violence; [...] 2) The second observation is that law is itself violence; legal decisions, too, use violence" (Menke, 2018, p. 3). According to Menke, law is a complex entity: by introducing legal forms of decision-making at its origin, it places a curb on the endless chain of violence that distinguishes the world of revenge, but to achieve this it can only implement, externally and internally, i.e., on the bodies and minds of the convicts, a certain degree of violence, that is exactly what was programmatically intended to definitely eradicate.

As Francesco Mancuso clearly states in "Oltre il destino della violenza" ('Beyond the fate of violence'), an essay in the Italian edition of Menke's work, the problem of the tension between facticity and validity is the focus of the research made by Menke, "which tends to explain the circular, oscillatory, essentially fateful movement of the relationship between legality and violence" (Menke, 2018, p. 10). In §7, Menke affirms, quoting Benjamin, that "the violence of law is 'violence crowned by fate' (Benjamin, 1996, p. 242), which is to say, the violence of law consists in its operating as — *like* — fate" (Menke, 2018, p. 30). What exactly does Menke mean by saying, with Benjamin, that *the violence of law is crowned by fate* or, to use another Benjaminian term, that law is "mythic violence" (Benjamin, 1996, p. 248)? Answering this question gives one the possibility to get to the heart of the author's theoretical proposal, that is to understand how he deals with the juridical *and* political problem of the legitimacy of law.

First, a clarification. Benjamin's theoretical point, which is the fundamental prerequisite for an effective critique of violence, is that the violence of law, in its mythical or faithful character, is not at all about the violent means that law can or cannot employ — it is not tied to *contingency* — but rather "designates an operation that is concerned with itself; an operation, that is to say, in which purpose and means coincide" (Menke, 2018, p. 31) — it is for *necessity* that law is violence.

As mentioned above, to adequately understand the self-referential operation of law in which purpose and means coincide, and thus the faithful character of its violence, one must dwell on the *political-procedural* character of law, i.e., the procedure of equality by which law breaks with the violence of the endless repetition of revenge. To achieve this theoretical aim, Menke turns to "the experience of law in tragedy" (Menke, 2018, p. 33). According to the author, the Benjaminian critique of violence — which can be expressed in two fundamental theses: "1. The violence of law consists in its endless compulsion to repeat the violent enforcement in which it prevails over the extra-legal. 2. The root of the violence of law is that law must prevail over non-law". (Menke, 2018, p. 33) — must be supplemented with a genealogy of the relationship between legitimacy and violence, that is to be found in the Greek tragedy.

Legal-Political Ontology

Before analyzing, in the next section, the way Menke marks the fundamental passages of the experience of law in tragedy by reading the *Oresteia* and *Oedipus Rex*, I consider it opportune to establish some methodological coordinates.

1. The first aspect concerns how to understand the second Benjaminian thesis, the one that identifies in the endless repetition of the differentiation between law and non-law the character of the faithful violence of law. As Mancuso points out, recalling Gustav Radbruch's reflections on the negation of law, "the jurist is accustomed to thinking of the non-law as something that is in any case only conceivable in the space of law" (Mancuso, 2022, p. 11). The way Benjamin and Menke approach the question is completely different: the functional differentiation between law and non-law, made from the institution of the justice of law as opposed to the justice of vengeance, marks for the first time a space of irreducible extraneousness between law and non-law, between ought-to- be and being. Non-law, while not being the opposite of law, is completely foreign to it. Non-law pertains to the *ontological* dimension, not to the *normative* one.

To put it in the most direct way possible, the differentiation between law and non-law, as intended by Menke, is literally inconceivable to the jurist: to his eyes such a point of differentiation remains a blind spot. In order to shed light on such a blind spot, which constitutes "the dark side of law" there is a need for the activation of a genealogical gaze that gives way to a philosophical approach that I propose to call *legal-political ontology*. The problem of the legitimization of law, namely the distinction between law and non-law, and thus the relationship between law and violence, has to be framed with the philosophical approach of a legal-political ontology. Neither pure legal theory — when flattened on analytical formalism — nor political philosophy — when understood as a philosophy that claims to ground politics from the perspective of the representation of order, and therefore of the neutralization of conflict (Esposito, 2011) — are able to grasp the genealogical nexus of violence and legality.

