



Law & (dis)order.
Norma, eccezione, fondamento



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**La forza della legge fra
kratos e *Gewalt*.**

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**On Law, Power and
Violence: from
Christoph Menke
to Hannah Arendt.
A critical analysis**

Valerio Fabbri

On law, power and violence: from Achristoph Menke to Hannah Arendt. A critical analysis

Valerio Fabbrizi

This article wants to propose some reflections on law, power and violence in contemporary political philosophy. My attention will be devoted to a critical analysis of some relevant contribution on these matters by prominent scholars and authors such as Alessandro Ferrara, Christoph Menke, Walter Benjamin, Hannah Arendt.

The first part is dedicated to a brief introduction in which the Alessandro Ferrara's reading of Menke's *Law and Violence* will be presented. The second part focuses its attention on the philosophical backgrounds of violence, especially in its relation to liberty, power and government. In this case, the main focus is devoted to some of the classics in political philosophy: Niccolò Machiavelli; Thomas Hobbes; Hannah Arendt.

The last two paragraphs are finally dedicated to further reflections on law and violence. On the one hand, giving a deeper description of Ferrara's remarks on Menke's work, especially in its connection to Rawlsian political liberalism. The last paragraph, on the other hand, proposes few brief and final reflections on law and violence.

LAW

VIOLENCE

POLITICAL POWER

AUTHORITY

LEGITIMACY

[...] Faced with one who stands outside, and is alien to the law, the judgment of the judges can rule only by fear. That is why violence is part not just of the manifestation of the law but of its essence: the violence of the law flows from its political-procedural form of judgment.

Christoph Menke, *Law and Violence*

Between law and violence: a brief introduction

Violence – especially in its relationship with law and power – is one of the most debated issues in modern and contemporary political philosophical thought. Many authors and scholars have written and discussed on this relevant topic, giving their fundamental contribution and constantly renewing its philosophical grounds.

In a recent contribution entitled *Deconstructing the Deconstruction of the Law: Reflections on Menke's "Law and Violence"*, Alessandro Ferrara gives us a new reading of one of the classics in contemporary philosophy – “Critique of Violence” by Walter Benjamin – through the interpretation given by Christoph Menke in his *Law and Violence*. In this short essay, Menke – as Ferrara underlines – highlights that the relationship between law and violence is, actually, much stronger and deeply grounded than we can imagine.

Alessandro Ferrara assumes here three key points: the first focuses on this relationship between law and violence; the second moves its attention to the reinterpretation of Benjamin's work given us by Menke; the third takes a much more peculiarly political-philosophical point of view, focusing on the relationship between the political power as such and the legislation, with the latter which seems to derive from the former.

Before moving to Alessandro Ferrara's comment on Menke's *Law and Violence*, in the next paragraph I shall present some reflections and considerations on “law” and “violence” as these two concepts have been addressed and interpreted in modern and contemporary political philosophy.

Law, violence and politics. a philosophical interpretation

In the beginning of the 16th Century, Niccolò Machiavelli – one of the most influential thinkers in the history of political thought – argued that violence was one of the ways in which *the Prince* could establish and hold his political power. According to Machiavelli, this “political use of violence” was connected to those regimes which he defined “per scelera” – namely those regimes obtained by means of “criminal virtues” or “violent actions”.

However, Machiavelli distinguished between an “intelligent” and “limited” use of violence and an “indiscriminate” or “unjustified” one. As regards the first case – which sees in Agathocles of Syracuse a symbol figure – the Prince, as Machiavelli stressed, «[...] matched his iniquity with such great *virtù* of mind and body that, entering the army he rose through its ranks to become the military commander of Syracuse» (Machiavelli, 2008, p. 179).

