



Jeanne Marie Gagnebin and Walter Benjamin's critique of Law

Jeanne Marie Gagnebin e a crítica de Walter Benjamin ao direito

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Resumo

Entre a produção da filósofa Jeanne Marie Gagnebin dedicada ao pensamento de Walter Benjamin, são dois os textos em que a autora parece trabalhar mais diretamente com as reflexões de Benjamin sobre o direito: “Mito, Direito e Justiça em Walter Benjamin” e “Estado de exceção: entre catástrofe e necropolítica”. Estes textos discutem os fundamentos teórico-políticos e históricos da crítica feita pelo pensador alemão ao direito. Este artigo realiza um breve comentário destes textos, e, além disso, pretende indicar, baseado nestes textos e em outros momentos de sua obra, que a forma pela qual Gagnebin interpreta a filosofia da história de Walter Benjamin nos traz elementos importantes para a tarefa (ainda inacabada) de construir uma percepção crítica sobre o direito e principalmente sobre o regime de histórico a ele subjacente. É com base nessa proposta que o artigo é dividido em 3 partes. A primeira pretende comentar os dois ensaios mencionados previamente; a segunda a diferenciar a proposta de leitura sugerida por Gagnebin de algumas interpretações influentes da obra de Walter Benjamin no campo da teoria e da filosofia do direito; e, por fim, discutir como a interpretação proposta pela pensadora suíço-brasileira dos textos de Benjamin sobre o direito está baseada em uma leitura mais integrada da crítica histórica proposta pelo autor.

Palavras-chave: Jeanne Marie Gagnebin; Walter Benjamin; Direito; Crítica; Tempo

Abstract

Among the production of the philosopher Jeanne Marie Gagnebin dedicated to Walter Benjamin's thought, there are two texts in which Gagnebin seems to work more directly with Benjamin's reflections on law: “Myth, Law and Justice in Walter Benjamin” and “State of exception: Between catastrophe and necropolitics”. These texts discuss the theoretical-political and historical foundations of the critique of Law made by the German philosopher. This article intends to realize a brief comment on these texts; and also to indicate, based on these texts and other moments in her work, that how Gagnebin interprets Walter Benjamin's philosophy of history brings us important elements for the task (still unfinished) to build a critical perception on law and especially on the historical regime underlying it. Based on this proposal, this article is divided into 3 parts. The first aims to comment the essays previously mentioned; the second to differentiate the reading suggested by Gagnebin from some influential interpretations of Walter Benjamin's work in theory and philosophy of law; and the third to discuss how the



interpretation proposed by the Swiss-Brazilian thinker of Benjamin's texts on law is based in a more integrated reading of the historical criticism proposed by the German philosopher.

Keywords: Jeanne Marie Gagnebin; Walter Benjamin; Law; Critique; Time



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The Swiss-Brazilian philosopher Jeanne Marie Gagnebin self-identifies as belonging to the May 1968 generation, a generation that emerges from the possibility of being on left-wing without believing in the dogma of progress and is critical of Stalinism, as she stated in an interview (GAGNEBIN, 2009a, p.113). It is within this generation that a first reception of Walter Benjamin occurs among a broader audience (PRESSLER, 2005, p.63-65; GAGNEBIN, 2011a, p. 285; GAGNEBIN, 2021, p. 5), marked at the time by intense disputes. This reception extended discussions on Benjamin's work beyond a relatively narrow and restricted circle that had contact with his texts while the author was alive and immediately after his death. Gagnebin, who arrived in Brazil in the late 1970s, occupies a unique place in the reception of Walter Benjamin's work in the country (PRESSLER, 2005; CHAVES, 2013, p.15-16; 2018, p.98 et seq),² as an interpreter, professor, editor, and also as a translator.

Among her extensive production dedicated to the thought of Walter Benjamin, there are two texts in which the author seems to work more directly with Benjamin's critique of law, discussing its theoretical-political and historical foundations. These texts are "*Mito, Direito e Justiça em Walter Benjamin*", republished in the dossier on "*Walter Benjamin e o Direito*" in the Journal *Direito e Práxis*, and initially published as "*Mito e culpa nos escritos de juventude de Walter Benjamin*" in her book "*Limiar, aura e rememoração: Ensaio sobre Walter Benjamin*". Another paper is "*Estado de excepción: entre catástrofe y necropolítica*", published in the collection "*Estado de excepción en Argentina y Brasil: Una perspectiva desde la Teoría Crítica*", organized by Miguel Vedda, Renato Franco, and Antônio Zuin, published in Argentina by Editora Herramienta. Both texts are deeply interconnected. The first one provides an overview of Benjamin's early writings (and their repercussions in his later writings) where the relations between myth and guilt are the subject of discussion. The second paper comments on the relations between law, violence, and the state of exception based on the well-known essay on the

¹A first version of this text was presented at the "Colloquium Silenced Narratives: Jeanne Marie Gagnebin reads Walter Benjamin", organized by the Research Group "Critical Philosophy of Law and Literature" at UFPA. I would like to thank Ricardo Dib Taxi for the invitation.