2. The second methodological aspect conveys to the concept of violence. In the third part of *Law and violence*, Menke replies to the critics moved to his arguments. The first reply to Daniel Loick concerns the very concept of violence. Substantially, Loick refuses the necessary, conceptual connection between law and violence arguing that "the connection between law and coercion is not a conceptual, but a historical one" (2018, p. 10). Without going into the details of Loick's critique, what I would like to emphasize is Menke's response, from which I see the need for a legal-political ontology approach. The violence of law is not an historical feature because "the violence of law is not a matter of its means but rather of its form". For Menke, the concept of violence "has an ontological quality; it defines the *being* of law: the way in which it operates". If understood in the instrumental sense, violence is defined by its effect, whether "ontologically understood, as inscribed in the legal form of normativity, […] violence means the manifestation of the normative vis-à-vis the non-normative" (Menke, 2018, p. 214).

The legal-political ontology approach aims to shed light on the meeting space of *the ontological* and *the normative*, of *being* and *ought-to-be*. By dialectically relating the two dimensions of law and being, the relationship between law and violence can be better understood. From a methodological point of view, this consists, more specifically, in injecting historical, cultural, and social contents into the theory of law, in order to investigate more deeply the level of effectiveness. As Geminello Preterossi points out, "the harshest limit that legal reason encounters on the level of effectiveness", takes place in the relation to power and violence, that is the "realization of law" (2015, p. 51). On the side of political philosophy, the method makes use of what, in the absence of a specific thematization, takes on the role of an assumption: the political is traversed by con-

flict, by the power of the negative. The failure to recognize the cogency of the negative in the sphere of interest of political philosophy does not allow, as one would like, the construction of a granitic order immune to conflict (Badiou, 2005). On the contrary, such a philosophical operation causes the conflict to continue to press at the margins of the political in the phantasmatic, and therefore much more fearsome, form of the return of a repressed.

The tragic experience of law

In the Menkian reconstruction of the relationship between law and violence, the tragic experience of law plays a decisive role. For the author, the genre of tragedy and the institution of law are closely interconnected: "Tragedy is the genre of law; law is the justice of tragedy. It is accordingly not only the themes and plots of tragedy that are juridical; so is its genre-specific makeup. This also applies conversely: "not only is tragedy the form in which law is represented, law is also tragedy's form of justice" (Menke, 2018, p. 6).

Starting from this assumption, the questions I try to answer in this section are the following: how is the *justice of vengeance* distinguished from the *justice of law*? Why is violence not eliminated at all in the transition from the former to the latter sense of justice, as a certain *ideology* would have it? In what does the transition from authoritarian law (*Oresteia*) to autonomous law (*Oedipus Rex*) consist?

As is well known, in Aeschylus' *Oresteia*, Athens is the place where a tribunal of citizens, to whose votes Athena has added her own, has just acquitted Orestes of the murder of his mother. At the end of the tragedy, Athena creates the Areopagus to watch over the pacified city, whose protection will be entrusted to the terrible Erinyes — the last manifestation of an ancestral, wrathful, archaic, vindictive world — who, transformed by now into the Eumenides, become the guarantor par excellence of the universe of the newly born Athenian democracy.

For the author of *Law and Violence*, *Oresteia* paradigmatically represents one of the fundamental stages of the tragic experience of law, namely the political institutionalization of authoritarian law. The way in which authoritarian law puts an end to the endless chain of killings that torment the world of the justice of retribution, of revenge, is that of the institutionalization of a just proceeding in which the contrasting voices are placed on the same political plane of equality that allows them to recognize each other

as parties to the dispute by ceding their power of judgement to a third, which cannot be a party.

"The break with retributive justice and the accession to the justice of law demands from both antagonists that they see themselves as parties. […] It demands that they see themselves and the other as parties that are incapable of just judgment on the point of contention between them and so can obtain that judgment only from another: from another who is not merely yet another, yet another party, but categorically different from them, who is not a party — the Other" (Menke, 2018, p. 12).