As regards the second case, Machiavelli identifies a particular figure of the Prince – exemplified by Oliverotto da Fermo – who resorts to an indiscriminate and senseless violence, continuing in his crimes even after having obtained the power and until such violence turns to himself. As Machiavelli wrote «it cannot be termed *virtù* to murder one's fellow citizens, to betray friends, and to be

without loyalty, mercy and religion; such method can cause one to win power, but not glory» (Machiavelli, 2008, p. 181).

Machiavelli's argument is still considerably relevant in the contemporary political-philosophical debate. This means that – in the light of the Machiavellian conception of politics – violence is “well used” just when it is the result of an immediate action, limited to the only seizure of power. After these “criminal actions”, in order to impose the obtained power, Machiavelli suggests that the Prince has to pacify the people, condemning and refusing any further violence. Parallel to this “well used” kind of political violence, Machiavelli identifies a “misused” kind of political violence: violence is “misused” when “criminal actions” continue constantly and incessantly over time, worsening and intensifying the “wounds” and the pains of people.

A further consideration about “law” concerns its relationship with “liberty” and its dichotomy between “positive” and “negative” conception of liberty itself.

A first suggestion is given us by Alessandro Ferrara. In his comment to Menke's work, Ferrara (2016) underlines that:

Menke emphasizes that law bears not simply an instrumental relation with violence, in those unfortunate cases when persuasion, deterrence or all other means fail, but also a “structural”, permanent and ineliminable relation to violence [...] Law does not discover an previously existent lawlessness, as though the state of nature really existed, but it *creates* areas of lawlessness to be violently subjected to lawful regulation. This is what Menke understands as “the fate of law” (p. 2)

In this few lines, Ferrara uses the term “lawlessness” to mean – literally – a condition of “absence” or “silence” of the laws which clearly refers to a Hobbesian conception of law and liberty. As we said, “law” turns out to be the key element in this dichotomy between a *positive* and a *negative* conception of liberty. This differentiation between the two interpretations, theorized and outlined by Isaiah Berlin in his *Two Concepts of Liberty*, was clearly identifiable in two classical authors such as Jean-Jacques Rousseau and, as we said, Thomas Hobbes.

On the one hand, a *negative* concept of liberty is possible just in absence of laws (precisely, in a *lawlessness* condition), and it recalls the classical Hobbesian sentence according to which «we have liberty just when the law is silent». On the other hand, a *positive* concept of liberty – which has in Jean-Jacques Rousseau one of its main exponents – concerns the possibility to respect and obey the laws we – as citizens – contributed to create. From the same perspective, according to Menke, in a community of equal citizens, the presence of law involves the idea according to which we have no law outside such community. However, Ferrara notes that this idea proves to be false due to the expansion of international law and constitutional globalization, especially with regards to human rights.

A second argument to be proposed here is more directly related to the connection between “law” and “violence”; we can see this issue in Thomas Hobbes again. In the *Leviathan*, Hobbes theorized that «covenants, without the sword, are but words». This means that, according to him, violence represents the only way in which the law can be established and respected; at the same time, for Hobbes, the “sword” is fundamentally the only instrument to make the laws binding for all citizens.

A third consideration concerns the definition we give to the term “violence” in politics. On the one hand, we can face a purely “verbal” violence, which is often used during electoral campaigns in order to delegitimise the opponents and to show yourself stronger than them.

A recent example can be found in Donald Trump’s USA presidential campaign. In his speeches – both during primary and presidential elections – the Republican candidate for the White House often resorted to language and expressions that many commentators did not hesitate to define as “politically incorrect” or even, frequently, “violent”. At the same time, some others are convinced that his way of speaking and his “violent” conduction of the electoral campaign largely contributed to his final victory.

Trump’s talking “outside the box”; his politically incorrect speeches; the arguments and proposals he made (like when, for example, he proposed to put Hillary Clinton in jail); the tones and gestures he used (let us remember when, during an electoral meeting, Trump said he could shoot someone in the middle of the road without losing even one vote) are the proof that the use of “verbal” violence has now entered the contemporary political speech, deeply marking the USA presidential elections.

