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Postmodern legal theory as critical theory

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(Translated by Gerrit Jackson)

Understanding the relationship between law and violence is one of the most urgent challenges a postmodern critical legal theory faces today. In his essay, Christoph Menke explores the thesis that violence is to be thought of not as an external quality of law but as an essential part of its constitution. While his concise analysis reveals the fundamental conflict between the autonomy and the social responsiveness of law, I will suggest that we must radicalize his conception in three ways. First, we need to reconsider Menke's belief that law requires a polity (I). Second, I will argue that the reflexivity of law needs to be conceived of as a process of fundamental democratization of law (II). Third, I will propose that the law must not just be depotentiated, as Menke writes, but transcended (III). For only transcending the law enables us to appeal to the utopian notion of a justice to come.

Although with Henryk Grossmann, Carl Grünberg, and Karl Korsch critical jurists played a considerable role in the early period of the Institut für Sozialforschung in Frankfurt, reflections on legal issues were peripheral to the social theory of the first generation of critical theory. Legal scholars such as Wolfgang Abendroth, Otto Kirchheimer, and Franz L. Neumann were never members of the Institute's inner core, and the leading authors of critical theory did not dedicate particular attention to the analysis of legal form, with the notable exception of Erich Fromm's dissertation.[1] That changed with the second generation of critical theorists. Jürgen Habermas and Ingeborg Maus, in particular, included the law among the objects of their influential analyses in

social theory.[2] The third generation of critical theorists affiliated with the Frankfurt School has now established legal theory as a central field of research, also with significant contributions from scholars whose primary training is in other fields.

This trend is manifest in Axel Honneth's Hegelian philosophy of law, Rainer Forst's theorem of justification, which draws on Rawlsian liberalism, Hauke Brunkhorst's combining of systems-theoretical with discourse-theoretical perspectives on law, and Sonja Buckel's materialistically inspired legal theory.[3] Each of these approaches builds on selected intellectual tendencies from the rich tradition of critical theory, ranging from Marx to Adorno and from Kant to Hegel. What sets Christoph Menke's studies on law apart is their explicitly postmodern take; through a careful study of Walter Benjamin's "Critique of Violence,"[4] he integrates deconstructivist and systems-theoretical analyses of law into the thinking of the Frankfurt School.[5]

Habermas has remarked that Menke's project, though it presents an "interesting and independent postmodern reading of liberalism," puts an "anti-utopian spin" on the deconstruction of justice.[6] But this critique misapprehends Menke's postmodern theory of law; that becomes especially evident in Menke's essay here, in which he expounds a conception of a utopia of law that, he argues, "is not about transcending law but about depotentiating it" (p. 60). As law reflects on its relation to non-law and "recogniz[es] itself to be without law," Menke writes, the utopia of "a law that knows […] about itself" (p. 61) comes into view.

What Menke spells out in his lead essay is the basic idea of postmodern legal theory: that law's operations are not untainted by violence.[7] Unlike legal scholars whose work is informed by Kant, Menke accepts it as a given that the differentiation of the legal sphere does not result in the nonviolent equitemporality (*Gleichursprünglichkeit*) of popular sovereignty and human rights, nor in the unity of law's authors and its addressees. He argues that the realization of the ideal of legal pacifism – the establishment of nonviolent social relations – is thwarted by a differentiated legal form that, as such, does violence to its social environment. Where the modern philosophy of law followed Kant in

seeking to bring social and political violence under control by installing politics and the polity as an "applied branch of law,"[8] the postmodern theory of law discerns that element which the Kantian legal tradition wished to pacify by all legal means at the very center of the law: the positing of law is a "violence without ground."[9] Violence, as Christoph Menke puts it, "is not only part of the manifestation of law but also of its essence" (p. 21).

Menke's analytically precise distinction draws our attention to the fundamental paradoxes of law, the process of juridical decision-making in undecidable matters, and the ambivalent situation in which law is operating: justice cannot be rendered quasi-automatically, by way of a mathematical subsumption under legitimately instituted norms, but is generated in the struggle for law as the state of a just order that remains unattainable – that it is never more than justice "to come."

Menke's critique "counters the legal legitimation of violence by asserting that legal legitimation is itself violent" (p. 5). He conceives of the process in which law attains autonomy as one of expropriation: a form of conflict management mediated by the polity and implemented in legal procedures supplants the immediate social management of violence performed by the parties to the conflict.[10] Only in this process is legal subjectivity constituted. This raises the question of how the decisions rendered by the autonomous law can be adjusted to be socially responsive. To address this problem, Menke turns to Walter Benjamin's idea of an *Entsetzung des Rechts* (relief of law). Law, he writes, must be reflexive law. The self-reflection of law he sketches "leads into a paradox that," he argues, "does not promise a realm beyond the contention, violence, and suffering against which the law takes a stand and that it ends up reenacting within itself. The self-reflective implementation promises nothing more than a law that knows as much about itself" (p. 61).

This advanced deconstructive demystification of law throws the essence of the tension between its autonomy and its social responsiveness into sharp relief. Still, Menke's sketch contains the potential for a more trenchant analysis of the momentous consequences of the autonomy attained by law and the processes of juridical decision-making

and a more radical normative program, a potential Menke himself does not explore any further. That is why I want to discuss Menke's central claims – I will focus on three of them – and propose a more radical version of each:

I. *Claim (Menke):* The autonomous law supplants the revenge-oriented immediate settling of conflicts by the parties and implements the rule of the polity over the partisan individuals.
Radicalization: Neither the establishment nor the preservation of autonomous law is bound up with the polity; as law of world society, it comes into being in transnational processes of coevolution between law and its social environment.

II. *Claim (Menke):* Juridical decision-makers must take the paradoxical basic constellation and the relation of the law to non-law into account in their legal decisions in order to realize a self-reflexive application of the relieved law.
Radicalization: Law is more than the sum of legal decisions; the self-reflexivity and relief of law must be realized in the procedural conjunction of decision and discussion as a democratization of the legal form.

III. *Claim (Menke):* Self-reflection of law points towards a utopian justice that consists in the depotentiation, rather than the transcendence, of law.
Radicalization: The utopian justice to come can be conceived only in transcending the law.