From my perspective, in this genealogy of the authoritarian law, one of the most interesting points is that Menke does not read the staging of the political institution of the authoritarian law as a simple overcoming of natural violence, but as the transition from one order of justice to another. For Menke, the philosophical fiction of the state of nature has no place in the realism of tragedy. Even if Menke is right to argue that tragedy represents an alternative, realistic mode of expression to philosophical discourses on legitimation that see law as opposed to a fictitious state of nature, it would be appropriate, even with regard to tragedy itself, to sharpen the blade of criticism more, so to speak, by showing that even in the Greek discourse on the political institution of law there are ideological elements that a shrewd treatment of the relationship between law and violence cannot leave out of the analysis.

It is exactly what Nicole Loraux does in a series of essays collected in *The divided City*, a text in which the author intends to show how the Greek world, and specifically the city of Athens, constructs its ideology of a justice without violence by denying the very reality of the political, which is conflict. Loraux's work starts from a reading of a political event. The fundamental question is "to understand what motivated the Atheniens in 403 B.C. to swear 'not to recall misfortunes of the past' (Loraux, 2006, p. 15). The amnesty episode of 403 BC. — neither the first nor the last in the course of Greek history — has, for Loraux, a strong paradigmatic value, as from it one can understand the nature of the Greek political. One must focus, Loraux suggests, on the oblivion of conflict, on the repression of stasis from the city. By contrasting internal dissension and its condemnation with the glory of external war, therefore maximizing the distance between *stasis* and *polemos*, the polis works its *ideology* of unity and indivisibility. The oblivion of *stasis* allows the internal pacification of the city, which, by relegating to its exterior the cause of all conflict, and thus excluding from its centre every possible reason for opposition, founds the illusion of a law without violence, and of a politics immune to conflict.

Although space does not permit me to do so, it would be useful to further explore the implications of this discourse. Indeed, I am convinced that the interaction with Loraux's thesis on the repression of the political in ancient Greece, and thus the reflection on the paradigmatic (I would say "ontological political") value of the *stasis*, could offer to Menke's perspective an even deeper understanding of the relationship between law and violence. If one would move a critique to Menke's analyses of the bond of law and violence, I think it should be focused right on the lack of a specific thematization of the relationship between law, politics, and war.

The second fundamental step identified by Menke in the tragic experience of law concerns the constitution of autonomous law, which finds its paradigmatic moment in *Oedipus Rex*. For Menke, Sophocles' tragedy thoroughly investigates the relationship between law and non-law, namely the way in which law imposes its interminable and progressive internalization on what is exterior to itself. Autonomous law, in order to legitimize its procedures, to enforce itself, requires not only the institution of a court in which the judge determines what is just in a dispute between parts on the basis of the principle of the political equality of citizens, but also the production of the autonomous subject. As *Oedipus Rex* clearly shows, the autonomous right makes "Everyone […] becomes the authority that can and wants to turn the violent action of law against the lawless individual as that individual's own deed against him- or herself" (Menke, 2018, p. 23). For Menke, "Oedipus' new insight is that the rule of law can be ensured only when it is exercised from within: when it enforces the legal manner of judging as the own judgment of the subjects it subjugates; when law *and* the subjects become autonomous at one stroke" (Menke, 2018, p. 26).

In Menke's study of the tragic experience of law, the justice of law, unlike the justice of revenge, requires each party to judge and to be judged as an equal citizen. The judgement of law, as based on the political unity, is indeed the judgement of all. But the tragedy of *Oedipus* also shows that precisely in this lies the dominion and violence of law. As already stated, — it is the thesis of the faithful character of the violence of law — "it is not that law, despite its claim to be justified, must resort to additional coercive measures in order to rule. Rather. It must realize its claim to be justified *as* the exercise of violence; […] the aspiration of law to be justified falls upon its subject as a curse" (Menke, 2018, pp. 28-29).

