A Living Constituent Power and Law as a Guideline in Walter Benjamin's "Critique of Violence"

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1. Introduction

Walter Benjamin's 1921 essay "Critique of Violence" (CV) [*Zur Kritik der Gewalt* (KG)] constitutes an inexhaustible source for reflections on violence and its relationship to law, politics and ethics. "The essay," as Richard Bernstein (2013, p. 48) has put it, "has virtually taken on a life (and an afterlife) of its own – and provoked radically diverse, conflicting interpretations and evaluations." In its elusiveness, the essay is as fascinating as it is complex. It invokes contentious issues only to abandon them as suddenly as they appear in the text. However, the problematic relationship between the origin and power to make law (lawmaking violence/*rechtsetzende Gewalt*) and the violence necessary to enforce and sustain it (law-preserving violence/*Rechtserhaltende Gewalt*) is examined carefully throughout the essay.

Benjamin's distinction between lawmaking and law-preserving violence corresponds to the distinction between the twin concepts of the constituent and constituted power; concepts which are central to the modern constitutional theory of the state. Explicitly or implicitly invoked in a number of modern constitutions, the constituent power designates, in short, the creative power to set in place a legal and political order from scratch. The authority of that order in its entirety rests on it (see Loughlin, 2003, ch. 6). The constituent power is illimitable in the sense that it recognizes no legal constraints on its capacity to define the constitutional order and its powers. The constituted power, in turn, refers to the powers thus created. While exercising governmental powers, such powers (executive, legislative, judicial) are, in principle, not empowered to create or modify the constitution and the nature of the powers they have been granted. They derive their authority from the constituent power and can therefore only act in accordance with existing expressions of its will. As such, they are limited powers.

This clear conceptual, institutional and even temporal separation, however, is difficult to sustain in theory as well as in practice and Benjamin's essay is powerful exposition of this difficulty (see also Loughlin and Walker, 2008, p. 6-7; Agamben, 2005, p. 54). To Benjamin, the emancipatory potential of the constituent power is tainted by its inescapable relation to the oppressive violence necessary to sustain the constituted order. Benjamin thus seeks to identify a different kind of power which is able to transcend the dialectic. The question is whether this attempt can speak to the concept of the constituent power and its jurisgenerative dimension beyond an outright rejection.

In so far as it is accepted that the essay can indeed speak to something central concerning the constituent power, two positions can be discerned. On the one hand, we might accept Benjamin's rejection of constituent power and move towards a conception of politics that is in keeping with this. Agamben, the most prominent representative of this approach, develops both a critique of the juridico-political paradigm of sovereignty (1998, 2005) as well as an attempt to conceive of a way of transcending the violence of law based in significant part on his reading of the essay (Agamen, 1999, 2005; on this see Larsen, 2016). More recently, Agamben has stressed the need to "conceive of something as a *puissance destituante,* a purely "destituent power"" as an alternative to the paradigm of constituent power (2016, p. 28).[1] On the other hand, we might take Benjamin's critique as a starting point from which to develop an alternative conception of constituent power. In an attempt to develop an understanding of human rights "more at home on the riotous streets than between the hallowed walls of supreme courts or in the leather-bound chairs of power," Illan rua Wall (2012, p. 8) bases his "turn away from politico-legal terminology" (Wall, 2012, p. 60) partially on a reading of the essay. While Wall claims that Benjamin's "project fails utterly" and that the notion of "divine violence is beyond use" (Wall, 2012, p. 75), the central task of divorcing the constituent power from pre-figured notions of authority and human rights expressed in the juridical language of the state is accomplished. Benjamin's critique thereby contributes to paving the way for a different and more open and indeterminate constituent power.

In this article, I accept Benjamin's critique on its own terms. However, by shifting the emphasis from 'constituent' to 'power/violence' [*Gewalt*][2] what emerges, I argue, is not a

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[1] 'Destituent power' is derived from Benjamin's "Entsetzung des Rechts samt den Gewalten" (KG, p. 64), where Agamben (2014, p. 70) translates *Entsetzung* as 'destitution.' *Entsetzung* (literally: 'off-setting') might also be translated as 'shocking' or 'displacing.'