I

With a view to the tragedies of the Oresteia and *Oedipus Rex*, Menke portrays the establishment of law's autonomy as an evolutionary process in which the emergence of law is tied to the political community of the citizens. This nexus is not self-evident. In particular, the dynamic nature of evolving legal frameworks in the transnational constellation raises the question of how plausible it still is for a "law in global disorder."[11]

In the era of Westphalian sovereignty, the notion that legal and constitutional processes were bound up with the polity was plausible. A law outside the polity was virtually inconceivable. In Hannah Arendt's critique of the aporias of human rights, which Menke has discussed elsewhere,[12] she insisted that the declaration of universal rights remained pre-political and pre-juridical unless it was wedded to a political organization. Arendt accordingly conceived the "right to have rights" first and foremost as the right to membership of a political community.[13] The central idea is that the granting of the right to membership of polities can effectively prevent exclusion from the law. Stateless persons and refugees who fall through the cracks of this protective system can be afforded effective protection through inclusion in national entitlement schemes.

But such concepts of the community-based polity, which usually focus on its protective function, and the close conjunction they create between community and law not infrequently lead writers to presuppose a unitary constitution of that community, a highly consequential theoretical choice that appears in Menke's argument as well: "The practice of legal judgment," he writes, "executes the rule of political union over the partial individuals" (p. 16). Menke's law is constitutively tied to "the" political community: "There is no law outside the polity"; "the justice of law can exist only in a community of equal citizens" (p. 14). Both conjunctions – the unitary conception of the community and the concession of monopoly power over the law to the polity – are problematic. They tend to obscure patterns of inequality, sources of resistance within configurations of power,[14] intersectional structures of discrimination and polycentric lines of exclusion, and unequal distributions of resources.[15] Claude Lefort has accordingly substituted the conflictive character of the social for communitarian homogeneity and deconstructed concepts of political community:

> Now, it becomes apparent that the concept of "people" blankets an opposition. Or to put it differently, within a people, a visible community to which the state assigns its identity, is found the masses of those without power – "people" in the precise sense that abstracts it from the fictive unity that political language projects onto it.[16]

Not coincidentally, the theorists of community cannot reach a consensus concerning even a very basic question: what is the communality of each of the various entities in question anchored in? In the Kantian theory of democracy, the law-generating community is usually the "community under law" as the identity of the addressees and authors of the law; political conceptions of the community, by contrast, often posit the polity as its basis. When endowed with substantial content, these conceptions give rise to the adoption of homogeneity requirements and create situations of exclusion. Tying the law to homogeneous communities in this manner is the point of departure for conceptions that continue to assign a central function in the genesis of political collectivity and lawmaking to the narratives of communities of fate and homogeneous cultures and values, even if they acknowledge, in postmodernist fashion, that such communities do not strictly speaking exist. They maintain that the European Union suffers from a constitutionality deficit because the space beyond the state lacks the necessary homogeneity, and they argue that the idea of international constitutional law championed by Jürgen Habermas[17] is doomed to fail a priori. Their excessive cathexis of the community leads them to claim that only the state can be "the project of erotic love"[18] in which the civic spirit of self-sacrifice and confraternity in the law can thrive.

Menke gives a wide berth to such abusive reliance on the community. Nor does he follow Carl Schmitt in conceiving the law as growing out of a given community of fate as the self-legislating political subject. Menke's conception reverses the order of priority. The law, he argues, is constitutive of the political community. In tying the creation of law to a community, he teases out an implication of postmodern liberalism with its characteristic self-reflexive politics of equality. The concept of a politics of equality requires due consideration of the complaints of individuals "about the violence, constraint, and oppression that is implied for them by the existing practice of equality."[19] His theory thus thinks the polity with its exclusions and reflects on the emancipatory benefits that flow from granting the legal subjects subjective rights as formally free rights to equality. But having conceived the *homo iuridicus* in the form

of the legal subject as a character mask, a personification of juridical relations in which the law must presuppose equality as the legal equality of abstract legal subjects, because the very contingency formula of justice commits it to equality, Menke then proceeds to bind legal equality to an entity that is extrinsic to the law: the polity. Pashukanis understood the legal subject, in structural analogy to Marx's *homo oeconomicus*, as the abstraction of the act of economic exchange instituted by a fully differentiated legal form (referred to by Marx as the commodity form;[20] Menke, by contrast, melds the legal subject to the subject of the *homo politicus*, to the political community: legal equality and the political equality of the citizens, he argues, are interdependent.

Yet this conjunction between law and political equality of the citizens is hard to reconcile with the reality of the social creation of law. If, on the one hand, what Menke conceives as citizenship or membership of a polity is a purely formal determination, any contractual relationship is necessarily at once also the perpetuation of a political community. Contracts between private persons, between transnational corporations, or between transnational corporations and states would then have to be bound in one way or another to a political community. But then this conception, to avoid losing sight of crucial legal problems of world society,[21] would have to set the bar for what constitutes a "community," a "polity," and "political lawmaking" so low that any form of social lawmaking remains bound up with a polity. This would make "community" and "polity" ubiquitous concepts that would apply even to complex structures of arbitral jurisdiction in an economic community of transnational corporations.[22]

If, on the other hand, the bond that ties law to citizenship is more than a merely formal link – if, in other words, we add substantial criteria concerning the nature and degree of political organization – we arrive at a theory that is plausible in a world defined by the Westphalian order. But this form of life has grown gray; law of world society is polycentric. As a consequence, the philosophy of law then no longer has any answers to urgent questions of global legal pluralism. This may be a species-appropriate stance for the owl of Minerva. But a philosophy

of law that remains in touch with the legal-political problems of world society should query the nexus binding the law to "political communities." Both components of this conceptual conjunction are questionable: what is communal, and what is political, about the "political communities" of the transnational constellation in which the "rule of political union" over the individual is supposedly realized?