As I have tried to show, in Menke's study, the justice of law, unlike the justice of vengeance, requires each party to pass judgement as an equal citizen. The judgement of law is in fact the judgement of all. This entails, Menke argues, that "law demand of the

whom it judges, and even the one whom it convicts, that she share its judgement of her (Menke, 2018, p. 27). But the tragedy of Oedipus also shows that precisely in this, i.e., in the condemnation that the subjects of law inflict upon themselves, consists the domination of law that resorts to violence. "Under the rule of law we must condemn ourselves, and this self-condemnation under the rule of law is a curse. Precisely because it is a condemnation we inflict on ourselves, it is a condemnation in which we are not free, and more importantly, *from* which we will never be free. (Menke, 2018, p. 28). This is why law begins with the autonomy of the subject, namely with what Hegel calls "the commandment of right […]: *Be a person and respect others as persons*" (Hegel, 1991, §36).

Simone Weil's transition to the impersonal

In open polemic with French personalism, Weil opposes the primacy of rights, brought forward by that tradition, with the precedence and cogency of *obligations*. It is enough to compare two statements, one made by Jacques Maritain and the other made by Weil, to understand the distance that separates the author from what Esposito calls the "juridical vocation of Roman Catholicism" (Esposito, 1996, p. 20). Maritain writes: "The notion of right is even profound than that of moral obligation" (Maritain, 1945, p. 37). As does Weil in *The Need for Roots*: "The notion of obligations comes before that of rights, which is subordinate and relative to the former" (Weil, 2002, p. 2). The notion of right, a part from the fact that it has a "commercial flavour", and therefore is linked to the semantics of division, exchange, and quantity, is structurally dependent on force. "Rights are always asserted in a tone of contention; and when this tone is adopted, it must rely upon force in the background, or else it will be laughed at" (Weil, 1990, p. 279).

As Benjamin had already grasped in the "Critique of Violence" essay, violence is so inherent to law that it almost coincides with it, as can be seen from the duplicity of the term *Gewalt*, which in German means both law and violence. What makes it possible to juxtapose the Benjaminian critique with Weil's lies in the common assumption that law and *justice* are separated by an irreparable fracture. Law is not justice because law is nothing but legitimate violence. Both have discovered, to say it with Montaigne, the "mystical basis of […] authority" (Montaigne, 1993, p. 353) that is the act that founds law by hiding its violent origin.

With respect to Benjamin, the further step Weil takes is to center her critique of law on the subject to which it applies, namely the person. This legal figure, considered sacred in the personalist philosophers' circles with which Weil polemizes, is far from indicating what is sacred in every human being. "There is something sacred in every man, but it is not his person. Nor yet is it the human personality. It is this man; no more and no less" (Weil, 1990, p. 273). The sacred has nothing to do with the person, namely with that part of man — the rational part — to which rights are ascribed and duties imposed. Justice — which is one of the senses in which what Weil calls sacred can be understood — does not step the path of law, does not use the weapons of claim, of bargaining, of negotiation, but always arises from "the sense of contact with injustice through pain" (Weil, 1990, p. 275).

By its constitutively possessive and exclusionary character, law, and the figure of the person on whom it rests, is what bars the way to justice. It is certainly not law that will make us more inclined to welcome the cry of pain that arises from injustice[3]. We must then, according to Weil, take another path: it is necessary to enter "into the impersonal" (Weil, 1990, p. 277). To explain what she means by "impersonal", Weil gives an example of rare clarity that deserves to be quoted: "If a child is doing a sum and does it wrong, the mistake bears the stamp of his personality. If he does the sum exactly right, his personality does not enter into it at all" (Weil, 1990, p. 276). If law belongs to the person, justice, and the obligation to which it calls, concerns the impersonal, the anonymous, that which is before or beyond the personal subject. In the example of the child, the correctness of the calculation does not belong to the area in which his personal will is placed, this always linked to the possibility of error, but stands on a different level that connects the child to the impersonal perfection of truth: if the calculation is correct, it means that the personal part of the child is as if silenced, that he adheres perfectly to the impersonal order of things. It is in that part that manages to touch this impersonal order that what is sacred in the human being resides. "So far from its being his person, what is sacred in a human being is the impersonal in him. Everything which is impersonal in man is sacred, and nothing else" (Weil, 1990, p. 275).

