THE LIMITS OF VIOLENCE: CONCEPTUALISING THE CONTEMPORARY LIBERAL PARADIGM OF VIOLENCE WITH THE HELP OF WALTER BENJAMIN

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In the beginning of his text entitled Violence: ideality and cruelty, Etienne Balibar mentions a 'fascination of intellectuals with violence', the source of which he locates in a certain interest to keep violence outside of the thinkable, in a 'thought police' whose function is averting attention from unrest, crime and such. This fascination is a counter-movement that opposes the imposition of order and security in, as Balibar says, 'cities and in souls'. He suggests that this is what makes intellectuals cross the line of the forbidden where some even arrive at 'the conclusion that nothing really fundamental can actually be thought outside of violence and its 'element', unless thinking and writing themselves become 'violent' and mimetically imitate certain violence.' (Balibar 2004, 431)

Balibar does not give any further explanation regarding the origin of this interest or the nature of 'thought police', but he obviously suggests that we should turn to the State, specifically to the modern bourgeois state and its apparatuses in search for it. We would like to argue that 'thought police' is a function of 'law and order', a function of the pacifying State regime which Balibar following Derrida will later call non-violence. Under these conditions violence is not only banished from cities, meaning its manifest forms, but also from souls, implying that even the idea of violence poses a danger to law and order. Violence, even the sole idea of it, is thus, under the conditions of a pacifying State regime, fundamentally delineated by expulsion. The hypothesis we are going to follow is that the form of expulsion becomes a feature of violence as such: violence is kept on the outside and its exile leaves a mark on it. Our starting premise is that the product of 'thought police' the exiled violence, is the necessary form of representation of violence in contemporary historico-political conditions and that it as such plays a central role in the production of violence in these conditions. The political question of breaking out of this violence or at least following the goal of 'less' violence thus demands the breaking of this form of representation. The mentioned intellectuals with their imitations of violence in thought and writing could be read in this perspective even if this was not always their explicit intention. Nevertheless, imitation does not necessa-

rily rid us of complying with the form of expulsion, since it can fall into the discursive circle revolving around the notion of 'excess' which we are going to examine.

To begin with, we need to take a close but condensed look at what we mean by the necessary form of representation of violence (form of expulsion) and its conditions. The condition of this expulsion is the same as the condition of pacification, which political theorists have recognized, following Weber, as the defining trait of the modern State – monopoly on violence by which the State is the sole guarantor of absolute peace or non-violence, but only on the condition of making itself at the same time the privileged agent and locus of violence. On the level of discourse this privilege is upheld and reproduced by delimiting sanctioned, legal and thus at the same time legitimate violence, from non-sanctioned, illegal and thus illegitimate violence. The delimitation is produced by some form of a negotiative process of legitimisation (which can include legal and/or extra-legal procedures) in which the logic of ends and means is introduced as the basic principle of judgement in accordance with modern law (whether it is natural or positive law).

We would like to argue that these procedures of law affect the extra-legal contexts of violence. Through the lawful procedure some acts of violence are incorporated into the self' of the Law/State by being legalised and legitimised, but only on the ground that they are subjected to the logic of ends and means, that they are sanctioned by the order of law, and that they, consequently, to a certain extent lose their character as violence. They become 'rationalised' violence, a non-violent violence. But violence can never be fully rationalised, not every act (general violence), not every hit (physical violence), not every death (war as violence). That which is impossible to rationalise and legitimise is necessarily left on the outside. It is exactly at this point that a subjective representation of the form of expulsion[1] emerges and is proliferated in extra-legal milieus. Within the subjective representation violence usually involves at least two parties. The procedure of legitimation also takes place here (but here it is not identical with the procedure of legalisation, it rather serves as its prior step that can play a major role in relation to it), and this time the aim of the involved parties is also or even primarily to determine the cause for violence in a realm other than themselves, i.e. an external reason, and the consequential, retributive, or self-defensive[2] character of violence on the side of the one speaking. This is where the form of expulsion plays its part: as a discursive form through which violence is addressed by its perpetrator. It presents itself in a general formula: 'it is not I/us who is/are violent, but it is the other'.

1 That is, how this form appears in the imagination of concrete individuals.
2 All three amount to 'reasonable' and 'legitimate'.

Whoever may be the subject of this statement, an individual, a group, or an institution,[3] the violence pertaining to it is always retaliatory, which is, following our hypothesis, a necessary (self-)representation (in the conditions of the modern State).

It is the discursive context defined by this general stroke that Hannah Arendt's essay On Violence is rooted in. It is intriguing how under such a resolute title one finds violence almost in a marginal role. But Arendt herself offers a simple reason for this and swiftly extinguishes the intrigue: 'Violence is by nature instrumental; like all means, it always stands in need of guidance and justification through the end it pursues. And what needs justification by something else cannot be the essence of anything.' (Arendt 1969, 51, my emphasis). Violence is by its nature instrumental, which is why we are unable to consider it in and by itself, but only as subordinated in relation to other more substantial terms (for Arendt these are primarily power, strength, force, and authority). The horizon of Arendt's attempt of thinking violence is limited by the conception of legitimate violence, i.e., the economy of (just) ends and (just) means,[4] which robs violence of its potential status as an independent term, denies it any substance and proclaims it to be 'nothing more than the most flagrant manifestation of power.' [5] (Ibid., 35)

Proclaiming violence as being essentially instrumental hollows it out both on the substantial and the conceptual level, but it does so only by providing it with minimal values on both levels: substantially violence holds the value 0 and conceptually it can be defined as an excess of power. The thesis we would like to develop is that both of the features that supposedly characterise violence correspond to the form of expulsion. Before coming back to this point, we need to develop the problem of violence further along the lines we just proposed.