² The author recently published an essay on the reception of Benjamin in Brazil, with a greater emphasis on the themes and contexts that marked the author's reception in Brazil from the 1960s until today (GAGNEBIN, 2021).



critique of violence and the contemporary debate generated around the eighth of the theses "On the Concept of History".

However, these texts do not limit the possible contributions of the author regarding law. It is necessary to go beyond the epistemological closures typical of legal positivism or theories that limit reflections on law to moments when the term is enunciated or when norms are theorized. If this approach is proposed, we can identify in other moments of the philosopher's work contributions that address the theme more briefly or indirectly, or that have repercussions on law. Her writings on memory (see in general GAGNEBIN, 2006) and/or those that focus on the conjunctural debate about transitional politics in Brazil (GAGNEBIN, 2010, p. 177-186; even more directly in GAGNEBIN, 2014, p. 251-263 and GAGNEBIN, 2021, p. 9-23); on criticism (GAGNEBIN, 1980, p. 219-230; GAGNEBIN, 2014, p. 75-95); or on historical experience (GAGNEBIN, 1994, p. 7-19; GAGNEBIN, 2014, p. 197-216) allow possible dialogues with objects worked in law, even if in frequent contrast to its dominant apprehensions. They also end up discussing the foundations of the historical regime in which law is placed.

Within the limits of this article, I would like to provide a brief commentary on the essays about myth and the state of exception. Additionally, I would like to indicate, based on these texts and other moments of her work, that the way in which the author interprets Walter Benjamin's philosophy of history brings important elements to the task (still unfinished) of constructing a critical perception of law and, primarily, of the socio-historical regime underlying it. It is based on this proposal that the article is divided into three parts. The first part is dedicated to the commentary on the two previously mentioned papers; the second part differentiates Gagnebin's reading from some influential interpretations of Walter Benjamin's work in the fields of theory and philosophy of law; lastly, I discuss how the Swiss-Brazilian philosopher's interpretation of Benjamin's texts on law is anchored in a more integrated reading of the historical critique proposed by the author.

II

Jeanne Marie Gagnebin begins the essay "*Mito, Direito e Justiça em Walter Benjamin*" by questioning the fragments gathered in the book "*Dialectic of Enlightenment*" by Theodor Adorno and Max Horkheimer. Recognizing the importance - and relevance - of this book



for thinking about the past and the present, the author wonders about the influence of Walter Benjamin on this well-known work that marked philosophy and social theory in the 20th century. More specifically, the author starts with the hypothesis of Benjamin's reflections on myth being present in the "Dialectic of Enlightenment." At the same time, she also suggests a theoretical shift by seeing a greater influence of the Jewish tradition on Walter Benjamin's concept of myth than the Greek tradition, thus distinguishing from what Adorno and Horkheimer seem to suggest, especially in the first essay of the "Dialectic" when they discuss Homer's "Odyssey" as a starting point for investigating the presence of myth in modernity.

In making this proposal, the author comments throughout the text on some of Walter Benjamin's key essays in which he elaborates on the concept of myth. Her emphasis is on the relationships established by the German critic between myth and law, especially between 1916 and 1922. According to Gagnebin, in Benjamin "myth is posited as the conceptual foundation for understanding the notions of 'guilt' and 'punishment'" (GAGNEBIN, 2020, p. 1938), seen as manifestations of the mythical domination that culminate in the reduction of life to mere natural life, a movement that also operates within legal institutions. In the 1916 essay "On Language as Such and on the Language of Man", Benjamin sees in the loss of communicability the sign of the emergence of the abstraction typical of judicial language, and "this monstrous irony is the sign of the mythical origin of law" (BENJAMIN, 2011, p. 69; GS II, p. 154). In "Fate and Character" from 1919, the author is much more incisive in describing the consequences of this intertwining between the juridical and the mythical. Problematising the submission of human beings to an order where the temporality of destiny prevails, Benjamin states that:

"Happiness and bliss, as well as innocence, lead outside the sphere of destiny. But an order whose sole constitutive concepts are those of unhappiness and guilt, and within which there is no conceivable path to liberation (for insofar as something is destiny, it is unhappiness and guilt [...]) Then it is necessary to seek another domain in which only unhappiness and guilt are valid; a balance in which bliss and innocence are found to be too light and rise in the air. This balance is that of the law. It elevates the laws of destiny, unhappiness, and guilt to the status of the measure of the person" (BENJAMIN, 2011, p. 93; GS II, p. 174).