3. For Simone Weil, law is particularistic in the sense that it is both private and privative: it always has to do with privileges that some people have, and others do not. Looking at the genesis of law in ancient Rome, she emphasizes the patrimonialistic character of the Roman legal institution, to which she addresses a harsh criticism. "It is singularly monstrous that ancient Rome should be praised for having bequeathed to us the notion of rights. If we examine Roman law in its cradle, to see what species it belongs to, we discover that property was defined by the *jus utendi et abutendi.* And in fact, the things which the property owner had the right to use or abuse at will were for the most part human beings" (Weil, 1990, p. 279).

Before the law

Kafka's story *Before the Law* is the place of a possible confrontation between Jacques Derrida's and Giorgio Agamben's reflection on the origin and essence of the law. According to Derrida, Kafka's legend, beyond the fact that it makes manifest the relationship between law and literature, reveals the paradoxical tension that exists between the generality of the law and the absolute singularity of the subject to which it applies. Indeed, what is at stake in the case of the "country man" and the "doorkeeper of the law" is not so much the question of the value of a specific law, be it natural or moral, as the question of the "being of these laws" (Derrida, 2018, p. 36). Taking a completely different route, Agamben sees in the passage commented by Derrida, "the summit and the root of every law" (Agamben, 2017, p. 44). Thus, following the Agambenian "schema of the sovereign exception", according to which the law applies by disapplying itself, it turns out that for the country man "the open door destined only for him includes him in excluding him and excludes him in including him" (Agamben, 2017, p. 44).

Given the decisive importance that the subject of the essence of law plays in the thought of both philosophers, and the importance that the name of Franz Kafka plays in it, in this section, rather than examining their interpretation of Kafka in detail[4], Agamben and Derrida are, so to speak, brought to the scene as 'conceptual characters', namely as representatives of two alternative legal-political ontologies: *destituting juridical-political ontology* and *deconstructive juridical-political ontology*.

Before the law: Agamben and Derrida, in their philosophical attempt to relief the structural violence of law by going to the genesis of its procedures (archeology and deconstruction), lead to two very different political outcomes. Whereas the Agambenian project leads to the rejection of all possible political action, precisely because it is based on the destitution of all actions[5], and thus result in a form of political nihilism, Derrida, in the insistence with which he will have marked the distance between law and justice traces the way towards an affirmative promise of justice (and democracy) that should be pursued *not only beyond but even through* law. Indeed, as could be shown by numerous

4. On this topic, I would like to refer to my articles *L'expérience littéraire de Kafka comme expérience de la justice* (Galasso, 2020) and *Lire Kafka. Jacques Derrida et Giorgio Agamben devant la loi* (Galasso, 2022).

5. In the epilogue to the volume that concludes his archaeological exploration of politics, Agamben opposes the constituent power of sovereignty — locked as it is in the dead-end dialectic of a violence that poses and a violence that defends law — to the destituting power, or destituent potential. "If the fundamental ontological problem today is not work but inoperativity, and if this latter can nevertheless be attested only with respect to a work, then access to a different figure of politics cannot take the form of a 'constituent power' but rather that of something that we can provisionally call 'destituent potential' (Agamben, 2017, p. 1268).

textual references, I am convinced that Derrida's philosophy expresses a clear affirmative political line that is completely assent in Agamben's. Anyway, in order to articulate an instituting critique of the violence of law, I believe it fruitful to make Derrida's deconstructive paradigm of legal-political ontology interact with the Menkian paradigm of the self-reflexivity of law. I do not believe at all that the two paradigms should be thought of alternatively. Besides, it is Menke himself who mentions Derrida, in addition to the young Hegel, among the attempts most akin to his way of understanding the problem of the relationship between law and violence.

Towards an instituting critique of violence

The legal-political ontology articulated in this paper must lead to an *instituting* critique of violence. Being an "instituting" legal-political ontology has consequences on both the side of the theory of law *and* on the side of political philosophy.

