I would like to deal with the following questions: What is the reason for the failure of Western states to protect refugees and to welcome migrants? And what is an adequate response? One popular hypothesis is that liberalism is the problem. The most elaborate version of this hypothesis comes from Christoph Menke, who employs his radical critique of liberal subjective rights in his widely discussed *Kritik der Rechte* (2015) to the problem of refugees and migration in a small article in the journal *Merkur* (2016).

In what follows, I first reconstruct Menke’s argument, explaining that the merit of his approach is to problematize subjectification through subjective rights, which produces egoistic subjects and an egoistic society. Secondly, I criticize Menke by pointing out that he dismisses the emancipative function of liberal subjective rights too quickly, which is why I call his philosophy “radical republicanism”. For this reason, in the third step, I propose a new concept of liberal universalism which can address the problem of subjectification while avoiding the pitfalls of radical republicanism, which amounts to a conceptual connection between freedom and critique, short: freedom as critique.

1. Reconstructing Menke

In his *Merkur* article, Menke draws on Hannah Arendt’s famous notion of the right to have rights, which she uses to analyse the situation of stateless persons after the European wars. He connects Arendt’s analysis with the situation of today’s refugees and migrants, and thereby constructs the argument that it is liberalism which is the problem, more precisely an atomistic social ontology. The right to have rights is a concept based on Arendt’s holistic Aristotelian social ontology, which claims that human beings are *zoon politikon* — social and political animals – and therefore always already members of society.

The liberal framework rejects the idea of membership, as it treats human beings as atomized individuals, instead of as social beings who are defined by their very membership. While the liberal debate about rights frames the problem as denying the refugee something which *we* have (for example, the right to be *integrated* in *our* society), Menke claims that the denial is more general. Liberal societies do not even give *real* membership to their own members, because they are based on the idea of individual subjective rights (Menke 2016, S. 57). Menke’s assessment of the situation: We have to change our liberalism if we really want to change our policies regarding refugees and migration.
In *Kritik der Rechte*, Menke elaborates on the problem of the form of subjective rights in greater detail. Subjective rights naturalize the individual will and freedom as pre-social; the liberal legal order is designed to secure this private will and freedom. However, Menke critically turns the genealogy around: We do not have the liberal order to secure our freedom and individual will, as liberal philosophy tells us, but we think of ourselves as individual subjects because of the liberal legal order. This is the subjectification through law. The autonomous, individual and egoistic subject of subjective rights (of liberalism) is the product of the primacy of rights in liberal law. By securing the individual will from political influence, it sets free and entitles egoism and thereby leads to an amoralistic society without normative reasons. The private will of the subject is protected against politics and ethics. Because the will does not have to justify itself, politics as a process of justification is blocked; the bourgeois society is a depoliticized society (Menke 2015, S. 358).

The last chapter of Menke’s monograph is devoted to developing a new concept of law which allows to overcome the bourgeois-liberal pathology of depoliticization. This concept is a repoliticized law which is based on participation: The “Neues Recht” (new law) with the “Gegenrechte” (counter rights).

The Neues Recht shall provide a repoliticization of the individual will, while avoiding the pitfalls of political paternalism. Menke works through the problem of paternalism under the keyword “communism”, by which he means a political self-determination of the community which is total and does not leave the individual room for passivity – in communism, there is only politics. In contrast to communism, the Neues Recht shall allow political self-determination while allowing passivity, which is secured through Gegenrechte.

What is new about this „Neues Recht“ is an entanglement of the concept of judgement with the concept of the sensual (Sinnlichkeit) — while in liberalism, there is essentialized sensuality and in communism pure reason disconnected from sensuality (Menke 2015, S. 373–380). The difference to liberal subjective rights is that the Gegenrechte are not rights to a naturalized egoistic will, but to the consideration of sensuality and passivity in the process of political judgements. Because the private will and interest are not thought to be in the pre-political realm of the social which has to be protected against political influence, the new law opens and endorses the possibility for real political change, the political steering of the social without predefined (ideologically bourgeois) limits. The conceptual trick which Menke applies is to point out that a real democratic process of self-determination necessarily rests on allowing passivity and integrating the sensual (Sinnlichkeit) of the participants.