Immediately after this powerful passage, Benjamin identifies in the typical administrative apparatus of the judiciary the materialization of this tendency, which imposes on the subject a nexus of guilt that is posited and presupposed, from which they



cannot free themselves, and in which the forces of destiny and determination prevail. Benjamin states that "the judge can discern destiny wherever he wants; each time he punishes, he must, at the same time, blindly dictate a destiny - a destiny in which the man is never affected, but only the mere life in him, which, due to appearance, participates in natural guilt and unhappiness" (p. 94; GS II, p. 175). This is the first time that the concept of mere life appears in Benjamin's thought. This concept will reappear in the essay on "Critique of Violence/Power"³ and gains contemporary notoriety in the reinterpretation made by Giorgio Agamben (2002), despite the philological warnings by Jeanne Marie Gagnebin in this text. For now, setting aside the philological discussion, it is important to emphasize that Benjamin sees in this reduction of human beings to natural life the sign of the reactualization of the forces of myth⁴ upon the subject. Therefore, in Gagnebin's proposed reconstruction of Benjamin's thought, she indicates that the concept of myth is associated with a "conception of life and destiny that always threatens, in various forms, human attempts to act historically and freely" (GAGNEBIN, 2011b, p. 9).

In the edition of the Journal *Direito e Práxis*, the philosopher summarizes the argument in the abstract:

"The critique of myth is not only a critique of a certain moment experienced by humanity, but it means the critique of a conception of life and destiny that always threatens to return in various forms, particularly in the transformation of mythical coercion into a building of rules and punishments that Law embodies, but which cannot be confused with justice (GAGNEBIN, 2020a, p. 1935)."

This passage is indeed rich in meanings and relevant themes to be addressed. It is important to note that the author highlights significant aspects of modern law, using the metaphor of a building. Modern law is formed within dense socio-historical transformations, influenced by processes of primitive accumulation of capital (MARX, 2013, chap. 24), the dynamics of European colonization, and the emergence of the modern state as a political form (TILLY, 1992). In this highly conflicting dynamic, under the

³ The German term *Gewalt* can be translated into English as "violence", "power," and, in some contexts, as "force." Cf: (BENJAMIN, 1986; BENJAMIN, 2011, KHATIB, 2020, p. 1875-1877).

⁴ It is interesting to note that in the essay on the critique of violence/power, although the political argument is greatly influenced by Sorel's anarcho-syndicalism, Benjamin does not incorporate Sorel's central idea of constructing a new myth as the foundation of a political theory that, from his perspective, would be up to the tasks facing the working class at that time (SOREL, 1992, p. 143-171). Benjamin maintains the association made in previous texts between the mythical and the juridical, formulating the concept of mythical-juridical violence, which is contrasted with the three forms of *Gewalt* discussed at the end of the text - the pure, the divine, and the revolutionary. The concept of myth is present in the conservative and reactionary reception of Sorel's work, both in Mussolini's and in Francisco Campos's, the theorist of the Brazilian Estado Novo.



transitional political arrangement of monarchical absolutism, the multiplicity of legal sources characteristic of the medieval world is gradually eliminated (HELLER, 1968, p. 157-172), establishing the monopoly of legislation around the State. In this process, a modern bureaucracy is forged (WEBER, 1985, p. 159-167), with a body of officials linked to the State, spatially distributed and destined to guarantee the newly established territorial, legislative and political unity. The modern standing army, another modern creation linked to territorial wars in the European power system, is part of this body of officials tied to the State, to which modern police power is added to ensure internal order.

The metaphor of the building aptly captures these movements, relating them to the threat of mythical past that tends to be reactualized in different forms to subdue human desires for happiness and emancipation, under the dominance of capitalist production (and religion, says Benjamin) consolidating its hegemony in the period following the bourgeois revolutions. Some questions arise: In what ways does modern law contain the reenactment of the anguish of mythical domination? And in which senses the projection of a secularization movement and the typical rationality of modern law formulated by Weber is in a certain sense problematic? Or, to be more provocative, based on Adorno and Horkheimer, how is the typical instrumental rationality of enlightenment itself immersed in mythical elements that present renewed forms of violence and barbarism?

In the text on the state of exception, Gagnebin engages in a closer reading of Benjamin's essay on "Critique of Violence/Power". Here, the discussion on the relationships between law and violence, which marks Benjamin's text, is revisited. According to the author, the core of Benjamin's text lies in "a conception of law and the juridical as a territory closely linked to the exercise of violence, and not as an objective and neutral territory aiming to punish and correct injustices. Between '*Recht*' [law] and '*Gerechtigkeit*' [justice], the relationship is one of opposition, not complementation" (GAGNEBIN, 2020b, p. 21). The violence articulated and administered by the law is a foundational component in establishing, maintaining, and organizing an unequal social order. Throughout the text, Benjamin ironically revisits a sentence by Anatole France to question the formal equality typical of the law, where it is asserted that the laws "equally prohibit the poor and the rich from sleeping under bridges." As Gagnebin observes, Benjamin plays with semantics to bring *Recht* (law) and *Vorrecht* (privilege) closer together in a passage of his essay, identifying in modern law the inheritance of prerogative



law [*Vorrecht*] that refers to the privileges of kings and the wealthy. The main theoretical problem here is to emphasize how law is inseparable from the exercise of power in this unequal order and constitutes one of its forms of expression.