3 This does not mean that this statement produces the same effects on the level of enunciation regardless of who or what holds the position of the subject, nor that all the potential subjects wield the same degree of power or control over their violence when uttering the statement. The substantive aspect of violence does not concern us at this point. The question rather concerns the necessary forms in which violence presents itself in specific historical, political, and discursive conditions. But the underlying thesis is that these in turn actually bear on the substance of violence: their *necessity* reveals their functional role in the actual mechanisms of violence.

4 "Violence, being instrumental by nature, is rational to the extent that it is effective in reaching the end that must justify it." (Ibid., 79). Here Arendt links violence and rationality, accentuating the relationship; but this also presents us with the possibility of its opposite: irrational violence.

5 Arendt is critical towards this idea, but we believe she remains within the horizon of it, since her critique goes in the direction of a strict differentiation of violence and power, but one that denies any substantiality to violence, which is thus banished to the outside of power and left with no potential of its own. It can only be used by power, and it even seems that when it is used rationally, i.e., in accordance with its ends, it almost loses its violent character; it could be said that rationality competes with the violent character of violence. By not being able to address violence as an independent term, all questioning is aimed at power, especially at 'bad' power that pollutes its own purity with violence. This is how we are returned back again to the claim that violence is an excess of power, even if Arendt attempts to dismiss it. It would be interesting to read her thesis on 'the banality of evil' in this light.

THE THRESHOLD AND ITS LIMITS: SUBSTANTIAL LACK AND CONCEPTUAL EXCESS

While developing the problem of violence up to this point it would be wrong to assume that a diametrically opposite idea – that of violence as substance on its own, violence with an 'essence' – should take the place opened by the critique of its conception within the frame of ends and means. We would rather attempt to advance a thesis according to which violence occupies a threshold that stretches between two limits. These limits correspond to the minimal values just mentioned.

The first limit is the substantial limit = 0 which is anticipated by the procedure of legitimation, and is in its ultimate form embodied by the law.[6] This is the classical conception that we have presented with the help of Arendt, but is common to the main current of political theory (violence as means). Arendt advances a conception of power and law – which she conflates[7] – that absolutely excludes violence from it: 'politically speaking, it is insufficient to say that power and violence are not the same. Power and violence are opposites; where the one rules absolutely, the other is absent. Violence appears where power is in jeopardy, but left to its own course it ends in power's disappearance. This implies that it is not correct to think of the opposite of violence as nonviolence; to speak of nonviolent power is actually redundant. Violence can destroy power; it is utterly incapable of creating it.' (Ibid., 56). Violence can be the means used by law, but at the same time law itself is absolutely heterogeneous to it.[8] Law thus represents the external limit to it. Our suggestion is therefore not that this conception is 'wrong', but that it (as a concept) actually bears on what violence is, on its 'substance', and does so in a specific way and as a part of a specific power arrangement. It bears on the substance of violence by disintegrating it through the process of legitimisation, by proclaiming it to be rational. This is nothing but a new stroke of violence that only adds to the violence the substance of which has been disintegrated by it.[9]

6 This also coincides with the point of (both imaginary and legalist) transformation of violence to non-violence by the criterion of rationality mentioned in the previous note.

7 Ibid., 39–41. We do not want to conflate the two terms, since we find Arendt's concept of power far too idealist. Rather, we subscribe to Foucault's concept of power, which is why we are staying with the term 'law' when talking about Arendt's notion of power (even though this conflation of power and law could not be completely in accordance with her overall theory, it does seem that the text we are discussing offers enough support for it).

8 Arendt implies the usage of violence by power only in a covert way in which power is negated by violence.

9 What we have in mind should be immediately clear when we think of all the examples of violence perpetrated under the cloak of legality (and thus under a pretence of legitimacy) such as requisitions of homes and expulsions of residents, or police violence targeting protestors or migrants: the fact that this is done under the flag of legality introduces a whole new realm of violence, heterogeneous to and supplementing the physical violence. It opens up a new space for an abundance of cruelty.

This conception then actually does define violence as far as this 'does' conceals a relation of production between the concept and actual violence.[10]

The second limit of the threshold, the conceptual limit[11] of violence as an excess of power, is something that we did not touch upon yet, but it is the capital direction of our question. We can start with a general remark that the given conception of violence in relation to law can explain neither the historical heterogeneity of violent events nor the phenomenality of violence of which we are witnesses, victims, or perpetrators in our everyday lives. It attempts to offer a legalist measure to these, but it can do so only after the fact – it does not tell us much regarding the violence itself. Even though we are focusing our discussion on the terms of classical political philosophy (state, law, legality, etc.), it is obvious that violence is not limited to this field. Leaving this fact out of our discussion would mean falling under a bias that could itself play a role in the legalist conception. At the same time, even if presupposing an identical nature of all sorts of violence would also be a bias, our problematization of violence itself incites us not to take the separation of legitimate and illegitimate violence for granted in the sense that it would designate two different categories of violence that should actually be kept separate. There are enough empirical examples which cast more than a doubt on this claim. But beyond these, there is also a relatively widely recognised problem within the legalist conception itself which we are going to take a look at with the help of Walter Benjamin.