Although world society lacks political union and has neither a Weberian *Anstaltsstaat* nor a Kelsen–Merkl-style hierarchical structure of law on the transnational level, it is not without legal rules. In fact, the problem legal practice faces is usually a different one: how to correlate the different legal orders. Overlapping circles of jurisdiction and the parallel existence of widely divergent patterns of order – what Saskia Sassen has called assemblages[23] – give rise to norm collisions in the global legal pluralism and a fragmentation of international law that cannot be comprehended in the perspective of the politically organized international community: a pluralism of regimes that provokes novel conflicts of law.[24] The narrow focus on political entities is not conducive to a better understanding of these conflicts. How does it help us interpret the interplay between the legal orders of the European Court of Human Rights (which were drawn up by the Council of Europe, a political organization), the politically organized European Union (EU) and the politically organized nation states? Each of these legal systems aspires to extend the purview of its particular perspective. The relations of membership of the various institutions – the Council of Europe and the EU as well as the World Trade Organization (WTO), NATO and so on – are asymmetrical. There is no unifying entity in the system of polycentric global governance, and global law is primarily about structuring the pluriverse of legal policy by instituting obligations of mutual consideration between the various patterns of order.

Tying the law to the unified polity is not only unhelpful for an understanding of the polycentricity of political rule and political legislation, it also blinds us to the phenomena of social lawmaking. Even in the nation state, the monopoly of politics over lawmaking defines many legal issues – free collective bargaining, customary business practices as legal norms, accepted standards, and so on – in a way that shunts

them off into the realm of non-law and brings them out of focus. In the transnational constellation, which is characterized by a multiplication of authors, addressees, and organizational forms of law, the theoretical fixation on the community is a doubly pernicious form of myopia.[25] The assumption of a political monopoly over lawmaking fails to appreciate the reality of national and especially of transnational legal practice.[26] For example, the *lex mercatoria*, the law of the unfettered global economy, and the *lex digitalis* of cyberspace have each evolved their own legislative dynamics. The legal questions that arise in this context can aptly be described as structurally analogous to the questions of national and European law with regard to the challenge of ensuring social responsiveness of the law.

In particular, with regard to the effort to commit private transnational corporations to human and environmental rights, the focus on the unified polity in the conception of law not only impedes a proper understanding of what law is, it also obscures the structures of the legal attribution of responsibility and the leverage points for a creation of legal responsiveness obligations. For example, Christoph Menke and Arnd Pollmann emphasize that conceptions that instate private actors as subjects of international law "overshoot the mark by declaring every single private person to be an addressee of human rights obligations. If, however, human rights […] describe entitlements vis-à-vis the public order, then […] it is primarily the institutions and representatives of states and, ultimately, the global community of states that are bound by social human rights."[27] This argument ignores the structural transformation of the public sphere and is barely in touch with contemporary legal practice. For instance, the German Federal Constitutional Court has applied the public forum theory developed by American jurisprudence to privately owned public spaces; in a decision rendered in 2011, it found that a joint stock corporation was immediately bound by constitutional law.[28] The question of how the "public order" can be conceived arises in spheres beyond the state with even greater urgency than in the national framework. The threats to human rights posed by transnational corporations highlight the fact that the dichotomy of private versus public needs to be rethought[29] in order to prepare the ground for

the attribution of a horizontal binding force to human rights.[30] Shell's pollution of the Niger delta, the global trade in goods produced using child labor, private military corporations such as Blackwater: these cases call for the development of legal strategies to compel private actors to abide by human rights. The focus on the "international community of states" is of little avail in this regard. Enhancing the obligation of the states to offer protection by regulating the actions of private actors remains an important avenue of the enforcement of human rights,[31] but it is nonetheless an indirect approach that must be complemented by an expansion of the direct route of committing private actors.

In short, global law is engendered as law of world society in processes of coevolution between the law and its social environment, and not just in politically organized entities. Postmodern legal theory will have to face up to the challenges of legal practice and broaden its reflections to take into account forms of lawmaking beyond the political community conceived in unitary terms. Conflict rather than consensus, multiplicity rather than communality, engagement with polycentricity rather than the imposition of unitary templates, and social rather than political lawmaking: these are then the basic coordinates. They are also what Jacques Derrida had in mind when he argued that the "effective responsibility" of any intellectual engagement consisted in "doing everything to transform the existing state of law […] [and] inventing new laws," a task that, he noted, is "transnational and not just cosmopolitan, because the cosmopolitan still presupposes the categories of the state and the citizen, even if the citizen is a world citizen."[32]

II

This shift towards a social conception of law also affects the creation of law and its decision-making practices. In his essay, Menke rightly severs law from the relations of civic reciprocity and describes it as one sphere of communication among others. He takes up Walter Benjamin's idea of a relief of law to stake out a position contrary to Carl Schmitt's suspension of law,[33] a decisionistic model in which the

political sovereign issues legal decisions *ex nihilo* and unencumbered by any legal constraint. Using Heiner Müller's play *Volokolamsk Highway I*[34] as an example – it concludes with a military commander's decision to have a soldier executed in accordance with martial law rather than pardoning him – Menke persuasively demonstrates the duplicity of the law: that it is, as Brecht put it, "a pig in a poke."[35]

Menke paints a vivid picture of the decision-maker's anguish. Heiner Müller has been described as a purveyor of defeatist demystification,[36] and he is perhaps nowhere more so than in Menke's reading: the commander's order to execute the soldier goes unchallenged; military morale outweighs the sacredness of the person. Demystification lies in the reflection on the tension between law and non-law and the paradoxical challenge the law faces of having to acknowledge its being non-law. But Menke's analysis of this passage also throws the fact into sharp relief that, in tying law back to state authorities, he does not rigorously conceive law as a trans-subjective communicative process that is more than the sum of communicative acts performed by legal decision-makers.