This intertwining places the law in a permanent zone of indistinctness where the differentiation between law and the exercise of power and violence lacks solidity. The moments when "excess" becomes evident only demonstrate to Benjamin that it is a deeper problem that superficial analysis tends to overlook. For this purpose, the German critic resorts to various historical phenomena of Europe at that time, such as the State's response to proletarian strikes, war, the death penalty, police power, and others. The so-called "Rule of Law" (*Rechtsstaat*) coexists with a zone of anomie that is part of its regular mode of operation, discernible to the naked eye depending on which subjects and phenomena one is faced with. This zone of anomie constitutes its existence, but can be created and visibly asserted when what is at stake is "maintaining the order", a moment in which any coherent distinctions between law, its negation, violence, and the exercise of power are called into question.

According to Jeanne Marie Gagnebin, "it is already considered in here [in the 1921 essay], a question that borders on the definition of the state of exception, in which the State, feeling threatened, resorts to the establishment of a new form of violence" (GAGNEBIN, 2020b, p.21).⁵ This observation seems accurate, not because Benjamin had already read Schmitt, but because they were both operating within the same historical context. This context was marked by the use of Article 48 of the Weimar Constitution by the German Social Democratic Party (SPD) and the German ruling classes, which allowed for the suspension of a set of rights in situations deemed exceptional, as a response to the struggle of the proletariat. In 1920, the German proletariat defeated the far right that had attempted the Kapp Putsch⁶; with the defeat of the coup forces, the proletariat collectively shaped an insurrectional movement, brutally repressed by the SPD government and the German bourgeoisie (LOUREIRO, 2005, p. 117 et seq), an issue that lies at the origin of the fragment "The Right to Use Violence" (BENJAMIN, 2020, p. 2090-

⁵ In another text, the author will be even more incisive when she points out in this element a characteristic of the State itself, expressing it in the following terms: "This space of violence seems to emerge as the implicit nomos of the modern State as an instituted state of exception" (GAGNEBIN, 2014, p. 259).

⁶ The historical episode is probably what gives rise to the note "Life and Violence," now disappeared, which according to Benjamin in a letter dated April 17, 1920, was "written with the heart" (Br. I, p. 237). The same episode is discussed in the preserved fragment "The Right to Use Violence," which is the origin of the essay on the critique of violence/power/force.



2095; GS VI, p. 104-108) and the essay on Critique of Violence/Power. For Benjamin, as Gagnebin affirms, "the power of the Rule of Law reveals itself as its secret power of exception" (GAGNEBIN, 2020b, p.29), at which point the indeterminacy between law and violence becomes clearly evident. The response to these problems proposed by Schmitt is to suspend the law to preserve it and thereby maintain order (SCHMITT, 2007). The same historical context generates a completely different response from Benjamin, who formulates the concept of deposition of law [*Entsetzung des Rechts*] (GS II, p. 202), expressing the possibility of a political action that breaks the dialectic between violence that establishes and conserves the law, inaugurating a new historical era.

The historical context is crucial to understanding this text, as emphasized by the author in different moments (GAGNEBIN, 2007, p. 207; 2014, p. 54; 2020b, p. 16-17, and p. 19-20), an observation unfortunately ignored by many commentators of this essay, who tend to view it from a supposed philosophical "purity" that focuses primarily on its language and internal coherence and disregards (or even dismisses) its context.

In both commentaries, the author seeks to draw attention to the radicality of Benjamin's historical critique in his texts addressing law. This search for a different historical experience, distinct from the one governing the capitalist mode of production, is what connects these early texts with his later writings. It is important to highlight the final paragraph of "Myth, Law, and Justice in Walter Benjamin," where the author concludes the text with a sudden shift, going beyond the comments on the relationship between myth and law in Benjamin's writings between 1916 and 1922, while simultaneously revisiting them. Gagnebin interprets Benjamin's writings on Kafka from the 1930s and points to both the reiteration of youth themes in his later works and the presence of the critique of *Gewalt* (violence/power) in the Berlin essayist's approach to the work of the Czech writer. Under a seemingly simple "last observation", Gagnebin presents an intriguing insight into the way Walter Benjamin reads Kafka. It is essential to quote this lengthy passage:

"Benjamin reads Kafka's texts as a lucid literary elaboration, in their irony and despair, of this fatal entanglement in the order of law, as if the path of law could lead to the realm of justice and freedom. Put differently: the forces of myth resurface in Kafka's novels and stories through the labyrinthine description of the buildings of legality (even the 'swampy' forces, to use Bachofen's expression, of a pre-mythical age resurface). In *The Trial*, K. confuses this legality with a search for justice - perhaps this confusion is his secret guilt, which always sets the machinery of law and punishment in motion. Indeed, only the abolition of this mythical order, which reemerges under the deceptive guise of law, that is, the refusal to conform to its rules,



would allow K. to leave behind a mediocre and conventional life, without generosity or freedom, and achieve justice and innocence. In Kafka's texts, true freedom is confined to figures so devoid of power that they do not need the law to maintain it. They are the favorite characters of fools, assistants, Oklahoma theatre actors, or even children who do not want to sleep and run aimlessly at night on the road. They are light-hearted and playful in contrast to so many other figures burdened by guilt and the law, paralyzed, or even slowly killed by the mythical inscription of the sentence on their backs, like the condemned in the story 'In the Penal Colony'. Precisely because they lack power, Kafka's fools cannot liberate or help their companions in distress. But they are the unmistakable, albeit utopian, sign that the realm of freedom - that is, also a messianic reconciliation with the forces of nature - would be a realm without the need for domination, the possibility of a human happiness that would not require mythical or legal rules to ensure its permanence" (GAGNEBIN, 2020a, p. 1943-1944).