BENJAMIN'S THEOLOGY OF VIOLENCE: OUTLINING THE EXCESS

We began with several assumptions stemming from the critique of the legalist conception and constructed our premise from them. To take a closer look at them, let us turn to the founding text of this critique, Walter Benjamin's Critique of Violence (1921). When reading the translations from its German original, there is usually a note in the beginning of the text that explains the problem of translating the title. The original title is Zur Kritik der Gewalt and the meaning of the German term

10 We are not saying that the concept is itself directly violent (even though this could be argued for any concept in so far as it rearranges the relations between other concepts, negates some, makes them redundant or dissects them), but that it is a necessary representation of violence in a certain 'regime' of violence, making it a working part of a machine that produces violence.

11 The description of the limits as substantial and conceptual respectively, is clearly not an absolute distinction between them. The 'substantial' limit (violence as means) is substantial to the degree that it plays a major, underlying role for the procedures of legitimisation of violence by an actual state or other type of powers; it is enacted within them. But it plays this role the only way it can – as a concept or even a whole conceptuality. On the other hand, the 'conceptual' limit is such because it comes to light predominantly in the context of theory (theory of law, political philosophy etc.). But it nevertheless provides substance to violence when it is used to describe particular instances of violence which are non-coincidentally other to the position of enunciation. Substance and concept are thus not in any way exclusive in relation to each other, their distinction is provisional, and they play into each other.

'Gewalt' ranges between 'violence', 'power', and 'force'.[57] It is an untranslatable term, and it denotes a phenomenon which is unassimilable under clear distinctions between the possible meanings. It designates the direction Benjamin takes in his analysis of Gewalt which we will from now on translate as 'violence' in line with other translations.[12]

Benjamin sets off his analysis with the legalist conception of violence, where he finds the crux of the matter at the point of the distinction of 'so-called sanctioned force and unsanctioned force', or what we called legitimate and illegitimate violence - in the eyes of the law. We followed his next step in which he does not dismiss this conception as theoretically or conceptually flawed, but asks: 'What light is thrown on the nature of violence by the fact that such a criterion or distinction can be applied to it at all? In other words, what is the meaning of this distinction?' (Benjamin 1996, 238). He then goes on to show how violence is not outside of a political or state community, but that it necessarily resides in its heart. In the words of Balibar from his text Reflections on Gewalt, Benjamin shows that 'any institutional (legal) force takes the form of a monopoly and consequently of an excess of power, which points as required to its own targets in society by setting the boundaries of legality and illegality.' (Ibid., 123) This is the ground on which a contradiction regarding violence emerges within the order of law itself. Benjamin shows this with two examples: the order of law includes both the right of workers to strikes and military action, which are both instances of sanctioned violence, but are at the same time examples of violence that is able to influence legal relationships or even threaten the whole of established law. Inherent in all such violence is its lawmaking character that also explains 'the tendency of modern law to divest the individual, at least as a legal subject, of all violence [...] The state, however, fears this violence simply for its lawmaking character, being obliged to acknowledge it as lawmaking whenever external powers force it to concede them the right to conduct warfare, and classes force it to concede them the right to strike.' (Balibar 2009, 123). In his meticulous deconstructive reading of the text Jacques Derrida recognises Benjamin's ambition to arrive at the point of homogeneity of law and violence: 'Such a situation [carrying the right to strike to its limit – the general strike] is in fact the only one that allows us to conceive the homogeneity of law or right and violence, violence as the exercise of droit and droit as the exercise of violence. Violence is not exterior to the order of droit. It threatens it from within.' (Derrida 1992, 34). The violence of the general strike is a violence the potential of which originates in the order of law, but that at the same time threatens it as a 'fundamental, founding violence' that could found another law. We can see that conceptually it all depends on the excess: first, it is the excess that defines the 'non-excessive', the excess of power is a necessary condition of power as such; and second, it is the excess that connects the supposedly neighbouring dimensions of power and violen-

12 See: Benjamin, Walter. „Critique of Violence". In *Selected writings, Vol. 1, 1913-1926*. Cambridge, Massachusetts, 1996, p. 236; Benjamin, Walter. „H kritiki nasilja". *Problemi* 40, št. 1–2 (2002), p. 119; and Balibar, Etienne. *Politics and the Other Scene*. London: Verso, 2002, p. 134.

ce – the excess of power brings us to the excess of violence (we could even add 'an excess of law' with the help of Carl Schmitt, as we will see later on). We can also already sense an ambivalence at work between homogeneity and heterogeneity of law and violence: violence threatens law (heterogeneity), but it threatens it from the inside (homogeneity). Derrida does not make explicit or does not notice the imbalance at work here: in the second part of Benjamin's text, which we are approaching and where Benjamin is the most creative, it is even more explicitly not homogeneity in question anymore, but the primacy of violence over law. We are going to take small steps in order to arrive at this point. For now, it is enough to stress that the lawmaking dimension of violence goes beyond the general strike and war for Benjamin. The admiration of a 'great criminal' in the eyes of the public is an admiration of an ancient or mythical figure of a lawmaker or prophet, an admiration of the power and courage of the one who establishes new law. Lawmaking violence thus stands at the origin of law (Benjamin 1996, 239).