A further reflection we can propose here concerns a more historical and philosophical interpretation of violence. In this case, Hannah Arendt helps us to understand how violence is one of the essential elements of any totalitarian regime. We can mention here many examples of the use of violence as an instrument for political fighting, in order to eliminate opponents or suppress any form of cultural and political opposition. Two examples are here paradigmatic: the first concerns the fascist violence in Italy during the late ‘20s and the early ‘30s of the 20th Century; the second one regards the violence committed by the SA, better known as “brown shirts” (or “camicie brune” in Italian), which preceded the seizure of power by the Nazi Party in post-Weimar Germany.

As Arendt shows, violence – distinct from the pure exercise of power, show of force and strength – is often accompanied by *implements* (Arendt, 1969) such as an historical context (e.g. a war or a revolution), new technological knowledge and so on. On this line, the essence of violence is characterized by a “means-end category” which – applied to the political sphere – focuses on the idea that «the end is in danger of being overwhelmed by the means which it justifies and which are needed to reach it» (Arendt, 1969, p. 4).

One of the points which Hannah Arendt noticed is that, for a consistent group of political theorists, violence reveals itself as a peculiar manifestation of power. At the same time, power represents an instrument of rule, while – in turn – rule is essentially understood as an “instinct of domination” (Arendt, 1969). However, in the political theoretical discourse, we cannot confuse terms such as “violence”, “power”, “force”, “coercion” and “authority”, because each of them affects particular aspects of political sphere.

A rather sad reflection on the present state of political science that our terminology does not distinguish among such key words as “power”; “strength”; “force”; “authority” and, finally, “violence” – all of which refer to distinct, different, phenomena and would hardly exist unless they did [...] To use them as synonyms not only indicates a certain deafness to linguistic meanings, which would be serious enough, but it has also resulted in a kind of blindness to the realities they correspond to. (p. 43)

Hannah Arendt argues that these terms seem to be synonyms because they try to give an answer to one of the most relevant issues in political philosophy: who rules whom? In this sense, Arendt shows how these terms – power; strength; force; authority and, finally, violence – indicate different but valid instruments through which someone rules over someone else. These terms seem to be synonyms essentially because they have the same function: to make the rule over men possible.

Its “instrumental” character is the peculiar aspect of *violence* in the political sphere and – as Arendt notes – it is apparently much more similar to *strength* rather than to *force* or *power*. But frequently, *violence* and *power* – or *violence* as manifestation of *force* – occur combined, rather than in their pure or extreme form.

From this it follows that *authority*, *power* and *violence* cannot be considered or understood as sides of the same coin. However, it is not so easy to immediately perceive the differences between such issues and, in fact, some confusion can always happen.

It is particularly tempting to think of power in terms of command and obedience, and hence to equate power with violence, in a discussion of what actually is one of power's special cases – namely the power of government. Since in foreign relations as well as domestic affairs, violence appears as a last resort to keep the power structure intact against individual challengers [...] it looks indeed as though violence were the prerequisite of power and power nothing but a *façade*, the velvet glove which either conceals the iron hand or will turn out to belong to a paper tiger (p. 47)

The distinction between *power* and *violence* also relates to the two main concepts of “justification” and “legitimacy”. On the one hand, *power* does not need justification due to its deep relevance in politics, but, on the other hand, *power* first of all needs legitimacy. Power belongs to people and draws its legitimacy from this democratic and popular sharing of sovereignty.

In turn, Arendt specifies that *violence* can be justifiable, but never legitimated. Violence can be justified in private affairs when it concerns self-defence and when one's own personal life or safety is in danger, but it cannot be legitimated in politics as an instrument for political conflict.