The example of the 2009 Kunduz airstrike illustrates the consequences of this decisionistic reading: in the early morning of September 4, 2009, an American fighter jet responding to a call by German forces struck two fuel tankers in northern Afghanistan, killing more than seventy people, among them children and women. A number of investigations, including a committee of inquiry of the German Bundestag, subsequently sought to shed light on how the decision to order the airstrike was reached. The protocol of the hearing of Master Sergeant W. (codenamed "Red Baron," he was in charge of radio communications that night) shows how unwillingly the decision-makers reached their decision – how no one was eager to kill. In W.'s account, Colonel Klein considered the matter for an extended period of time before deciding to order the strike:

> Colonel *Klein* was very abs.orbed in thought and pondered the issue for a long time. At some point he also said he needed more time. I passed that on to the aircraft, too, if I recall correctly, that it would take a little longer in terms of making a decision. To my mind, yes, for

> heaven's sake, he wasn't, or he isn't, someone who does anything rashly or decides anything purely by gut feeling. I think he weighed the matter for himself for a very long time and really struggled with himself over whether he should make that decision or in which way he should make that decision.[37]

This example seems to corroborate Christoph Menke's position that Carl Schmitt's suspension of law in the state of war is not a correct interpretation. Indeed, all those involved that night portrayed their decision as one option "in keeping with the law of war." No one argued that the law did not apply in wartime. The decision-making situation also seems to bear out Menke's conception of unwilling legal decision-making: note the colonel's indecision and hesitation, his doubts and the drawn-out anguish that preceded his decision. And yet the question remains whether the set of instruments Menke has honed for the observation of legal decision-making processes is not still too committed to the decisionistic paradigm: does not the conception of the unwilling decision-maker in the end simply replace Schmitt's decision *ex nihilo* with a decision *ex fastidio* for which the legal norms that apply to questions of discretionary competence, procedure, and the substance of the matter are effectively so much background noise?

The "war in the commander's mind," Menke writes, "the war between law and the non-legal, between the right of law and the non-right of law, no longer ends" (p. 60). This reading narrows the self-reflection of law down to the decision-maker's anguish and interprets the transsubjective self-reflection of law as a process of subjective reflection on the part of decision-makers instead of tapping the potential of transsubjective reflexivity and inquiring into the relationship between the social ensemble in which law is produced.[38] This setting in which the creation of law takes place is more than the sum of executive–military decisions. The decision of the undecidable is never more than one link in a chain of communicative acts and is itself immediately subject to legal observation. It is not the individual decision-maker but law's differentiated structure with its center (courts) and periphery (public and

private legal communication and lawmaking) that decides what is law and what is non-law.[39] No differentiated legal system can be said to exist until legal procedures have been evolved in which the conflict is transformed into a legal conflict and in which decisions of lawfulness or unlawfulness are rendered.[40] It is only then that the tension between law and justice becomes virulent.

Like the commander defending the Volokolamsk Highway, Colonel Klein made an executive decision in a situation of undecidability. But their cases remain to be litigated. Their decisions are merely the opening addresses in the struggle for law, a struggle in which the question of what is law and what is non-law is decided by the social communicative processes of law. In subsuming the lawmaking and the law-preserving powers under the title of mythical violence, Walter Benjamin describes two intimately interwoven components of the creation of law, which cannot be reduced to the act of the decision-maker; it is a social process. Of pivotal importance to its operativeness is the functioning reentry of the distinction (law/non-law) into what it distinguishes (law). Law must reframe the non-legal environment in the legal form. This internal reframing of the collision of incommensurable logics (*différend*), the alienating transformation of a social conflict into a legal dispute (*litige*), renders the conflict between law and non-law decidable for law – decidable as a legal conflict. Law always distorts conflicts over power, economic interests, and religious issues into legal conflicts, translating them into collisions between legal rights, interests, or spheres. Law is a King Midas machine: it cannot render the conflict between law and non-law other than as a legal conflict.

The conflict on Volokolamsk Highway is thus a collision between the military order to execute and the commander's right to pardon his subordinate; both are legal rules. The right to pardon is a legal rule that represents non-law within the law – and reframes the real social conflict as a legal collision. Dealing with such collisions is the everyday business of law. Marx had already put it in trenchant terms: "A struggle" is waged "between collective capital, i.e., the class of capitalists, and collective labour, i.e., the working-class" – "right against right […] Between equal

rights force decides."[41] Marx explicated this antagonism of law against law for the sphere of class struggle. We would have to generalize the idea of the collision of laws against laws as the struggle for law within the law and respecify it for other interfaces. Fragmented global law is rife with such collisions that pit right against right:[42]

- investment protection law (e.g., concerning the privatization of water supplies) collides with social human rights;
- WTO law (e.g., liberalization of trade in genetically modified foods) collides with the global norms on environmental protection;
- UN law (e.g., UN targeted sanctions) collides with global human rights.

It is not the war in the decision-maker's head that constitutes the undecidability of these collision situations; rather, the law is, as Jean-François Lyotard has put it, "the civil war of ' "language' with itself."[43] Elsewhere in "Law and Violence," Menke acknowledges as much, writing, with a view to the social process of the creation of law rather than the decision-maker's head, that " 'relieved,' both disempowered and liberated, law is at war with itself" (p. 61). The war of law supplants the law of war. This perspective on trans-subjective collisions, rather than the focus on the subjective decision-making process, captures the crucial fact of the creation of law.

The formula of the "law of the unwilling" (p. 61) must not be merely a tonic from which decision-makers draw reassurance: it must be read as a challenge to society to take possession of law.[44] This socialization of law, as Daniel Loick has recently shown with reference to Hermann Cohen and Franz Rosenzweig,[45] finds important guidance in Walter Benjamin's "Critique of Violence." Benjamin distinguished the physical violence on which law is founded from the mythical violence with its dimensions of lawmaking and law-preserving. He then introduced a third violence, which he calls revolutionary, sovereign, divine violence. To constrain Benjamin's divine violence by turning it into a relieving power in the hands of unwilling state-appointed legal decision-makers would be to misapprehend the potential of this legal theory.

Seen through the Benjaminian lens, the uprisings around the world – the protests in Greece, the Occupy movement, the indignados of the Puerta del Sol, the Arab Spring – are struggles for a new social law. The unwilling of the world are not content with the degenerate law of dictatorial regimes and global neoliberalism. They demand that global law live up to its promise of justice. The law of the unwilling is then not the law of the unwilling *comandantes y subcomandantes*, but the right of social protest. Tellingly, Benjamin invests his hopes not in the political but in the proletarian general strike, which "sets itself the sole task of destroying state power."[46] Read in the light of Benjamin's sovereign violence, the formula of the "law of the unwilling" implies a comprehensive mandate for society to take possession of the law. This appropriation must disrupt the constitutive nexus between law-making and law-preserving legal violence; it must amount to more than a reform of the existing ensemble of institutions; and it must not limit itself to merely domesticating the established and operative apparatuses of decision-making.