There is another function that Benjamin explicates from the example of the military: the law-preserving violence that coerces citizens to act according to law and its (legal) ends, such as obligatory conscription. But this example is not a special case of law-preserving violence. The critique of the latter coincides with a critique of all legal violence, implying that law-preserving violence is effective in the order of law as such (Benjamin 1996, 241).

This is where Benjamin introduces the notions of threat and fate. The interest of law-preserving violence is the general interest of positive law in as much as it is 'conscious of its roots'; the latter claims to 'acknowledge and promote the interest of mankind in the person of each individual. It sees this interest in the representation and preservation of an order imposed by fate.' The power of law does not reside in particular decrees and laws, but 'in the fact that there is only one fate and that what exists, and in particular what threatens, belongs inviolably to its order.' (Benjamin 1996, 242, my emphasis). Law-preserving violence is not threatening because it would intimidate with a prospect of punishment for a violation of a particular law, but because it represents the general order of things (das Bestehende, as in 'what exists', 'that which is actual'); it is threatening in its uncertainty, which is what links law and fate: 'The deepest purpose of the uncertainty of the legal threat will emerge from the later consideration of the sphere of fate in which it originates.' (Ibid.) Law-preserving violence functions as fate does. 'The sphere of fate' is thus of key importance since there is no functioning law without it. Derrida also accentuates this point: 'This order [order of law] is such that there exists one unique fate or history. That is one of the key concepts of the text, but also one of the most obscure, whether it's a question of fate itself or of its absolute uniqueness. That which exists, which has consistency, and that which at the same time threatens what exists belong inviolably to the same order and this order is inviolable because it is

unique. It can only be violated in itself.' (Derrida 1992, 41). This 'fate' in all its obscurity is crucial. We are going to address the fact of obscurity later on, but first let us follow Benjamin in his elaboration.

THE POLICE, CONCEPTUALLY

In order to develop the theme of fate and the uncertainty of the legal threat Benjamin examines three examples: the sphere of punishments, specifically capital punishment; the institution of police; and the parliament. Common to all three is the fact that they all testify about the necessity of violence for an effective order of law. The critique of capital punishment is actually always a critique of the order of law itself in that capital punishment is the privileged act of law and its highest violence (over life and death) in which 'the law reaffirms itself '. The parliaments of modern democratic states testify about the necessary link between violence and law in an inverse way. Their ineffectiveness and lack of power are a direct result of their democratic principles of consensus and non-violence that are a direct consequence of an absence of consciousness 'of the revolutionary forces to which they owe their existence.' Benjamin is clear on this: 'When the consciousness of the latent presence of violence in a legal institution disappears, the institution falls into decay.' (Benjamin 1996, 244). Associating this diminishing consciousness with Balibar's observation regarding police making law and order 'in cities and in souls,' we can see they fit together into the liberal paradigm of non-violence.

Both of these are more than just examples, but the case of the police is even more theoretically poignant for Benjamin. The police represents a singular institution of the modern state in which the two forms of violence, lawmaking and law-preserving, are mixed to the degree of indistinction, which is, in his words, an absolutely 'ignominious' form of authority. The police supposedly acts on behalf of the state and its legal ends, but in the conditions of the modern distinction of legislative and executive power, it finds its ground where the state is unable to reach its empirical ends by way of law, which means that the police possesses the lawmaking and the law-preserving function at the same time while emancipating itself from actual laws of the specific state. 'Therefore, the police intervene 'for security reasons' in countless cases where no clear legal situation exists, when they are not merely, without the slightest relation to legal ends, accompanying the citizen as a brutal encumbrance through a life regulated by ordinances, or simply supervising him. Unlike law, which acknowledges in the 'decision' determined by place and time a metaphysical category that gives it a claim to critical evaluation, a consideration of the police institution encounters nothing essential at all.

Its power is formless, like its nowhere-tangible, all-pervasive, ghostly presence

in the life of civilised states.' (Benjamin 1996, 243, my emphasis). The ignominy of police lies exactly in the combination of its all-pervasiveness and the lack of possibility of its critique (which in the end are one and the same thing).

At this point we will be making a step that is conceptually both anterior and posterior in relation to Benjamin's formulations. We are making it in order to both better explicate Benjamin's position and to develop a further conceptualisation of violence in modern democratic regimes on its ground. In the end, our analysis of Benjamin's text will bring us back to this point. The current step consists in considering the relationship between violence and law on the example of his analysis of the institution of police.[58]

[13]

In this respect it can be said that the police 'represents' law in a peculiar way. It does not represent a specific law of a specific state, but it could be seen as a paradoxical representative of Law as such (under the conditions of the modern State).[59] As a mixture of both types of violence (lawmaking and law-preserving) it provides a[14] 'answer' to the uncertainty of the legal threat (law itself). This answer is neither a general one, nor is it an open collection of particular and 'correct' answers in the sense that the police would be 'following the law', identifying breaches of it, and realising its justifiable and necessary applications. This answer would rather be paradoxical and inverted: it consists in distinguishing a particular act or a particular body out of an otherwise undifferentiated mass of actions and living bodies, and offering it to the law as a sacrifice. The police thus performs the function of providing a victim for the law. It (re)produces the uncertainty of the threat to the extent that the victim is coincidental. The latter is coincidental, because the law constitutes its own undifferentiated outside, from which it is impossible to identify and extract any particular body on the ground of any form of purely rational reasoning. This is why the notions of 'fate', 'sacrifice', and 'victim' can be introduced here, which we will develop further later on. From a strict perspective of law, police provides it with the empirical objects upon which it can then perform its operations resulting in a final determination (judgement) about legality or illegality of an act, guilt or innocence of an individual.