This explains why *power* and *violence* are intrinsically opposite: as Arendt underlines, «when the one rules absolutely, the other is absent» (p. 56). So, violence rises when power is unstable and jeopardized, but when it takes its own course it ends in power's disappearance. At the same time, Arendt notes that it is not possible to see in nonviolence the opposite of violence, because violence can easily destroy power, but it cannot create a new power, based – for instance – on nonviolent principles.

Violence is often aimed to emphasise protest movements and demands for change which power tends to ignore. This means that violence does not directly promote causes, nor revolution, nor any revolt; it is only an instrumental way to obtain attention and to bring such protest movements to public interest.

According to Sergio Cotta's analysis, we face some different interpretations of violence in political theory: violence as war; violence as terrorism in any form; violence as political fighting; violence as “common crime”. Cotta focuses on two directions: on the one hand, he defines a so-called “pessimistic-comforting”

approach to violence, according to which there is no difference between today's violence and past violence. Violence, in fact, is always inherent in human behaviour and it has marked the evolution of human civility throughout history.

However, Cotta notes that today's violence is peculiar for only two specific aspects: oblivion and illusion. Concerning the first one, Cotta argues that when, over time, we experience happiness and peace, we tend to forget violence in favour of the new peaceful conditions. Secondly, according to the "illusion" thesis, people seem to be convinced that political violence is no longer a real danger, but just an element from the past that we have to forget.

Cotta actually notes that, in the political sphere, violence is a constant feature which occupies a big part of our social and political experience. Moreover, Cotta underlines that our current conception of violence does not imply to minimise or underestimate past violence and its presence in human history, but it asks us to recognize that violence turned itself from essentially "physical" to a much more "verbal" kind of violence, which characterizes our contemporary political debates, as we have seen – for example – in the Trumpian case.

As Benjamin specified, an action becomes a *violent* action just when it affects moral relationships. The sphere and the context of such relationships are defined by the concepts of *law* and *justice*. So, Sergio Cotta remarks that if we act in order to defend a fundamental value (justice or liberty, for instance) our action will be dominated by a just and fair principle. Otherwise, if our purpose is to act in an aggressive way and our actions are not intended to protect or promote a fundamental value, but just to show our force, such actions will be considered as mere acts of violence.

In Benjamin's argument, some forms of social and political struggle – such as strikes or public protests – cannot be considered as manifestations of violence, but as a legitimated way to defend and enhance fundamental social rights and liberties. For Benjamin, indeed, we resort to violence, in its political sense, just as a form of domination and delegitimization of any opponent or critical voice.

In *Why Violence: A Philosophical Interpretation* Sergio Cotta (1965) wrote that:

In order to defend or propose a value, one may proceed in different ways. There is a profound difference between petitioning and invading Parliament, even when both actions are motivated by the same value. Benjamin himself recognizes that, despite the criterion of reference to values, there is still the problem as to whether violence is moral in general as a principle and also as a means to just ends. But to resolve this problem a more pertinent criterion is necessary, a distinction in the very sphere of the means, without concern for the ends to which they are necessary (p. 58)

It emerges here that – in Cotta's opinion – for Benjamin, "violence" and "law" are two incompatible elements. On the one hand, law is necessary to legitimise political power and to ensure the democratic character of our society. Violence, on the other hand, is frequently aimed to subvert democratic institutions, imposing an authoritarian conception of politics.

Law and violence in a liberal view: Alessandro Ferrara's argument

One of the pivotal points in Alessandro Ferrara's position concerns the limits

within which law is considered as just, fair and legitimated. As Christoph Menke points out, the presence of law within a community of free and equal citizens – in the words of John Rawls – implies that there is no law outside political society itself.

Ferrara contests this view arguing that contemporary societies are characterized by a different kind of pluralism, much deeper than in the past; at the same time – according to Ferrara – we are facing a completely different political and legal framework: in this sense, nowadays, we are no longer talking about law and constitution just in “national” or “domestic” terms, but, rather, in terms of “international” or “global” law. Democratic constitutionalism is now directed towards a new field of study which is more focused on a “global” dimension of constitutionalism.