The best approach to investigate the nexus between law and violence is the *institutional theory of rights*. From this perspective, it is indeed possible to think of law as an "institutional fact", which has the theoretical advantage of overcoming "the alternative between a 'natural law based conception of rights' (at least of basic rights) and a positivist conception" (Kervégan, 2016, p. 78) and, even more significantly for my research, makes it possible to grasp, in the meeting point of *the normative* and *the ontological*, the political-procedural value of the institution of law.

The instituting *political ontology* aims to deal affirmatively with the negative (the violence of law); it aims to think "the negative in a productive manner, subtracting it it from the dual tendency towards absolutization and repression that characterizes contemporary philosophy' (Esposito, 2021, p. 71). Indeed, giving an affirmative, instituting political tone to the philosophical operation of a critique of the violence of law makes it possible to avoid the following risks:

(i) *Removal of the negative*. The first error is based on the failure to recognize the structural link between law and violence. This leads to a form of "normative idealism", that is to "imagine law as progressively triumphant in the meritorious work of masking the Gorgon-like face of the power of civilization against a barbaric violence, the legacy of a dark past" (Mancuso, 2022, p. 7).

(ii) *Absolutization of the negative*. The second risk is that of understanding law and violence as indistinguishable. Such an approach is based on a clear rejection of the idea that law arises in opposition to violence as its ordering factor, and results in a form of political nihilism, which ends up by definitively obscuring the emancipatory power of law.

From the perspective adopted here, Menkian's idea of a relief of law as self-reflection turns out to be the most convincing. In dealing with the problem of the genesis of law in Greek tragedy, Menke highlights the conflictual, violent relationship that law has with "the lawless and norm-free". In order to accomplish what Menke does not hesitate to describe as an "impossible challenge" — that is, the fact that law from the beginning "must secure not just this or that law but the law of law" — law "must time and time and again 'suspend' itself". Recalling Schmitt, Menke defines the constitutive operation of law as follows: "The suspension of the law is its way of wielding power — as violent rule over the extra- or non-legal". For the author, the alternative to suspension lies precisely in the idea of a *relief of law*, a "relief *from* its suspension", which "consists in a form of the implementation of political-procedural judgment that is liberated from its violent rule over the extra- or non- legal" (Menke, 2018, p. 38).

According to Menke, when one is facing with this possibility of liberating from the violent rule of law, there are two possible types of response. The first, defined by Menke as the 'regressive answer', consist in "sublation of the difference between law and non-law", and in the "reconciliation of law with the nonlegal". Based on the model of a "teleological concept of pedagogy", the regressive answer implies that "the paideic sublation of the violent rule of law" is accomplished in the combined elimination of both law and politics. In fact, the repressive response coincides with that normative idealism that, by not recognising the negative, ends up removing the *instituting* difference between law *and* politics. The reflexive response does not at all require the erasure of the difference between law and non-law, but, on the contrary, requires that "the difference itself must be released" in a "non cratically, non violently" modality. For Menke, this response is reflexive because it is realised "only by law changing itself: by a law that has become self-reflective" (Menke, 2018, p. 39).

In what does the self-reflection of law consist? Even if it may seem little "the self-reflection of law reveals the contradiction between the two pretensions — the right of law to prevail over the non-legal, and the right of the non-legal to be taken into account

in law that prevails over it — whose identity law maintains in its ordinary operation" (Menke, 2018, p. 54). Thus, the self-reflection of law consists in the recognition of the contradiction that inhabits law itself. For Menke, this contradiction cannot in fact be resolved through a decision, but rather must be grasped in its radical paradoxicality and developed as such.

"That happens in an implementation of law that tries to satisfy two mutually exclusive demands at once. This must be an implementation that realizes law *and* disrupts it; an implementation that enacts the equality of the citizens *and* realizes the difference between citizen and non-citizen. […] The self- reflective implementation of law bursts the autonomous identity of self and law and lends full expression to the contradiction, which is to say the unity of unity and contradiction, of citizen and non-citizen, of participation in and obliviousness, refusal, incapacity of law" (Menke, 2018, p. 55).

Beyond and through law: it is only to the rhythm of this deconstructive or self-reflexive movement that law can effectively criticize its violent faith.

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