13 With this step we are building on the ambivalence mentioned beforehand. The step is anterior to Benjamin, because it poses the problem of law and violence as a problem of relation, which presupposes some kind of distinction between the terms, even though we are following Benjamin exactly for the purpose of going against the idea of heterogeneity between law and violence. And, as we shall see, we will be able, on a certain level, to actually develop their conceptual heterogeneity. This step is also posterior, because it elaborates and expands on Benjamin's own example in order to show the conceptual complexity that can be developed from the paradox he demonstrated and that does not necessarily go against his basic premises, but is rather able to defend and demystify his position. At least this is what we are aiming at.

14 'Law as such' is here and for now understood neither as a transcendent nor as a transcendental entity, but rather as an idea and a fantasy supported both by the legal system and the repressive activities of the 'apparatuses of the state'. In Benjamin's conceptuality, it coincides with the power of law which resides in the sphere of fate. The fact that we understand it as fantasy does not mean that its effect upon reality is nullified, not at all. But at the same time, this is not the primary point we are making here. We will touch upon this theme again later on when we will be analysing the influence of Hans Kelsen on Freud's concept of the Super-ego.

On the one hand, the law needs to be applied in order to be actual, but it is unable to do so by itself.[15] What is more, the law is unable to apriori identify the empirical objects (bodies) that correspond to its categories and cannot simply fill the positions defined by it as its object (legal subjects). A presupposition of unspecified bodily matter as a necessary outside is a condition of law, since the latter is supposed to regulate this matter, to manifest its power on it and hence actualise itself.[16] Its inability to determine its empirical object correlates with the uncertainty of legal threat traced by Benjamin to the sphere of fate.

On the other hand, the police needs to refer to the law in order to legitimise its activity (this is the productive heart of the idea that the police in some way represents the Law, which we mentioned earlier). The act of referral takes the opposite direction from that of an application of law. In a certain sense, and we have yet to uncover in which, the need for referral is primary in relation to the actual law. It could be said, in agreement with Benjamin's general mode of thought, that it is exactly this need and act of referral (by the police) which provides law with its power, actualises it, meaning that it no less than produces it in its material reality. The extremity of this thesis, which ultimately denies law its existence beyond its actualisation by the police, beyond its threat mediated by the police, is conceptually violent, but serves our purpose of gradually outlining a field of thought we believe Benjamin has inaugurated with his text.

To advance step by step, we can first stress that the activity of the police is not identical with the order of law. At first glance this goes against Benjamin's emphasis, but it is a claim that follows from Benjamin's analysis of the institution of police. In the imaginarium of the democratic order, the praxis of the police can indeed seem to be identical with the law, i.e., a direct means, nothing but means to a law, especially in instances where the police seems to follow it strictly. But Benjamin emphasises that the privileged domain of operation of police, i.e., where it 'lives up to its name', is a space 'where no clear legal situation exists.' In situations with no clear legal indicators on how to act, the police holds the power to invent and enforce directives and regulations, and it is this 'creative moment' of the police that by definition does not follow law but precedes it.[17]

15 This premise is explicit in Carl Schmitt's work which is close to Benjamin's, who in fact admired it (in opposition to absolute political divide between them): 'Because the legal idea cannot realise itself, it needs a particular organisation and form before it can be translated into reality.' (Schmitt 2008, 28).

16 The famous 'bare life' mentioned by Benjamin, of which blood is the symbol (Benjamin 1996, 250). Later developed by Giorgio Agamben, see: *Homo Sacer: Sovereign Power and Bare Life*. Meridian: Crossing Aesthetics. Stanford University Press, 1998.

17 This lack of clarity does not only correspond to the general uncertainty of the legal threat, but is actually positively sanctioned by specific laws that purposefully open up an indeterminate field of action for the police. An example of such a law in Slovenian legislation is the *Act on the Protection of Public Peace and Order* (*Zakon o javnem redu in miru* (ZJRM)), for which it can be argued that it is unconstitutional on the ground of its indeterminacy. Recently, a constitutional appeal against ZJRM on these exact grounds (violation of Article 28 of the Constitution) has been rejected by the Constitutional Court with an explanation that the Court has too much work with serious cases, while this appeal only concerns a small offence. However, this is only a local case among similar laws in most state legislations. (I am grateful to Kristian Hren for bringing this example to my attention.) They are generally to be found in the category of public peace and order, but also in other parts of legislation.