III

This passage, interwoven with Jewish references ("messianic reconciliation with the forces of nature") and materialist concepts (the category "realm of freedom," which seems to refer to the final pages of the third book of "The Capital", where Marx elaborates on communism) (MARX, 2017, p. 882-883), explicitly presents Gagnebin's reading hypothesis of Benjamin's antijuridicism – an antijuridicism also influenced by contact with antinomian currents in Jewish culture.⁷ This hypothesis goes against influential readings of Benjamin's work in the field of law. There will be a brief emphasis on the implications this has in legal theory and philosophy, although there are receptions of Benjamin's work that go in different directions in debates about the so-called "right to memory" (as an extension of the field of transitional justice) and criminology, with less impact on discussions about constitutional theory.

Derrida's lectures compiled in the book "Force of Law: The 'Mystical Foundation of Authority'" are important in bringing Benjamin's essay on the critique of violence to a relatively broader audience during the 1990s and 2000s. Before this, although commented upon by important figures in 20th-century philosophy such as Marcuse,

⁷ In Benjamin's case, starting from his conversations with Scholem since the 1910s, the author comes into contact with currents of Jewish mysticism developed after the expulsion of Jews from Spain during the process of formation of the modern state, particularly Lurianism and Sabbateanism. According to Scholem, Jewish criticism of law and the state is radicalized in Sabbateanism, which, for the author, has components that align it with a certain 'religious anarchism' (SCHOLEM, 2008, p. 343). In "Caminhos Divergentes" ("Divergent Paths"), Judith Butler refers to Benjamin and other authors of Jewish origin to discuss the possibility of a critique of law and the state from Jewish sources and currents, and thereby question the monopoly of Jewishness claimed by Zionism and criticize the intervention of the State of Israel in Palestine (cf. BUTLER, 2017, p. 11-13 and p. 75-102)."



Arendt, and Agamben, Benjamin's essay had not received more widespread attention among interpreters. The texts in this book were prepared by Derrida for a colloquium organized by the North American movement known as Critical Legal Studies, and later reworked by the author. In the second of these texts, Derrida offers a detailed reading of Benjamin's essay on the critique of violence, despite some factual errors and what Agamben politely calls a "singular misunderstanding" (AGAMBEN, 2002, p. 72) that marks the connections made in the text with the "final solution," which is also present in the postscript of the book – something that Seligmann Silva identifies as an "unjust and hasty criticism" (SELIGMANN-SILVA, 2007, p. 224).

Derrida, while recognizing a certain antijuridic dimension of some categories in Benjamin's essay (DERRIDA, 2007, p.128), suggests different paths from Gagnebin (and in a certain sense, from Benjamin himself). By indicating that the German term "*Gewalt*" can mean both violence and legitimate authority, Derrida's question in the text revolves around the possibility and impossibility of distinguishing legitimate power from original violence (DERRIDA, 2007, p. 10). The author seeks to establish a theory of justice based on the experience of aporia, a full experience of which is impossible since aporia is something that cannot be fully experienced. The possibility of justice is thus established alongside its impossibility of full experience. With law being an element of calculation and justice of the incalculable, justice "requires that the incalculable be calculated" (p.27) to establish in this aporia the improbable possibility of justice.

In this process, Derrida develops a theory of decision-making, envisioning its impact on the concrete figure of the judge. According to Derrida, "for a decision to be just and responsible, it is necessary that, in its own moment, if there is one, to be both regulated and without rules, conserving the law yet sufficiently destructive or suspensive of the law to must reinvent it for each case" (p. 44). This decision, marked by paradox, is always faced with the indecisive, perpetually precarious. The indecisive places the possibility of decision before what is strange and heterogeneous to the calculation of the rule, which must nevertheless be made, thus "submitting to the impossible decision, taking law and rule into account" (p.46). This aporetic indecisiveness is also faced with the urgency of decision that interrupts legal deliberation and thus decides with its risks and responsibilities.