If the war of law against law and the clashes between global law and global law articulate real social conflicts on a global scale, we cannot cede law to the self-appointed decision-makers. Instead, as Benjamin suggests, we must get involved in the struggle over the violence of the law and champion structures that give permanent form to society's law-making power and render it independent of the statist institutions of violence: Hauke Brunkhorst has called this the democratic conjunction of decision and discussion; Gunther Teubner has described it as the coupling of domains of spontaneity and organization.[47] The core objective is to make a democratization of the form of law possible and to open up the law to protest movements. This is the point that Otto Kirchheimer and Rudolf Wiethölter aimed at with their reflections on the socialization of the law (and the heuristic formula of the evolution of a social law of justification.[48]

The perspective of democratic law requires that we shift the focus from the governmental decision-makers to the social processes of legal creation in the struggle for global law. To come back to the Kunduz case: in

February 2012 the Cologne Administrative Court heard a petition by the truck driver in Kunduz for a declaratory judgment finding that the colonel's decision was unlawful. Several actions for damages are pending, a constitutional complaint has been filed against the decision not to initiate criminal proceedings, and it is foreseeable that this military decision will also occupy international courts such as the European Court of Human Rights.[49] The victims' fight for justice will keep the law busy for years. These lawsuits, the victims' rights to participation, and the potential for the creation of law implicit in the processes of global scandalization that Niklas Luhmann, following Émile Durkheim, has described as lawmaking by *colère publique*[50] which appeals to the public's sense of injustice,[51] are surely no less decisive data for the creation of law than the anguished decision-making process in the head of a commander.

III

This expansion of the terrain on which the struggle for law is waged in turn inevitably affects the utopia of law and the realization of the ideal of emancipation. The utopia of law, Menke argues, "is not about transcending law but about depotentiating it: by seeing law and its application become *one possibility*" (p. 60, emphasis added).

But if we content ourselves with such depotentiation, we merely make ourselves a little less comfortable in the enclosures of obedience to the law – we do not call them into question as such. Benjamin thinks "decision [as] transcendent";[52] Menke, by contrast, strips legal decision-making of this transcendent dimension. But must not the sting of the call for justice be more than the demand that those who render authoritative decisions develop a sense of unwillingness? Does not the struggle of those excluded from participation command more forceful partisanship? Must not law evolve a sensitivity for their sufferings?[53] Can the 1.3 billion people living in poverty around the world rely on the unwillingness of departmental bureaucracies and the world's courts?

"Justice is the principle of all divine endmaking [*Zwecksetzung*]":[54] that is Benjamin's formula for the basis of the law's relieving violence. Menke curbs the explosive force of this proposition by following Luhmann in interpreting justice as a formula for contingency:[55] as a mandate to secure the internal consistency of the decisions rendered, to establish responsiveness vis-à-vis the non-legal, and to reframe the tension between the law and its outside.[56] Yet it is only when justice is understood as a formula not merely of the contingency, but also of the transcendence of the law, that it remains ascendant; only then can the sting of justice be an effective agent of emancipation. Law – to quote Gunther Teubner – solicits "the attempt […] to transform the immanence of law in a non-conceivable manner […] Justice would be realised only after actually enduring injustice."[57] The interplay between applicable consistency constraints in the law and their transcendence can give rise to a process of the transformation of law in which the "enormous gulf that," as Benjamin writes, "essentially separates law from justice"[58] may be overcome. Such transcendence is not an automatism. Injustice must be articulated and scandalized; in the juridical struggle over its interpretation, law must be forced to look into the mirror of justice.

At this point it becomes apparent that the initially purely analytical distinction Benjamin draws between divine and mythical violence may be wielded in different ways: one reading – this is Menke's – is to effectively copy divine violence into mythical violence, and thus conceive Benjamin's relief as a domestication of mythical violence. In a second variant – Derrida in "Force of Law" emphatically warns of its dangers – divine violence obliterates mythical violence; the proletarian general strike then becomes indistinguishable from the totalizing anti-legal violence of annihilation – specifically, the law-annihilating violence of the fascists. In the third reading, as Cornelia Vismann has shown in a careful reconstruction, Benjamin's Messianic-Marxist discourse intends the yearning for the other, beyond the violence of law, a new legal form that cannot be realized, as a negation of the old and instead requires a new form of violence that acknowledges the difference between divine

and mythical violence, combining the two rather than subsuming one under the other.[59]

Benjamin hints at how this combination may be realized with his distinction between the political and the proletarian general strike. He is very clear that the political general strike is a token for a struggle that, in the final analysis, amounts to instrumental-strategic action, which must develop, and which inevitably becomes embroiled in political-legal forms if it hopes to succeed. The proletarian general strike, by contrast, is an expression of sovereign violence and, as such, breaks the cycle of violence, of calculation and counter-calculation, of success, concession, compromise, struggle, and so on. In its amorphousness, it is an anticipation of communism. The challenge is to develop a praxis that combines both the political and the proletarian general strike, such that Benjamin's perspective of sovereign transcendence is retained even when the proletarian strike inscribes itself in the political-legal institutions. This requires that we acknowledge the difference between the two forms, but then avoid the temptation to locate the sovereign element in the self-reflection on the part of the political decision-making bodies – on the contrary, political violence must be prevented from passing itself off as proletarian. The possibility of transcendence must not be ground to pieces in the mills of the political system. The point of Benjamin's argument is his insistence that the proletarian appropriation of the law must not obliterate it. The social appropriation of the institutions must instead keep the perspective of a transcendence of the law open in order to live up to the mandate of transcendence challenging us to transform the immanence of pervasive mythical violence through sovereign violence as the other of law. To limn this "possible use of law,"[60] which attaches to the study of the law "the promises which tradition has attached to the study of the Torah,"[61] Benjamin invokes a "culture of the heart" that provides the means of nonviolent agreement: "courtesy of the heart, sympathy, peaceableness, trust, and whatever else might here be mentioned."[62]