It precedes it just like production precedes the product. On this ground it can be said that the activity of the police is essentially heterogeneous to law. How does this incoherence emerge? Benjamin's conceptual ambition is to demonstrate the inevitability of violence present in established institutions and in political conflicts, and to demonstrate this especially in opposition to the idealistic and legalist liberal conceptions of law, state, and institution (based on the notion of contract).[18]

This is the reason his analysis progresses from law to the police, where the latter functions in the text as the most comprehensive case of violence characteristic of law. It serves Benjamin's theoretical goal of merging law with violence, which is explicitly hostile to pacifist and liberal ideas of consensus. We are not opposing this at all, but instead trying to develop it further in the direction of recognising different conceptualisations themselves as not only rightly or wrongly describing or reflecting the 'actual' workings of law and violence, but being as conceptualisations part of this same reality and having effects within the mechanisms they are supposedly only referencing. This is why the historical moment of enunciation appears to take effect in discourse: the question is not whether law is violent or not, but from where, from which perspective it is inherently violent? Or, inversely, from which perspective it is fundamentally non-violent?

If Benjamin conceptually merged law and violence, he was able to do so only on a specific condition. He, first of all, had to not take the position of classical liberal political philosophy in which law is self-sufficient and actualises fully in relation to itself. The path leading to the conceptualisation of violence from the perspective of law would have brought him no further than to the paradigm caught between the limits we have been describing. Here the word 'violence' even seems redundant, since violence is to the greatest extent dissolved within legalist categories of ends and means as we have seen with Hannah Arendt's essay. It is thus of no coincidence that in legal discourse 'violence' becomes 'force': 'legitimate force', 'excessive force', etc. The terms 'legitimate violence' or 'excessive violence' are absent,[19] since, following our thesis, if violence is legitimate, it loses its character as violence, while it is excessive by nature, which is why the adjective 'excessive' is not needed ('excessive force' is what designates violence in terms of law). The farthest this path leads is therefore the conceptual limit of violence as an excess, specifically an excess of power. But more importantly than solely directing critique at this conceptual inability, we are, in what we believe to be the 'spirit' of

18 '[L]ike the outcome, the origin of every contract also points toward violence. It need not be directly present in it as lawmaking violence, but is represented in it insofar as the power that guarantees a legal contract is, in turn, of violent origin even if violence is not introduced into the contract itself.' (Benjamin 1996, 243-244).

19 The expression 'legitimate violence' is not absolutely absent, but we believe it is to be found predominantly in the most theoretical part of legal discourse which borders on other fields of social sciences and humanities.

Benjamin, attempting to reconnect this inability with its base, where it commences on the one hand with a dilution of violence by judicial power into 'legitimate use of force' (violence as means) and on the other with a particularisation of violence outside of the law, transforming it into criminal breaches by individuals – an unlimited series of particular crumbs of violence.[65] In the paradigm we are attempting to define violence is therefore spanned on a threshold between these two limits, a means and an excess, between which it inconspicuously oscillates from one to the other, hollowing out both its substance and its concept in this movement. Nevertheless, the only near (and not full) redundancy of the word and actual experienced violence tirelessly corrode this paradigm and beg for a different concept that would also acknowledge parts of its substance that are left out of it. The description of the paradigm already signals a potential for its supersession, but actually traversing it requires a ground.

THE PERSPECTIVE

We are going to attempt to construct this ground by seeking to describe the position or perspective from which Benjamin aims and constructs his critique. In doing so, we are going to direct our effort towards conceptual 'conditions of possibility' which can undoubtedly be traced to his theoretical references at that time (Georges Sorel), his intellectual background (Judaism), and environment (Gershom Scholem). However, the explication of all of these would demand more than we can afford here, while it is also already its own vast field of research. This is why we are going to follow with the most general observation, which we believe is conceptually decisive.

Benjamin begins his Kritik by examining the 'cracks' in the order of law which have the form of contradictions and paradoxes, specifically emphasising the cases of war and workers' strike as we have seen. Seemingly, if we follow the linear order of the text, it is these inconsistencies that lead him to violence immanent to law and modern institutions. But he does not actually move from law to violence; on the contrary, his Kritik presupposes violence in a way that it is violence which essentially characterises the position or perspective from which he directs his critique to the violence of law. In order to bind law and violence, he had to take the perspective of violence from the start, he had to position himself on the ground defined by violence and take a look at law from there. It is only from such a position that law is evidently violent in its essence. Even more, in this perspective, it is not violence that is the excess of law, but it is law

20 'Within the institutional forms of power, the internal ambiguity of the word *Gewalt* is tendentially disguised, so that law-making violence, to which the legal institution owes its existence, disappears behind law-preserving, administrative violence. From the perspective of the state that claims a legally sanctioned monopoly on violence, violence itself appears only as an external disturbance (revolution, insurrection, crime, unlawful behaviour).' (Khatib 2013, 96). If we connect this to our initial problem of the 'form of expulsion', we can say that it has two branches: particularisation, which means the relation between the law and its object; and 'projection', where a specific order of law is threatened by another (at least potential) order of law.

which is nothing but a particular formation, a 'solidification' of violence. Not violence in general, since from this perspective violence loses its homogenous character, but a particular kind of violence. The concepts of lawmaking and law-preserving violence depend on this. They are developed from the analysis of law, but they would be absolutely unfathomable if Benjamin would not entertain a presupposition of violence which is not only an exception or a deviation in relation to law, but a distinct autonomous phenomenon that is conceptually even prior to it. What are the reasons for this conviction? In order to defy the impoverished idea of violence in political philosophy, Benjamin had to position himself outside it, which meant he was confronted with an immense lack of conceptuality proper to the magnitude of the problem. Two reasons follow directly from this challenge: the use of theological discourse and the introduction of 'divine violence'. Before discussing these, we will first elaborate on the third reason that we have already touched upon – Benjamin's use of 'examples', specifically the police, in his argument.