Derrida's lecture has an immediate impact⁸ on readings of Benjamin's essay and establishes important parameters for current German debates. Christoph Menke, in 2012, published "*Recht und Gewalt*" (translated into English as "Law and Violence"), an influential and representative text that marks the reception of Benjamin in contemporary German legal debate. Menke sees law in constant tension; at the same time opposed to violence by putting an end to the violent repetition of revenge, yet also exerts it on the bodies and souls of subjects. He proposes to understand the truth of both affirmations, seeking to elaborate a possible foundation under other frameworks than the current one, for a law that is both self-reflective and open to difference, containing its other within itself and being reluctant to itself. Menke extrapolates in some parts Derrida's argument,⁹ incorporating another set of references, but he retains the proposal¹⁰ to view this tension as a paradox. According to Menke, it is about seeking the gap of unity between law and violence, normativity and destiny, and seeing in the paradoxes within this unity the opportunity for liberation. Thus, he aims to offer a reading hypothesis of Benjamin's notion of "deposition of the law" not as a critical separation, but as a counterposition to Schmitt's concept of suspension (MENKE, 2019, p.55-56, p.58-59).¹¹ In Menke's interpretation, when Benjamin formulates the notion of deposition of the law, he has in mind a deprivation of the power of law, paradoxically freeing it at the same time. The deposition would then be a program of "self-reflection of the law: to depose the Law does not mean to continue applying it without question, nor to definitively suppress it, but rather to reflect on it, that is, to execute it reluctantly" (MENKE, 2019, p.18).

Andreas Fischer-Lescano, in contact with Menke's arguments and engaging with Derrida, published the book "*Rechtskraft*" during the following year. Fischer-Lescano seeks to conceptually distinguish violence/power [*Gewalt*] from law while simultaneously

⁸ Derrida's lecture gives rise to a collection of essays that will discuss his hypotheses (HAVERKAMP, 1994), and also marks a well-known essay by Werner Hamacher on Benjamin's critique of violence/power/force (HAMACHER, 2020; originally published in 1994).

⁹ Derrida recognizes law as a field of calculation and violence, seeking an element from the exteriority of justice to think it. Menke brings this tension within the field of law, attempting to recognize a violent and non-violent dimension within law itself, a conception that is not present in this text by Derrida.

¹⁰ Derrida plays a decisive role in Menke's proposal for the reconstruction of law (see also MENKE, 2019, p. 109 and onwards).

¹¹ Menke engages in a dialogue with Agamben's reconstruction of the debate between Benjamin and Schmitt. Agamben puts forward the hypothesis that Schmitt came into contact with Benjamin's essay on the critique of violence/power, based on the study of readings made by the German Catholic jurist in the early 1920s, and that Schmitt wrote "Political Theology" as a response to this reading (AGAMBEN, 2004, p. 83-84). Menke goes beyond this hypothesis to see in Benjamin's concept of 1921 a counterposition to Schmitt's concept from a book that will only be published in 1922.



reconstructing a theory based on a legitimate force [*Kraft*] of law that "points to a new and distinct law" (Fischer-Lescano, 2017, p.75). He argues that theories attempting to deny the violence/power present in law are weak and advocate for an understanding of law capable of reflecting on the relations between rationality and irrationality, reason and feeling, power and force in its everyday functioning (p.20). Fischer-Lescano emphasizes the importance of law understanding itself as the unity of the difference between legal force and validity: "Law must become sensitive to situations where legal force turns into violence, where it subjugates human forces and violently obstructs their development" (p.22-23). Drawing on Menke's reconstruction of tragedy in ancient Greece, he argues that "law must recognize its own tragedy" (p. 50). Fischer-Lescano also sees, along with Menke, in the possibility of law reflecting on itself in an outrageous way, what points law towards reluctance against itself (p.120). According to Fischer-Lescano, "law must behave responsively to force in order to understand and modify the mechanism by which it represses it," making it possible to release a normative force that claims legitimacy for itself, even though it is faced with a perpetually constitutive paradox marked by the potential to become violence/power [*Gewalt*].

While various criticisms could be made of these theorizations, it is important to underline that these interpretations differ from the way Jeanne Marie Gagnebin reads Walter Benjamin's texts on law. A legitimate approach, which could certainly be adopted, would be to indicate how Gagnebin reads Benjamin's texts more closely, starting from the texts that address the legal problem. If the authors mentioned above seek to establish a bridge, albeit more subtle and reluctant in some cases, between law and justice, Gagnebin (GAGNEBIN, 2020a, p. 1935; GAGNEBIN, 2020b; GAGNEBIN, 2021, p. 21-23) seems to stay closer to Benjamin to differentiate them more decisively. This differentiation permeates Benjamin's early writings, from a fragment from 1915-16 preserved by Scholem (SCHOLEM, 1995, p.401-402), the texts between 1916-1922 commented by Gagnebin, reappears in the text on Karl Kraus, in the end of his essay on Kafka in 1934 and other moments. However, I will take a different direction, a detour, without ignoring this question, and ask about the basis of this difference in interpretation. In the hypothesis I propose in this text, this difference is grounded in the more integrated reading made by the Swiss-Brazilian philosopher of Benjamin's historical criticism, and this has repercussions on how she reads his writings on law. From this perspective, we can interpret, in my view, the enigmatic and central statement that opens the last paragraph



of the critique of violence when Benjamin states "The critique of violence is the philosophy of its history" (Benjamin, 1986, p.174; Benjamin, 2011, p. 155; GS II, p. 202).