[2] *Gewalt* is notoriously difficult to translate, since its meaning in German is not singular. Hanssen (2002, p. 3) thus uses the somewhat awkward 'power/violence' to capture its meaning more adequately. While *Gewalt* can refer to physical violence, this, as Derrida (1990, p. 927) notes, is already an interpretation since it also means

rejection of constituent power *per se* but of a particular conception of it and the law it produces: power as command and law as an imperative. Benjamin does reject the circular dialectic between constituent and constituted power, which collapses into what Benjamin calls 'mythical violence.' With 'divine violence,' the antithesis of mythical violence, Benjamin a different conception of power which is at once destructive and creative. In that sense, Benjamin's destruction of the dialectic is exactly that: it aims at the *dialectic* in order to salvage the potentiality of a power purified of the imperative nature of law and suppressive *power over*. Divine violence thereby appears as people's living *power to* violate and overcome legal subjectivations and entrenched relations of domination.[3] It is the power of the general strike, as Benjamin notes, but it may also be the power to refuse giving up one's seat on the bus, thereby 'shocking' established authorities and displacing the meaning of the legal order. Immanent to this destruction is the creation of new ways of living, of new shared worlds. These are, however, not left entirely anomic, as Agamben (2005, p. 54, 2016, p. 28) appears to suggest. What is constituted, I argue, is a form of law, not as command but as a guideline for action [*Richtschnur des Handelns*].

Benjamin, however, ties this power and the guideline to the pre-constituted, transcendent moral compass of God's commandment. But if Benjamin's essay is to be relevant to contemporary conceptions of power, politics and law, this premise needs to be violated somewhat; its basis in something pre-ordained and external to the human realm must be abandoned. I seek to 'correct' this element of Benjamin's thinking through fusing it with Hannah Arendt's understanding of law and the constitutional order as being based on the principles immanent to the collective act of beginning something together. 'Law' thereby appears as a system of directives rather than imperatives, whose validity rests on the values and opinions of the community.

"legitimate power, authority, public force." It is used in reference to a variety of (political) phenomena such as legislative power (*gesetzgebende Gewalt*), the separation of powers (*Gewaltenteilung*), state power (*Staatsgewalt*), and, of course, constituent power (*konstituirenden* or *verfassungsgebende Gewalt*). This is also reflected in the English translation of the essay which mostly renders *Gewalt* as violence but sometimes as 'force' or 'power.' Adding to the confusion is that the term *Macht,* which might also be rendered as either 'force' or 'power,' is also translated as 'power' (compare CV, p. 295 and KG, p. 57). Finally, *Recht,* which is translated as 'law,' carries, like the Latin *ius* and French *droit*, broader connotations which invoke a comprehensive legal system of statutes, rights, duties, and norms. These additional meanings and connotations associated with the key terms of the essay are to some extent lost in translation but are important for a reading of Benjamin's essay and thus this article. I have used 'power,' 'violence' or 'force' depending on the context and provided the original German formulation when relevant.

[3] In distinguishing between 'power over' and 'power to' I follow Martin Loughlin (2003) and Andreas Kalyvas (2016).

2. Constituent power as juridical violence

One of the central distinctions that Benjamin develops and destructs in "Critique" is that between lawmaking and law-preserving violence [*rechtsetzende* and *rechterhaltende Gewalt*]. This distinction corresponds to that between constituent power and constituted powers [*konstituierenden Gewalt* and *konstituierten Gewalten*] found in Carl Schmitt's *Dictatorship* (D) of the same year. Agamben even goes so far as to claim that Schmitt, in *Political Theology*, "abandons the distinction between constituent and constituted power … and replaces it with the concept of decision … as a countermove in response to Benjamin's critique" (Agamben, 2005, p. 54; see also Wall, 2012, p. 66).[4] While it is unlikely that Benjamin had read *Dictatorship* before publishing the "Critique"[5] and it is not clear whether he had the notion of constituent power in mind, there is a substantial thematic overlap between the two texts. To present Benjamin's critique of constituent power, Schmitt's early conception of it can serve as a fruitful starting point.

Schmitt introduces constituent power, *pouvoir constituant,* in the context of his distinction between commissary and sovereign dictatorship. In short, whereas the former is an emergency commission to act on behalf of constituted powers, the latter acts in the name of the constituent power. Commissary dictatorship "suspends the constitution in order to protect it – the very same one – in its concrete form" against existential threats (D, p. 118). The commissary dictatorship is thus a law-preserving violence, acting on the concrete situation in order to protect the legal status quo. Because its task is to protect the order, however, it is bound to it and it has no creative, lawmaking freedom. It may suspend the law but not change it.