I would like to point out that the central insight of Menke’s theory is the connection of legal critique with the theory of subjectification. Subjectification, following Foucault, means the constitution of subjects through power. Subjectivity and the individual will are not pre-social, but the result of subjectification in a specific society – in modern liberalism this is a subjectification based on subjective rights. It constitutes individuals who feel and think that it is natural to live a life of bourgeois egoistic separateness and who feel that it is paternalism when politics interfere with their private lives. This is a critique of classical political liberalism and its negative
concept of freedom. The question is if such a negative concept of freedom and the blindness towards subjectification can be overcome without making true the liberal's nightmare, a paternalistic society.

2. Criticizing Menke

My critique on Menke is that the Gegenrechte do not provide a sufficient protection against political paternalism. Otherwise said: Menke’s aim in proposing the Neues Recht is to overcome the difference within political theory between a liberal and republicanist position, where the liberal position insists on universal rights of individuals and the republicanist position insists on the self-determination of the community. But either – following a strong reading of the Neues Recht – Menke ends up in radical republicanism, where the individual will is overruled by total politicization. Or – following a weaker interpretation of the Gegenrechte – Menke cannot escape the liberal framework he tries to overcome.

First the strong reading: Phrased systematically, the problem of radical republicanism is that it is structurally anti-pluralist, as it relies on a universalistic concept of political reason and blends out political conflict. Against Lefort, Gauchet, Rawls, and implicitly all the theorists who work on post-foundational political thought and the political difference, Menke insists that politics is about (universalistic) reason, posited against (particular) individuality.

Menke’s point here is that reason is not just another particularity which managed, through political fights about hegemony, to become dominant, but that the category of universalistic political reason really exists and stands against individuality. This idealism is the contrary of a political ontology based on conflict, which necessarily leads to a pluralistic (and post-foundationalist) theory of democracy, in which institutions deal with problem of normalization and political paternalism. In other words: Menke positions his critique against conflict and pluralism, the two bedrocks of contemporary political liberalism.

Second, a weaker reading stresses that the Gegenrechte shall protect individuality and plurality by enabling non-participation in a conception of politics which equates freedom with participation (based on a holistic social-ontology). However, it remains unclear in what way the Gegenrechte are really systematically different to liberal form of subjective rights. While the bourgeois subjective rights essentialize passivity (Sinnlichkeit) as a right and posit it against judgement (Urteilen), the Gegenrechte affirm passivity, suffering, and Sinnlichkeit by making it the point of

2 The reader might be reminded of the question how liberal or paternalistic Rousseau’s difference between volonté general and volonté de tous should be read; Inston 2010 shows how to make it compatible with the pluralism of contemporary radical democracy.
departure for political judgement (Menke 2015, S. 381–383). The best way to explain what could be meant by this is a political process of developing policy which protects minorities, for example the development of a political position (Urteilen) which does not discriminate against gays by taking into account the suffering from past discrimination (Sinnlichkeit). However, the incorporation of sensibility into judgement shall not essentialize sensibility, but include it into the political process and deliberate it. The problem is again the oscillation between two possible interpretations: If there is no conceptual limit to the deliberation of sensibility, but political judgement has the power of definition of which sensibilities to consider and incorporate and which not, the position amounts to radical republicanism and does not add any help to fight its paternalism. For example, positing that heterosexuality is natural and good for society, suffering from homophobia cannot be interpreted as justified Sinnlichkeit anymore, which needs to be heard in the political process. On the other hand, if there is a limit to the politicization of sensibility, then the position does not conceptually differ from bourgeois law, whose essence, according to Menke, is to set sensibility free from political judgement.