That implies a transcendental perspective for the law; Menke, however, negates this very perspective: "For the rule of law is the equality of citizens; beyond law, inequality rules" (p. 60).[63] Menke presses his analysis to the crucial point, but then shies away from its implications and observes

of the principle of justice what Adorno demonstrated for the barter principle: the abolition of law (Menke) is no more a viable option than the abolition of barter (Adorno). Yet Adorno did not leave it at this concession to reality. If we cannot abolish the barter principle, he urged, then we must transcend it – by demanding that it make good on its promise:

> If comparability as a category of measure were simply annulled, the rationality which is inherent in the barter principle – as ideology, of course, but also as a promise – would give way to direct appropriation, to force, and nowadays to the naked privilege of monopolies and cliques. When we criticize the barter principle […] we want to realize the ideal of free and just barter. To date, this ideal is only a pretext. Its realization alone would transcend barter.[64]

The same argument holds of the law: only the realization of the just law would transcend the law. This possibility of law as a legal force, beyond the nexus of violence that is the law, of a law "that checks and retracts itself,"[65] is what Benjamin gestures towards in his essay on Kafka, writing that "the law which is studied but no longer practiced is the gate to justice."[66] Only by integrating this possibility of transcendence will postmodern legal theory be able to carry forward the tradition of the first generation of critical theory with regard also to its demand for the realization of the ideal of emancipation and justice.

IV

In short, the constitutive conjunction between the unified polity and legal creation underestimates the degree to which the law is enmeshed in its social context. Law in world society operates independent of the polity, and so critical theories of law must go beyond a focus on the decision as an act *ex fastidio* and turn the spotlight on the institutional conditions that frame the struggle for law: they must take the social processes of legal creation into account in their reflections and engender procedural couplings between decision and discussion. Broadening the scope of legal theory in this manner is a necessity if the legal form

is to be democratized, and it will release the utopian perspective of law and thus facilitate a radically critical stance[67] vis-à-vis the existing relations of justification:[68] the critique of law wants the ideal of an emancipatory and just law, which has never been more than a pretext, to be realized in the struggle of the unwilling over the appropriation of the law. This alone would transcend law.

Notes

1 E. Fromm, *Das jüdische Gesetz: Zur Soziologie des Diaspora-Judentums* [1922], ed. R. Funk (Weinheim: Beltz, 1989).

2 O. Eberl and P. Niesen, 'Demokratischer Positivismus: Habermas und Maus', in Sonja Buckel *et al.* (eds), *Neue Theorien des Rechts*, 2nd edn (Stuttgart: Lucius & Lucius, 2006), 3–26.

3 A. Honneth, *Freedom's Right: The Social Foundations of Democratic Life*, trans. J. Ganahl (New York: Columbia University Press, 2013); R. Forst, *Justification and Critique: Towards a Critical Theory of Politics*, trans. C. Cronin (Cambridge: Polity, 2014); H. Brunkhorst, *Solidarity: From Civic Friendship to a Global Legal Community* (Cambridge, MA: MIT Press, 2005); S. Buckel, *Subjektivierung und Kohäsion: Zur Rekonstruktion einer materialistischen Theorie des Rechts* (Weilerswist: Velbrück Wissenschaft, 2007).

4 W. Benjamin, "Critique of Violence" [1921], in *Selected Writings*, vol. 1: *1913–1926*, eds M. Bullock and M. W. Jennings (Cambridge, MA: Harvard University Press, 1996), 236–52; cf. J. Butler, "Critique, Coercion, and Sacred Life in Benjamin's 'Critique of Violence'," in H. de Vries *et al.* (eds), *Political Theologies: Public Religions in a Post-Secular World* (New York: Fordham University Press, 2006), 201–19; C. Vismann, "Two Critics of Law: Benjamin and Kraus," *Cardozo Law Review*, 26:3 (2005), 1159–74.

5 C. Menke, "Für eine Politik der Dekonstruktion: Jacques Derrida über Recht und Gerechtigkeit," in Anselm Haverkamp (ed.), *Gewalt und Gerechtigkeit: Derrida – Benjamin* (Frankfurt am Main: Suhrkamp, 1994), 279–87; C. Menke, *Reflections of Equality*, trans. H. Rouse and A. Denejkine (Stanford: Stanford University Press, 2006).

6 J. Habermas, "Kulturelle Gleichbehandlung und die Grenzen des postmodernen Liberalismus," *Deutsche Zeitschrift für Philosophie*, 51:3 (2003), 371, my translation.
7 R. M. Cover, "Violence and the Word," *Yale Law Journal*, 95:8 (July 1986), 1601–29.
8 I. Kant, *To Perpetual Peace: A Philosophical Sketch* [1795] (Indianapolis: Hackett, 2003), 116.
9 J. Derrida, "Force of Law: The 'Mystical Foundation of Authority'," trans. M. Quaintance, in Drucilla Cornell *et al.* (eds), *Deconstruction and the Possibility of Justice* (New York and London: Routledge, 1992), 14.
10 Cf. G. Teubner, "Alienating Justice: On the Social Surplus Value of the Twelfth Camel," in David Nelken *et al.* (eds), *Law's New Boundaries: Consequences of Legal Autopoiesis* (Aldershot: Ashgate, 2001), 21–44.
11 E. Denninger, *Recht in globaler Unordnung* (Berlin: Berliner Wissenschafts-Verlag, 2005), my translation.
12 C. Menke, "Die 'Aporien der Menschenrechte' und das 'einzige Menschenrecht': Zur Einheit von Hannah Arendts Argumentation," in Eva Geulen *et al.* (eds), *Hannah Arendt und Giorgio Agamben: Parallelen, Perspektiven, Kontroversen* (Munich: Fink, 2008), 131–47.
13 H. Arendt, "'The Rights of Man': What Are They?," *Modern Review*, 3:1 (Summer 1949), 24.
14 I. Lorey, *Figuren des Immunen: Elemente einer politischen Theorie* (Zurich: Diaphanes, 2011), 293.
15 D. Loick, *Kritik der Souveränität* (Frankfurt am Main: Campus, 2011), 252.
16 C. Lefort, *Machiavelli in the Making*, trans. M. B. Smith (Evanston: Northwestern University Press, 2012), 140.
17 J. Habermas, "A Political Constitution for the Pluralist World Society?" *Journal of Chinese Philosophy*, 40 (2013), 226–38.
18 U. Haltern, 'Recht als Tabu? Was Juristen nicht wissen wollen sollten,' in Otto Depenheuer (ed.), *Recht und Tabu* (Wiesbaden: Westdeutscher Verlag, 2003), 141, my translation.
19 C. Menke, *Reflections of Equality*, trans. H. Rouse and A. Denejkine (Stanford: Stanford University Press, 2006), 31.
20 K. Marx, *Capital: A Critique of Political Economy*, vol. 1 [1867], trans. S. Moore and E. Aveling (Mineola: Dover, 2011), 96–97; in reality, of course, the category of the legal subject is abstracted from the act of exchange