Secondly, as Ferrara claims, Menke’s argument involves a further and wider reflexion on the relationship between law and violence within democratic liberalism. As we have seen above, one of the risks that democracy faces today is deeply related to the new upsurge of populism and alternative forms of political discourse, more and more tending to violence – first of all “verbal”. This tendency can be observed in today’s political debate, in which – as Benjamin predicted – we notice a continue delegitimization of critics and opponents.

Menke assumes by Benjamin three key points, concerning the discussion about law and violence: 1) The connection between maintenance of power and violence; 2) A so-called “realist” vision of politics which sees lawmaking proceeding from power; 3) An undefined and undifferentiated definition of power.

In discussing these three points, Alessandro Ferrara addresses some questions: as regards the first point, he asks why the maintenance of political and legal order should count as violence. At the same time, this also represents a controversial issue because it is not clear the reason why we should equate the defence of certain political and juridical practices – such as legislation, judiciary claims, judicial review, etc. – to violence. On this first point, Ferrara asks a collateral question: does a moral culture, an ethos, commit violence when it tries to preserve its own integrity as a system of principles and values aimed at orienting conduct? According to Ferrara, we cannot reduce law and violence in the tendency of law to maintain and protect itself against global social changes which affects the contemporary society.

Concerning the second point, Ferrara notes that Menke does not seem to share the Benjamin’s thesis for which «lawmaking is power making and, to that extent, an immediate manifestation of violence» (Benjamin, 1978, p. 295). This “realist view” of politics was deeply immersed within the political context of the aftermath of World War I, in which democracy was not strong enough to be a real political horizon for Western people. Our attention here undoubtedly goes to Carl Schmitt, who conceived sovereignty and legitimacy as the power to suspend the rule of law declaring the so-called “state of exception” (Schmitt, 1932).

In Benjamin’s idea, there is the attempt to separate law from violence, proposing the concept of *divine justice* or *mystical violence*, «from what» - Ferrara stresses - «he perceives as law’s compulsive repetition of the initial violence and yet to be forced to think of such liberation in terms of categories partially rooted in a hegemonic non-democratic context» (Ferrara, 2016, p. 9).

Finally, the third point concerns the relationship between law and violence especially in its connection to the concept of *power*. The critical point involves here Menke’s undifferentiated conception of power, in which there is no

distinction between “legitimate” power and the power as “use of force”. As Ferrara remarks, the legitimate use of power by means of law can never be confused with the exercise of violence or illegitimate act of coercion, simply because «the ordinary founding of a legal system requires a moment of *belief* or (...) a moment of *recognition* that naked power cannot impose» (Ferrara, 2016, p. 12).

The nexus between law, violence and liberalism appears to be – in Menke’s analysis – particularly relevant and directed to two main consequences. Firstly, within liberalism, individuals are free from the coercion and they become part of the legal and political order as free and equal, to pursue their own private and economic interest, facing which they are “hostages”. Secondly – quoting Menke – «liberalism leaves what it separates intact» (Menke, 2010, p. 47). It means to insulate certain areas of the human being from the so-called “law’s empire” (Dworkin, 1986), without questioning or changing it.

To move to contemporary issues, the recent “escalation” of violence, aggressiveness and animosity in politics carries the risk of leaving us a weaker and unstable democracy. In his famous article entitled *How Can the People Ever Make the Laws? A Critique of Deliberative Democracy*, Frank Michelman identified a list of particular conditions which could weaken and potentially undermine democracy in its own grounds. These *inhospitable conditions* for democracy include, for instance: a) The growing extension of the electorate – which seems to make our personal vote irrelevant; b) The complexity of our institutional systems which characterizes our contemporary society and makes it difficult to understand the functioning of our institutions; at the same time, this complexity seems to contribute in convincing citizens to move away from politics abandoning political participation; c) The vast and deep pluralism – political and cultural, first of all – which is now irreducible and renders our democratic consensus on fundamental values more unstable, due to a corresponding push towards the public hegemony of the majoritarian culture.