To conclude: Radical republicanism is problematic, and the Gegenrechte can only prevent a fall-back into radical republicanism if they are conceptually like subjective rights, not only bringing sensibility into political judgement, but also protecting arbitrary judgement (of individual wills and ethics) against political judgement. Menke does not resolve the tension between liberalism and republicanism, between law and politics, between sensibility and judgement through his concept of the Neues Recht. This critique opens the possibility to ask less radically and more realistically which subjective rights are helpful for refugees and where politics is problematically blocked through the language of rights and its liberal subjectification. Furthermore, having pointed out that the central merit of Menke’s approach is the theory of legal subjectification and the central problem is his anti-pluralism, it is now possible to ask how the problem of subjectification can be tackled without falling into antipluralism? In other words: can there be a pluralist (and that means liberal) way to address the problem of subjectification?

3. For reflective liberalism

Menke claims that liberalism and its focus on human rights lead to conceptualizing the issue of refugees as posing individual rights (of refugees) against the political collective (of the receiving countries), which leads the collective to demand adaption of the refugee on the values of the collective (Leitkultur). This problem of a paternalistic and normalizing collective, which imagines a singular political identity to which all individuals have to adapt, is at the core of Europe’s current rise of right wing populism and racism, which is an important driver of the repressive migration regime. Menke claims to overcome this by radical republicanism’s inclusion of refugees into social membership. But the critique of radical republicanism showed exactly the opposite: Menke has no conceptual protection of minority rights and his demand to moralization and politicization is potentially total and may lead to a sin-
gular ethical-political position which posits itself as the universal political rationality. What is needed instead of such ethical-political universalism is an ethos of plurality, in order to deal with diversity without identarian closures. But, isn’t an ethos or politics of plurality not in itself necessarily a universalist position?

To capture this kind of universalism, liberal political philosophy uses the distinction between morality and ethics, which allows to speak (in the register of morality) universally about the institutional conditions of possibility for an ethically pluralist society. However, the distinction is not as clear-cut as liberalism would need to have it, and numerous critiques pointed out that what is presented as a neutral and purely procedural universalism is in fact an ethical-political particular position (for Western styled white straight men’s capitalist individualism, mostly).

Thus, so far, there are two related problems: The first arises of Menke’s analysis of subjectification and the resulting amoralistic wills of individuals and my critique of its potential paternalism: How to decide between respecting and protecting individual wills, or interfering and changing them for the political good. The second problem follows from my discussion of universalism and pluralism, but haunts all of political liberalism: How to make sure that pluralistic universalism is not in fact a hidden particularistic position?

My hypothesis is that a new concept of freedom can help to deal with both issues: Freedom as the capability to criticize one’s own subjectification, or in short: freedom as critique.

Regarding the first question, what is needed is a mechanism to criticize the legal subjectification and the will of subjects, which is nevertheless based on the protection of individual freedom. This can be archived by institutionalizing critical reflexivity regarding subjectification, which enables individuals to reflect on their individual will and transforming it, without that the content of the transformation is politically predefined. What is needed, in other words, is a new concept of freedom, which is not essentializing the individual will as liberalism (negative freedom), or paternalizing and politically overruling it as republicanism (positive freedom), but enabling the individual will to reflect and criticize itself (freedom as critique).

Regarding the second question, freedom as critique can be the last normative universalism possible in a post-foundationalist situation. Post-foundationalism means that no universal foundation of politics is possible, but that there is only a plurality of contingent foundations. One traditional foundationalism which cannot be defended anymore is liberalism’s foundation of politics on a pre-social and universally rational subject. Freedom as critique enables to conceptualize the institutionalization of a never-ending process of critical reflection which is not based on such a liberal conception the rational subject or a predefined concept of the political good, but on the self-critique of the subject. Like liberalism, freedom as critique argues for political proceduralization, but is more radical as also the subject and its rationality, the classic foundations of the proceduralization, are subject to the critical process.

To conclude: Menke is right that the current situation of inhuman treatment of migrants and refugees is rooted in liberal subjectification which leads to amoralist and
unsolidary societies. However, to switch to radical republicanism will not help, as it easily transforms into right wing identarian politics. What is needed is a transformation of liberalism which enables it to cope with the problem of subjectification and to avoid paternalism, for which the conceptual starting point is to understand freedom in equidistance to negative and positive freedom as the capability to critically reflect one's own subjectification, in short, freedom as critique.

Literature