taking place in the market' (E. Pashukanis, *The General Theory of Law and Marxism* [1924], with a new introduction by Dragan Milovanovic (New Brunswick: Transaction Publishers, 2002), 117).

21 On this concept see N. Luhmann, "Globalization or World Society? How to Conceive of Modern Society," *International Review of Sociology*, 7:1 (1997), 67–80.

22 But see Berman, who wants to apply the concept of the community to the *lex mercatoria* as well: P. S. Berman, "Global Legal Pluralism," *Southern California Law Review*, 80:6 (2007), 1162.

23 S. Sassen, *Territory, Authority, Rights: From Medieval to Global Assemblages* (Princeton: Princeton University Press, 2006); K. Möller, "Global Assemblages im neuen Konstitutionalismus," *ancilla iuris*, 2008:44, 44–56.

24 A. Fischer-Lescano and G. Teubner, "Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law," *Michigan Journal of International Law*, 25:4 (2004), 999–1045.

25 G. Teubner, *Constitutional Fragments: Societal Constitutionalism and Globalization* (Oxford: Oxford University Press, 2012), 13.

26 H. J. Berman, "World Law," *Fordham International Law Journal*, 18:5 (1995), 1617–22.

27 C. Menke and A. Pollmann, *Philosophie der Menschenrechte zur Einführung*, 2nd edn (Hamburg: Junius, 2009), 109, my translation.

28 See Bundesverfassungsgericht (Federal Constitutional Court), BVerfGE 128: 226 (Fraport AG).

29 G. Teubner, "Societal Constitutionalism and the Politics of the Common," *Finnish Yearbook of International Law*, 21 (2010), 2–15.

30 A. Fischer-Lescano, "Struggles for a Global Internet Constitution: Protecting Global Communication Structures Against Surveillance Measures," *Global Constitutionalism*, 5:2 (2016), 145–72.

31 J. Ruggie, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, " vol. amsker Chaussee titution. text or is it your addition?is definition of violence?March 21 (2011), A/HRC/17/31.

32 J. Derrida, "Not Utopia, the Impossible," in *Paper Machine*, trans. R. Bowlby (Stanford: Stanford University Press, 2005), 123–24.

33 C. Schmitt, *Gesetz und Urteil: Eine Untersuchung zum Problem der Rechtspraxis* (Berlin: Liebmann, 1912), 86.

34 H. Müller, "Wolokolamsker Chaussee I: Russische Eröffnung," in *Werke*, vol. 5: *Die Stücke 3* (Frankfurt am Main: Suhrkamp, 2002).

35 B. Brecht, "Kaukasischer Kreidekreis" (1949), in *Werke: Große kommentierte Berliner und Frankfurter Ausgabe*, vol. 8: *Stücke* (Frankfurt am Main: Suhrkamp, 1989), 72, my translation.

36 N. Müller-Schöll, *Das Theater des "konstruktiven Defaitismus": Lektüren zur Theorie eines Theaters der A-Identität bei Walter Benjamin, Bertolt Brecht und Heiner Müller* (Frankfurt am Main: Stroemfeld/Nexus, 2002), 411.

37 Bundestagsdrucksache (BT-Drs.) 17/7400, October 25, 2011: 64, original emphasis, my translation.

38 A. Fischer-Lescano and R. Christensen, "Auctoritatis interpositio: How Systems Theory deconstructs Decisionism," *Social & Legal Studies*, 21:1 (2012), 93–119.

39 N. Luhmann, *Law as a Social System*, trans. K. A. Ziegert (Oxford and New York: Oxford University Press, 2004), 292–93.

40 H. Kelsen, "*Hauptprobleme der Staatsrechtslehre*" [1911], in *Werke*, vol. 2, ed. Matthias Jestaedt (Tübingen: Mohr Siebeck, 2008), 352, put it bluntly: "No law without courts."

41 K. Marx, *Capital: A Critique of Political Economy*, vol. 1 [1867], trans. S. Moore and E. Aveling (Mineola: Dover, 2011), 259; C. Miéville, *Between Equal Rights: A Marxist Theory of International Law* (Leiden and Boston, MA: Brill, 2005).

42 See the contributions in K. Blome *et al.* (eds), *Contested Regime Collisions: Interdisciplinary Inquiries into Norm Fragmentation in World Society* (Cambridge: Cambridge University Press, 2016).

43 F. Lyotard, *The Differend: Phrases in Dispute*, trans. Georges Van Den Abbeele (Minneapolis: University of Minnesota Press, 1988), 141.

44 R. Wiethölter, 'Ist unserem Recht der Prozeß zu machen?', in Axel Honneth *et al.* (eds), *Zwischenbetrachtungen: Im Prozeß der Aufklärung. Jürgen Habermas zum 60. Geburtstag* (Frankfurt am Main: Suhrkamp, 1989), 794–812.