IV

Jeanne Marie Gagnebin is one of the interpreters responsible for a careful reconstruction of Walter Benjamin's critique of the modern concept of progress. This concept, which reached its peak in European 19th-century thought, is generally associated with an interpretation based on historical development towards a determined ideal end, in which the sphere of means is seen as a temporal moment on the path toward that end. The present is viewed as a moment of the progressive historical march that will be realized in the future, perceiving the current time as a stage. This conception results, for both Gagnebin and Benjamin, in a homogeneous and empty temporal model, established as a series of similar points in an indefinite flow (Gagnebin, 2018, p.64).

In law, these traits appear clearly in theories that speak of successive generations of rights (the first generation corresponding to civil and political rights, the second to social rights, the third to human and cultural rights, and so on, with as many classifications as "historical stages" on an established path) as an inexorable path of humanity. The endpoint of this projection is understood as the moment when human beings will reach the final stage of progress, marking the future realization of the normative ideal in a gradual and successive manner. This type of discourse that relies on the existence of a linear and immutable historical chain (the "progress") erases concrete historical conflicts, class, racial, and gender struggles, and the historical subject that materializes them.

By understanding time in this way, this conception of history is oriented by perceptions that speak of a hypothetical continuous progress of 'clarity' and 'intelligence', where emancipation would occur according to the development of this march, which would gradually include actors until the idealized moment when this construction is guaranteed to all subjects. The present would be guaranteed as a sacrifice for the sake of an already established end (of history). In Jeanne Marie Gagnebin's critique, when we analyze time based on criteria of chronological succession, the resulting interpretation of history takes on the appearance of a causal relationship of necessity to be realized, expressing the tendency to naturalize the entire course (Gagnebin, 2009, p.96). In another text, the author states that beyond the theoretical limits highlighted by Benjamin



concerning this type of perspective, the Berlin critic knew that at the threshold of the Second World War, historical theories that ultimately postulated a sense of stability and conformist optimism were illusory (Gagnebin, 2011, p. 290) in the face of fascism and a world on the brink of catastrophe.

The view of time described above implies that the past has an eternal and unchanging image based on irrevocability and naturalization of past domination as a necessary cost for the future path. Similarly, the future is projected in an irreversible direction, failing to perceive that history's construction occurs through human action in the face of existing social structures, and not through abstract and unattainable laws. The idealized images of the future serve a strategic purpose for those in power: a constantly postponing sense, continuously delaying the decisive aspects of the present, where concrete struggles take place, in favor of an instant in the course of a homogeneous journey. Historical action loses any sense of urgency and is relegated to a role that submits to the triumphant march of history, leaving little room for collective subjects to intervene and contest its course, resulting in resignation to the projected ideal situation.

In few fields of the human sciences does this type of discourse reproduce as easily as in law. In law, time is generally seen as administrative routine, leaving little alternative but to control the established order under the banner of the so-called "legal certainty," often discussed among jurists. Law is not dissociated from a claim not only to guarantee, as Benjamin points out in his critique, but also to organize the current unequal order.

On the socio-historical level, time is reduced to a mechanism of regulation of the phenomenological dimension (BARBOSA, 2007, p.59). Modernity's tendencies to transform law into an impersonal and abstract technique align with this orientation towards stability. Time is perceived as administrative routine, where actions are diluted in the course of a predictable and regular process. Predictability, repetition, and the impersonal course of the law are part of this tendency, which not only reproduces a problematic perception of time but also has the main consequence of concealing the reality that law guarantees to function. This type of rationality aims to prepare and predict changes based on its internal procedures, avoiding the instabilities that escape its control.

The innovative process is compressed when institutions are produced by other institutions in a self-centered model where the primacy of proceduralism as false freedom distances actors from what has been normatively configured. It is evident that this process is not entirely static, neither in theory nor in practice, where action manifests to give



certain conjunctural meanings to that form. However, it is important to emphasize that there are relatively porous lines in the functioning of this order and that they may be relatively movable, but they have recurring borders that are clearly demarcated. These boundaries lie within the established structural limits, which respond to certain postulates of invariability that guarantee their place in the historical process as a whole. The image of a linear-progressive flow is crucial here, as historical time is seen as irreversible evolution, even though the conjuncture forces it to constantly deal with relatively variable conditions of punctual modification. Therefore, the active and dynamic capacity of historical subjects operates simultaneously with a tendency to encounter heavy gates that produce a counterforce that redirects their demands back to the normal state (the state of the norm), as normativity and the homogeneous flow are their fixed values. These mechanisms of controlled change are active within a general historical course in which they are inserted and projected, and this projection is characterized by the preservation and reproduction of what Giacomo Marramao called the structural norm (and the project incorporated in it) (MARRAMAIO, 2005, p.252-256).¹²