Ferrara, in his most recent book entitled *The Democratic Horizon. Hyperpluralism and the Renewal of Political Liberalism*, indicates a new condition of plural society which he calls *hyperpluralism*. Ferrara addresses his attention in the sense of expanding and renewing the classical paradigm of reasonable pluralism in Rawlsian political liberalism. The last *inhospitable condition* he identifies in this new democratic horizon is d) the so-called “depersonalization” of politics, which contributes to the substantially anonymous process of political will formation increasingly related to the new social media and the consequent impersonal political relationships.

Ferrara, assuming this classical classification of *inhospitable conditions* from Michelman, adds some other possible conditions which could potentially contribute to make a weaker or unstable democracy: 1) the new hegemonic role played by neo-liberal capitalism and the prevailing of financial markets within contemporary capitalist economy; 2) the extreme acceleration of our society, which reduces the time we devote to political engagement, limiting our participation in the political debate; 3) the transition from the classical public sphere embodied by the traditional media, to a new social sphere controlled by new media.

To this long list of *inhospitable conditions*, we can add one more condition – related to our new complex society, characterized by *hyperpluralism*, increasing migrations and growing cultural diversity: a progressive shift towards new (or old) forms of populist democracy, which assume verbal violence as a tool of political competition, appealing to fear and insecurity to justify political

decisions.

Another point discussed by Ferrara concerns the relationship between “law” within “legitimate forms of government” and the dichotomy between normative and realist conception of politics. In this sense, according to a normative approach – especially in its Rawlsian definition – the exercise of power is fully proper and legitimated just when it is exercised «in accordance with a constitution, the essentials of which all citizens as free and equal may reasonably be expected to endorse in the light of principles and ideals acceptable to their common human reason» (Rawls, 1993, p. 137).

On the contrary, a more realist interpretation of politics – as expressed, for example, by an author such as Richard Bellamy – defends the idea according to which the legitimate exercise of power and the legitimacy of laws – and of the constitution itself – are just related to the will of a majority as expressed in the last electoral turn or in a legislative and parliamentary vote.

Law, violence and society. Few final remarks

In this last section of the article, I want to propose some brief final reflections on law and violence in the political context. First of all, creating law involves two different aspects: on the one hand, creating law it’s the way to give legitimacy and justification to political order – in this sense, our scheme of government is legitimated and justified when it is “always under law” (Michelman, 1995); on the other hand, creating law is a way to create “political power”, which is aimed – at the same time – to preserve and reinforce itself, resorting to violence against opponents especially when political power expresses itself in authoritarian ways.

Following Benjamin’s analysis, we can distinguish two basic arguments on law and violence. The first assumes violence as a means used by political power to pursuit its ends; it fails – in Ferrara’s words – because it would focus merely on the *law-preserving* function of violence (Ferrara, 2016).

The second argument investigates the deep connection between *law-making* and *violence*, identifying two main functions of violence in the lawmaking process: firstly, as Benjamin notes, «lawmaking pursues as its end, with violence as its means, what is to be established as law» (Benjamin 1978, p. 295). Secondly, this end is not unalloyed by violence, but – actually – it is deeply and structurally bound with it, assuming the name of *power*. These two arguments are addressed by Benjamin and summarized in a general final consideration: «lawmaking is power making, and, to that extent, *an immediate manifestation of violence*» (Benjamin, 1978, p. 295).

On this line, Menke clarifies that, according to Benjamin, the violence of law is equivalent to the fact that the use of violence by political power is just aimed to protect and preserve itself. As he clearly notes «the law is purely about power, yet not about the power of the ruling class or the victor; it is about its own power, the power of the law. The “fateful” violence of the law is the violence of its pure self-preservation» (Menke, 2010, p. 28).

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