As we have seen, it can be argued that the police is in its practice heterogeneous to law, but that, at the same time, it needs to refer to law in order to secure its own status of legality and/or legitimacy.[66] And it is in this act of referral that it summons the power of the Law beyond specific laws[21] of a specific state. This is because the need for referral is primary to particular laws among which the search for the appropriate one unfolds, but only as a secondary action. Structurally, this need presupposes the Law before it apprehends any of the actual laws, which is a mechanism tied with Benjamin's sphere of faith.

As the fundamental concept of Benjamin's political theology, the latter thus designates the distinction between a law and the Law, the Law being a necessary presupposition, a condition of possibility of a law.[67] In this sense, the act of referral positively produces Law (or at least participates in it[22] production, if there are other instances of production involved – and we would not be wrong to say there are). The paradox is that law and the police are interdependent and provide each other with necessary, even essential functions, but they do so without their respective procedures forming a unified circuit. They are like two different productions communicating on the level of exchange, by providing each other with their respective products and then using them as necessary means of production, but at the same time not knowing anything about

21 This does not mean that the activity of the police is illegal before it is legal. As a mixture of law-making and law-preserving violence, police holds a position just besides the law of which it is a necessary complement (it provides objects for the law which then decides upon legality or illegality of an act, the guilt or innocence of a subject). Even though the question of legality or illegality of the conduct of police is constantly brought up in public debates and not rarely also in courts, it does not mean that this distinction bears on the conceptual essence of the police. The accusations aimed at police conduct from the side of the public and the legal institutions rather affirm that it is not only an extension of the law, but an independent institution to which the law is only secondarily applied when there is enough public or other pressure. Also, in the context of law and violence as means, we are making no real distinction between legitimacy and legality, even though it can or should be argued in other contexts.

22 'Law' designates nothing but the operation of law.

each other as productions. This is how they are strangely tied to each other by the act of referral, mediated through the sphere of faith, where Law is produced as a shared entity between both. We are now able to better understand the paradoxical character of their relationship, which is both homogeneous and heterogeneous at the same time: it is homogeneous on the level of 'exchange', where a common and necessary imago of law is produced (what we are calling the Law); and it is heterogeneous on the level of production, where the production of police cannot be subsumed under law (or vice-versa).

Even though we are a step outside of Benjamin's conceptual milieu with this proposal, it does tie in with his basic premises. Since for him the police is a mixture of lawmaking violence and law-preserving violence, it necessarily refers to law, but at the same time it invents law where there is none, which makes it heterogeneous to law.[23] And, we are adding and emphasising, it is heterogeneous precisely as violence, as far as it is an institution centred around the violence it produces. It is for this reason that Benjamin is able to use police as a privileged example in his argument. On the level of heterogeneity law is utilised by police within its production circuit of violence, where it is, so to say, drowned in violence, just as violence is dissolved as a means in the production circuit of law.[24] This is not to deny the existence of violence proper only to law, but it does open up a dimension of necessary foreignness in relation to law, a production whose products are consumed by law, but a production that is not centred or defined by law. This holds important logical consequences for what we are searching for, i.e., what we called Benjamin's ‚position' or ‚perspective': heterogeneity or, what amounts to the same, autonomy of violence cannot be seen from anywhere, specifically it cannot be seen from inside of the discourse of law. What, then, is the position from which this distinction is obvious? Provisionally we can name this the position of violence: a perspective from which everything is regarded in terms of violence, just as everything

23 'The assertion that the ends of police violence are always identical or even connected to those of general law is entirely untrue. Rather, the 'law' of the police really marks the point at which the state, whether from impotence or because of the immanent connections within any legal system, can no longer guarantee through the legal system the empirical ends that it desires at any price to attain.'(Benjamin 1996, 243)

24 To go even further, we could pose that law is drowned in violence precisely as a supposed end that legitimises violence in the consciousnesses of the involved actors, meaning that law is drowned in violence in one and the same act as violence is dissolved by law, which would make these two procedures just the two directions of one and the same movement. They would be absolutely commensurable, and we would be able to express one in terms of the other in both directions. But there is an important difference, a dissymmetry at work here, since one takes place in the social field and the other in the stage of consciousness. In the case of the latter, there is nothing necessary about its phenomenality; law-enforcers acting as the perpetrators of violence need not subjectively imagine their actions as means to a lawful end, even if this is presumably the usual case. They can also imagine it as 'only doing their job' or any other way. What even more clearly betrays this lack of necessity between consciousness and the content of law as an end is the cynicism in relation to law that regularly accompanies the enforcing of it by the concrete enforcers. Finally, and most crucially, the incommensurability and distinction of the two procedures comes explicitly to light, when we actually take into account *all* the involved actors, meaning also the ones who are on the receiving end of police violence. For those, violence is nothing but violence since there is no sense in justifying their own pains and wounds with law. On the other hand, the inverse formula 'law as a means of violence' does make sense, if we acknowledge the primacy of violence over law (law as an additional stroke of violence).

is regarded in legal terms from the position of law. However, this does not mean that these two perspectives are formally homologous. This designation is rather nominal, it functions as a provisional thesis for opening a possibility of a theoretical leap. If our reasoning is valid, Benjamin's critique opens up this dimension of thought.