Gagnebin's reclamation of the concept of "*cesura*" (rupture) from Benjamin is significant in providing an alternative understanding of historical interruption. Benjamin's concept of "*Jetztzeit*" (now-time) stands in opposition to the typical historical orientation of modern law, offering a perception of time that, in Gagnebin's words, is simultaneously the emergence of the past in the present and an event of the instant (GAGNEBIN, 2009, p. 97). Reflecting on the "*Jetztzeit*," Benjamin elaborates on a historical possibility (here, the study of the revolutions of the 19th and 20th centuries is central to this conceptualization) that seeks to break away from a temporal development model that gives rise to a reified conception of past, present, and future. Gagnebin reminds us that both the remembrance and the historical critique in Benjamin are indissociably related to the constantly renewed attempt to think about what calls for a different becoming (GAGNEBIN, 2009, p.89), in a time that can be situated in the future of the past (SZONDI, 2009, p.20). Gagnebin highlights the essay on the critique of violence in "História e Narração em Walter Benjamin" and states that:

"this text also speaks, in conjunction with the Sorelian general strike, of a radical figure of interruption as resistance to the political and social

¹² This passage from the author's work, with which there is a close dialogue here, is important for a complexification of the analysis of time in the functioning of legal institutions, based on the critique made by Marramao of systems theory.



machinery: here too, only the attempt to stop time can allow another history to emerge, a hope to be preserved instead of succumbing to the acceleration imposed by capitalist production. The general strike stops production, just as the clocks that revolutionaries shoot; it is the same gesture of interrupting time, breaking historical continuity. It is all the more difficult to be described and analyzed as traditional historical discourse relies not only on a trivial principle of causality but also on an idea of infinite and regular temporal continuity, an idea that, moreover, is the source of this lifeless notion of causality." (GAGNEBIN, 2009, p. 98).

However, this process of creating other possibilities for experimenting time is not without risks. It does not renounce practical and theoretical critique, both patient and urgent. As reminded by the author, it remains theoretically and politically committed to the "nameless" buried by the triumphant march of progress (GAGNEBIN, 2014, p. 75-95). The search for silenced narratives (this was the title of a recent colloquium in Gagnebin's honor) should not forget the moment of action, of praxis in the urgency of the present time that is the time we have to fight against fascism.

In the 2018 preface to "Walter Benjamin: os cacos da história", the author problematizes certain melancholic and complacent interpretations that lose sight of the claim of urgency that permeates Benjamin's writings (GAGNEBIN, 2018, p.11). According to the philosopher, precautions are necessary to avoid turning Benjamin's work into a "cultural treasure" of purely scientific interest (GAGNEBIN, 2011, p. 286). In an interview, she expressed her concern to prevent Walter Benjamin's work from becoming a new cultural fetish. According to her, it is necessary "to preserve the questioning, unsettling, and subversive aspects of his thinking. All of his thinking fought against the fetishization of culture and writing" (GAGNEBIN, 2015).¹³

Jeanne Marie Gagnebin claims the radicality of the historical critique proposed by Benjamin, formulated based on an original confluence between Jewish theology and critical materialist tradition. She maintains a commitment to the emancipatory and radically transformative project that characterized the first generation of the Frankfurt School, a commitment that was forgotten by some influential readings in the field of law, which accuses the first generation of lacking normative and juridical foundations. However, the issue lies in the different way these readings identify the problem when

¹³ In a recent text dedicated to the reception of Walter Benjamin in Brazil, the author indicates that from a certain moment in the 1990s, studies and publications about the author expanded considerably in Brazil, while the liveliness of debates about his ideas somewhat declined. According to Gagnebin, as the debate about Benjamin's work became more academic, the discussion became more melancholic and lacked brilliance (GAGNEBIN, 2021, p. 8).



confronted to Benjamin's perspective (which is characterized by the critique of the legal form itself).

As Gagnebin emphasized in the opening of the colloquium "Narrativas Silenciadas", "it is about thinking of a left-wing politics, class struggle, and revolution without faith in progress or the end of history [...]"(GAGNEBIN, 2021, minutes 30 and 31). After this, the author revisits Benjamin's reflections on the importance of an expanded concept of social class to understand the struggles of his time (and ours). Therefore, it is necessary to address the reality of structural racism and patriarchal domination in the formation of bourgeois society, particularly in the context of peripheral and dependent Brazilian capitalism. This problem is probably addressed in Benjamin's eighth thesis, which speaks of a "tradition of the oppressed". This conceptual expansion has implications for both the past, seeing the domination of the past and present as interconnected; and the present, understanding the task of liberating the past as something that concerns the current generation since the enemy has not ceased to prevail. Additionally, it demands recognizing the co-constitutiveness of relations of exploitation (object of Benjamin's previous writings and theses) and oppression within capitalism. Gagnebin's speech in the colloquium presents us with the challenge of addressing these questions in terms of historical subjectivity and forms of interrupting the current state of affairs, as she also addresses in her texts on the state of exception (GAGNEBIN, 2020b, p. 30-32) or in the analysis of the conjuncture proposed in her text on the reception of Benjamin in Brazil (GAGNEBIN, 2021, p. 21-23). These challenges go beyond philosophical-political considerations and become urgent tasks in the present time.

Tradução

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Revisão

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