45 D. Loick, *Kritik der Souveränität* (Frankfurt am Main: Campus, 2011), 279.

46 Benjamin, "Critique of Violence," 246; H. Brunkhorst, *How Is a Critique of Violence Historically Possible?*, lecture at the 2010 Benjamin conference in Santiago de Chile and Buenos Aires (manuscript), 6.

47 H. Brunkhorst, "Das öffentliche Recht in 'Empire'," in R. Faber (ed.), *Imperialismus in Geschichte und Gegenwart* (Würzburg: Königshausen

& Neumann, 2005), 177; G. Teubner, *Constitutional Fragments: Societal Constitutionalism and Globalization* (Oxford: Oxford University Press, 2012), 88.

48 O. Kirchheimer, "The Socialist and Bolshevik Theory of the State' [1928], in *Politics, Law, and Social Change: Selected Essays of Otto Kirchheimer*, eds F. S. Burin and K. L. Shell (New York: Columbia University Press, 1969), 3–21; R. Wiethölter, "Recht-Fertigungen eines Gesellschafts-Rechts," in Christian Joerges *et al.* (eds), *Rechtsverfassungsrecht: Recht-Fertigung zwischen Privatrechtsdogmatik und Gesellschaftstheorie* (Baden-Baden: Nomos, 2003), 13–21.

49 For the proceedings in administrative court, see Cologne Administrative Court, verdict of February 9, 2012 (Az. 26 K 5534/10) and Federal High Court of Justice, decision of October 6, 2016, III ZR 140/15, not yet final; and see the constitutional challenge before the Federal Constitutional Court (Az. 2 BvR 987/11).

50 N. Luhmann, "Das Paradox der Menschenrechte und drei Formen seiner Entfaltung," in *Soziologische Aufklärung*, vol. 6, 2nd edn (Wiesbaden: Verlag für Sozialwissenschaften, 2005), 229–36.

51 E. N. Cahn, *The Sense of Injustice: An Anthropocentric View of Law* (New York: New York University Press, 1949).

52 W. Benjamin, "Goethe's Elective Affinities" [1924/1925], in *Selected Writings*, vol. 1: *1913–1926*, eds M. Bullock and M. W. Jennings (Cambridge, MA: Harvard University Press, 1996), 346.

53 A. Fischer-Lescano, *Rechtskraft* (Berlin: August, 2013).

54 Benjamin, "Critique of Violence," 248.

55 This is the point of departure for the transformation of Luhmann's structurally descriptive systems theory into a normative theory: see A. Fischer-Lescano, "Critical Systems Theory," *Philosophy and Social Criticism*, 38:1 (2012), 3–23.

56 Menke's account of the domain of non-law remains vague. The term "non-citizen" does not distinguish between the functional rationalities (of economics, art, science, religion, etc.) as well as the human (body, consciousness) and natural environments of society. Menke instead replaces the multiplicity of social boundary relations with the difference between citizen and non-citizen or law and non-law: "Utopia is the equality of possibility between the legal equality of citizens *and* their non-legal inequality as

non-citizens. This utopian equality is not a criterion or basis for anything" (p. 60).

57 G. Teubner, "Self-subversive Justice: Contingency or Transcendence Formula of Law?," *Modern Law Review*, 72:1 (January 2009), 20; see also P. Femia, 'Infrasystemische Subversion', in Marc Amstutz *et al.* (eds), *Kritische Systemtheorie: Zur Evolution einer normativen Theorie* (Bielefeld: Transcript, 2013), 305–26.

58 W. Benjamin, "Notes toward a Work on the Category of Justice" [1916], in Peter Fenves, *The Messianic Reduction: Walter Benjamin and the Shape of Time* (Stanford: Stanford University Press, 2011), 258.

59 C. Vismann, "Das Gesetz 'DER Dekonstruktion'," *Rechtshistorisches Journal*, 11 (1992), 259–60.

60 G. Agamben, *State of Exception*, trans. K. Attell (Chicago: University of Chicago Press, 2005), 88.

61 W. Benjamin, "Franz Kafka: On the Tenth Anniversary of His Death" [1934], in *Selected Writings*, vol. 2: *1927–1934*, eds M. W. Jennings, H. Eiland, and G. Smith (Cambridge, MA: Harvard University Press, 2005), 815.

62 Benjamin, "Critique of Violence," 244.

63 Luhmann, by contrast, describes the constellation in the domain excluded from the law as one of equality in non-law. Sharelessness, to use Rancière's term, leads to equality in highly integrated unfreedom: "There is nothing to lose in the highly integrated area of exclusion, apart from control over one's own body" (N. Luhmann, *Law as a Social System*, trans. Klaus A. Ziegert (Oxford and New York: Oxford University Press, 2004), 490). On the side of inclusion, meanwhile, it is undeniable that the law is deeply implicated in the existing inequalities; it generates or at least stabilizes the differences between owner and non-owner, bourgeois and proletarian, and, by consequence, shareholder and shareless. That is why Benjamin's reflection on justice transforms the subjective right of ownership into "a claim that in no way refers back to needs but, rather, refers to justice, the ultimate direction of which probably does not tend toward an ownership right of the person but, rather, towards a good-right of the good" (Benjamin, "Notes toward a Work on the Category of Justice," 257–58; translation modified).

64 T. W. Adorno, *Negative Dialectics*, trans. E. B. Ashton (New York: Seabury Press, 1973), 146–47.

65 W. Hamacher, "Recht im Spiegel," in Georg Mein (ed.), *Die Zivilisation des Interpreten: Studien zum Werk Pierre Legendres* (Vienna: Turia + Kant, 2012), 212, my translation.

66 Benjamin, "Franz Kafka: On the Tenth Anniversary of His Death," 815; cf. A. Fischer-Lescano, "Franz Kafka's Critique of Legal Violence", *Revista Brasileira de Sociologia do Direito* 3:1 (2016), 9–51.

67 M. Foucault, 'What Is Critique?', trans. L. Hochroth, in S. Lotringer (ed.), *The Politics of Truth* (Los Angeles: Semiotext(e), 1997), 41–42.

68 M. Horkheimer, "Traditional and Critical Theory," trans. M. J. O'Connell, in *Critical Theory: Selected Essays* (New York: Herder and Herder, 1972), 188–243.