BENJAMIN AGAINST KANT

Kant's categorical imperative proclaims that one should 'act only according to that maxim whereby you can, at the same time, will that it should become a universal law.' (Kant 2011, 71). For Benjamin this is not possible at all, since it is not possible to tie human actions to ends, nor is it possible to tie them to other actions as examples that could be classified or generalised. In the words of a Benjamin scholar Sami Khatib: 'The reason for this is in the abstraction from the concrete historical situations that are, if we consider them generalizable, declared as an ahistorical precedent on the ground of which we are able to judge other, unique situations while disregarding their historical index. But according to Benjamin a specific action can only be tied to the universal (moral law or maxim) in the sense of orientation, and not inversely regarded as an example of use (and a posterior precedent) of a certain generality.' (Khatib 2013, 104).

Schematically speaking, Benjamin opposes the historical singularity of a situation (a singular case) to the generalization of law or norm (with its particular applications constituting examples), where in the case of the former these historically singular situations incapacitate all prospect of generalisability, whereas in the case of the latter the general form (the legal form) subsumes the concrete historical situations under its rule. In Groundwork of the Metaphysics of Morals, where he develops his categorical imperative, Kant distinguishes between the 'universality [Allgemeinheit] of the principle (universalitas)' and a 'mere general validity [Gemeingültigkeit] (generalitas).' (Kant 2011, 77). In his exposition of practical reason, they are not comparable in a moral sense, since only the categorical imperative as a formal rule ensures the ascent from a maxim to a universal practical law which is able to 'determine the will as will'. This determination should be independent of 'conditions that are pathological and therefore only contingently connected with the will.' (Kant 2015, 18). The will should be determined through form and not matter, since it is only form that ensures the universality of a law: 'Empirical determining grounds are not fit for any universal external legislation and are no more fit for internal lawgiving (…)' (Kant 2015, 25). Universality by form is thus reached by way of a separation of law from everything material, that is, from every possible empirical object of will. For Kant the empirical and the material hold the title of pathology. The moral law is modelled after the laws of nature and, specifically, their universality,[70] which in

25 '[T]he universal imperative of duty could also be expressed as follows: so act as if the maxim of

the context of the emerging natural sciences signifies the absence of an exception.[25] Kant allows for 'exceptions' as particular deviations from the moral law in actual conduct, but these are understood as empirical occurrences that do not taint the universality of the categorical imperative since they represent 'a resistance of inclination to the prescription of reason,' where the latter is nevertheless acknowledged in its validity (Kant 2011, 77).

Benjamin and Kant are in general agreement about empirical ends not being a matter of law (in contrast with Schmitt), but their reasons for this curious agreement are entirely divergent. Even though with his categorical imperative Kant attempts to build a bridge between pure reason (represented by law as pure form) and human action, he is explicit in his exposition that empirical ends are nevertheless not a matter of law as far as the practicality of pure reason is a theoretical possibility that is independent from a concrete material actualisation and stays grounded in the sphere of the transcendental form. But this does not preclude a non-empirical, formal, and transcendental end – a position held by the categorical imperative itself.

As we have seen, Benjamin on the other hand introduces an absolute conceptual separation of justified means and just ends, which in turn implies a separation of ends and law, as well as a rejection of the practicality of pure reason. This separation throws light on 'the ultimate insolubility [Unentscheidbarkeit] of all legal problems', (Benjamin 1996, 247, my emphasis)[71] which we can regard as a key characteristic of law for Benjamin (an idea he shares with Schmitt).[26] If for Kant pure reason is practical and he attempts to prove this by developing the moral law in its pure form, modelling it after natural laws, their universality and their objectivity, and thus surpassing maxims as subjective principles that in human action usually determine the ground of the will (Kant 2015, 18).

Benjamin severs this bond between pure reason and its practical ability, implicitly suggesting with his 'ultimate insolubility [Unentscheidbarkeit] of all legal problems' that law is absolutely detached from human action and rather closed in on itself if we conceive of it as the highest expression of reason. In order for this separation to exist, and for law to nevertheless hold a privileged position in relation to the sphere of human action – privileged to the extent that it seems as if it determines it or is at least able to determine it – it depends on a third element, an independent element not thought by Kant – violence – which replaces reason as the ultimate point of reference – to reiterate Benjamin's central statement: 'For it is never reason that decides on the justification of means and the justness of ends: fate-imposed violence decides on the former, and God on the latter.' (Benjamin 1996, 247, my em-

your actions were to become by your will a UNIVERSAL LAW OF NATURE.' (Kant 2011, 71).'

26 'Unentscheidbarkeit' could also be translated as 'undecidability' or 'indecision'.

phasis). If Benjamin makes Kantian reason redundant in relation to the sphere of human action and to the functioning of law, he nevertheless retains the function of decision. In Kant‘s view, decision would fall into the category of the exception, even the category of a tainted empirical, whereas with Benjamin it is exactly this ‘exception’ that everything depends on. This is also the point from which it would be erroneous to continue without Schmit, his proximity to Benjamin, and more so their differences.

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