Review

Critique of rights

Christoph Menke
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Since the eighteenth century, political revolutions in the West have claimed to have supplanted traditional modes of domination with a new political thinking premised on the notion that 'all men are created equal'. It is tempting to think that our current era of global politics, dominated by authoritarian abuses of power under the guise of 'law and order', is a radical departure from the ideals of individual freedom and equality that we uphold as the ethos of modern liberalism. In *Critique of Rights*, Christoph Menke suggests instead that the juridicalization of these ideals in the modern form of rights reifies these very modes of domination. By laying bare the contradiction immanent in our bourgeois-revolutionary notions of freedom and autonomy, Menke demonstrates that the form of rights upon which modern law is predicated has itself disempowered the political community by elevating, legitimizing, and naturalizing the desire of the individual over and above the social.

Describing his work as a 'genealogy of bourgeois rights', Menke reveals how the modern form of rights has engendered a 'fundamental upheaval in the ontology of law' that has redefined normativity itself (pp. 4–5). By tracing the development of law across three historical legal systems – Aristotle's Athens, Cicero's Rome, and Ockham's London – Menke demonstrates how the emergence and reification of an individual, claims-based notion of rights took the place of classical, normative conceptualizations of justice: justice is no longer fair distribution or right reason, but the ability to will at one's discretion, negative liberty made manifest. This bourgeois form of rights has reduced law to an assessment of rights claims and transformed the 'ontology of normativity' into the juridicalization of the natural. Justice, in turn, has become the protection and validation of individual autonomy over and against the autonomy of others.

The first half of Menke's four-part book traces the 'legalization of the natural' that has culminated in the modern form of rights. Menke's work differs from other critical analyses of law by taking as his focus not the subject, but the structure of rights that comprises modern law: By demonstrating how the transition from a normative and natural understanding of law to a formal and nominal understanding of right has engendered a more fundamental separation of law and morality, Menke

argues that the rights form has depoliticized law into the rote administration of rights. While law in classical antiquity served a social function – moral education in Athens and commanding right reason in Rome – the emergence of private property and the elevation of the private sphere necessitated a new mechanism for regulating contractual disputes and protecting the rights of individuals over their private domains. The 'right of rights' engendered by this social transformation simultaneously 'enable[d] interests and permit[ted] choice', including what one determined essential to the preservation of one's private domain. Law thus became fully external to the subject, lacking access to or influence upon the subject's interiority (or what Menke calls her 'self-will'). The form of rights, the 'ontological definition' of modern law, thus confers normative freedom on the subject – the 'permission to think and believe whatever one wants, whatever one deems it right to think and believe' (p. 55) – and paradoxically frees the subject *from* law.

The structure of the modern form of rights, Menke argues, is fundamentally self-reflective, a mode of being that is established in the gap between law and the 'outside' of law, an 'outside' which law can never fully capture but which it must constantly presuppose. This space between law and non-law is also where the 'violence of law' dwells: the determination of legality is the 'moment in which law must establish itself for the first time and always again' (p. 84). There is a contradiction at the heart of this self-reflective form, insofar as law contains its 'other' (the natural, the outside, the non-legal) within itself. Modern law overcomes this contradiction in the form of rights, which enacts and is enacted by law's self-reflection, bridging the gap between law and non-law and 'signif[ying] the opening of law to non-law', to that which is pre-juridical (p. 108): the self-will of the subject of rights. The basis of law is, thus, grounded in the autonomy of the subject, while the content of subjective rights is the subject's natural striving.

The radical implication of Menke's self-reflective conceptualization of law – and where his work finds its critical edge – is that normativity itself has been hollowed out of law. In contrast with the *paideic* role that law played in classical antiquity, modern law is the protector of individual will, an institution of 'permission or authorization' (p. 55) that validates the negative freedom of private man. In so doing, it takes the subject as a pre-given 'fact' – the source of 'a pre- and extra-normative facticity' (p. 3) – and the subject, unbound by normative constraints, is *a*-moral and *a*-rational, an embodiment of the 'positive capacity for moral indifference' (p. 181). This is not to say that law does not play a normative role, of course; in every moment of legal determination – what we might call law's juridical colonization of the natural – law creates, by naturalizing the facticity of the subject of rights, its own normativity. Nor is the subject of rights immoral or irrational; what separates modern law from the systems of law that came before is that law no longer supplies a shared normative framework – a shared moral ethos – for bourgeois society. Subjective rights, in turn, are not rights possessed *by* a subject, but rather a normative power conferred *on* the subject: 'an

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opportunity for action that is normatively secured against others' (p. 135). The form of rights subjectifies the subject of rights as the author of normativity.

The second half of *Critique of Rights* demonstrates the paradox of liberalism generated by the bourgeois form of rights. Rather than a vehicle for moral progress and freedom from domination, liberalism is an ideology that moralizes rights *as such*. Liberalism 'identifies rights with their moral motives and goals so that it can *hide the social effects of their form*' (p. 185), thereby veiling the indifference toward normativity that is embedded in the structure of bourgeois law. This, crucially, includes the production of 'bourgeois society's forms of domination' under capitalist modernity (p. 185). Because bourgeois law validates and positivizes the subject of self-will, it incentivizes the subject of rights to enter into social relations that will allow her to realize her private goals. Under capitalism, however, individuals are *coerced* into such relations, for 'private property becomes the individual subject's private sphere' under capitalism and social participation becomes the means by which to secure this private sphere over and against others (p. 151). Thus, rather than institutionalizing relations of domination, law *authorizes* subjects to dominate or be dominated by one another. Conflict is inevitable, only to be worked out in the legal order in the form of litigation, of 'contending legal claims between parties' in a way that manages but never fully eliminates social conflict. In Foucauldian fashion, 'the subject of self-will thereby becomes the object of an endless governmental activity, in which ever-new rights must be devised to offset the effects, harmful to freedom, of other older rights' (p. 177). In part four, Menke speculates about how we might overcome legally authorized relations of domination in capitalist modernity by thinking beyond the bourgeois form of rights. This consists, ultimately, in recognizing that bourgeois law can only validate and reify the norms of social relationality – those which constitute bourgeois culture – that exist outside of it. What we need is thus not legal but *political* equality: equality that is not institutionalized through rights but which is actualized through social practices oriented toward a shared good, toward the *just*.

The distinction between legal equality and political equality is both Menke's most novel contribution and the most hurriedly theorized. As Menke asserts, the bourgeois and communist revolutions are 'two sides of the same conceptual opposition of servant and master' (p. 265), both seeking to neutralize their asymmetry through formal (legal) rather than substantive (political) equality. By contrast, the counter-right of the 'insurrectionary slave' is the right that dwells in the zone of indeterminacy between law and non-law, thereby opening space for the subject to judge and reflect upon the process of law making in relation to the good it is intended to actualize.

Because the content of the good must be indefinite, however, it is unclear what would become of law's administrative capacity, whether it would arbitrate in the interest of social equity or would take on a new role altogether. Additionally,

despite his attention to the historical reality of bourgeois modes of domination and inequity, Menke does not engage with the different categories of rights holders in the form, for example, of citizens, felons, or refugees. Would the new, counter-right of the powerless require that we abolish all juridical categories that circumscribe identity within legally demarcated spheres of action? Is it a new right that must take the place of *all* iterations of modern law predicated upon the rights model? As it stands, Menke's theory of revolutionary new right gives no indication. Nevertheless, *Critique of Rights* is an achievement of critical theory that paves new ways for how we might – and should – understand the role of law in political life and calls us to re-politicize how we imagine law and rights if we seek a more just future for all.

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