Sovereign dictatorship, on the other hand, "does not appeal to an existing constitution, but to one that is still to come." Its task is to bring about, by whatever means necessary, the "conditions in which a constitution – a constitution that it regards as the true one – is made possible." It is therefore not a "sheer power question [*eine bloße Machtfrage*]" that "evades all legal considerations" since "the power [*Gewalt*] assumed is … foundational to" the constituted order in becoming. "This," according to Schmitt, "is the meaning of *pouvoir constituant*" (D, p. 119). The constituent power is thereby defined by its product, but it cannot be fully captured and limited by any existing constitution. This power, in Benjaminian terms, is thus lawmaking; it is defined by its end: the creation of a new legal order. However, "[a]ny enforcement or any

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[4] Schmitt, however, revisits the concept in some of his later works, most notably in the 1928 *Constitutional Theory* (2008, p. 125).

[5] By 1930 he had read it and admired it (Weber, 1992).

legal form, any commitment of any kind, is completely unthinkable … As bearer of the constituent power, the people cannot commit itself and is entitled to give itself an arbitrary constitution at any time" (D, p. 121).

The constituent power is thus an illimitable *juridical* force, which is both creative and destructive:

> The people, the nation, the primordial force [*Urkraft*] of any state, always constitutes new organs. From the infinite, incomprehensible abyss of the force [*Macht*] of the *pouvoir constituant,* new forms emerge incessantly, which it can destroy at any time and in which its power [*Macht*] is never limited for good. It can will arbitrarily. The content of the willing has always the same legal value like the content of a constitutional definition … It becomes the unlimited and illimitable bearer of the *iura dominationis ...* It never constitutes itself, but always something or someone else [*einen Anderen*] (D, p. 123, translation modified based on Schmitt, 1928, pp. 142-3).

This points to the kind of power that Benjamin seeks to salvage from the dialectic of constituent and constituted power. Benjamin will, however, seek to turn this violence against the very notion of *iura dominationis,* 'the rights/prerogatives of domination/rulership' (see also Butler, 2012). To Schmitt, the power that does not desire to manifest itself in the constitution of a new system of domination that it finds more just and legitimate, cannot enter into juridical language. Its existence is, as such, outside of and even radically opposed to the legal-rational realm of the state. This, however, is precisely the aim of Benjamin's "Critique" (Agamben, 2005, p. 53). In order to capture the urgency of this task, it is necessary to examine Benjamin's conception of the relationship between violence and law.

3. Violence without law

On his path to destructing the dialectic, Benjamin situates his discussion in relation to "contemporary European conditions" (CV, p. 280). "Characteristic of these," Benjamin claims, is that "the individual legal subject" is denied "the natural ends … in all those cases in which such ends could … be usefully pursued by violence" (CV, p. 280). At first glance, this might not appear particularly repressive. What it points to, however, is that

> the law's interest in a monopoly of violence vis-à-vis individuals is not explained by the intention of preserving legal ends but, rather, by that of preserving the law itself; that violence, when not in the hands of the law itself, threatens it not by the ends that it might pursue but by its mere existence outside the law (CV, p. 281).

It is thus not the values embodied in the legal order that need protection but order as such. The figure of the 'great criminal,' who elicits the "secret admiration of the public" (CV, p. 281),

points to why such violence outside the control of the law is problematic: "In the great criminal this violence confronts the law with the threat of declaring a new law … The state … fears this violence simply for its lawmaking character" (CV, p. 283). The state fears it, as it were, because it manifests the possibility of rival sources of law and command, rival claims to sovereignty.

Benjamin links this to a discussion of the right to strike; that is, a situation not in conflict with the law, not 'illegal.' This right attests to organized labor being, "apart from the state, probably the only legal subject entitled to exercise violence" (CV, p. 281). However, from the state's perspective, this right is limited to protests against unreasonable working conditions. From the state's perspective, the general strike violates this right since "the specific reasons for strike admitted by legislation cannot be prevalent in every workshop" (CV, p. 282). As such, the state retains for itself the prerogative to "take emergency measures" (commission a dictatorship?) and suspend the specific right to strike to protect the broader legal order, thereby meeting "the strikers, as perpetrators of violence, with violence" (CV, p. 282).

However, if the end of the strike is to secure certain concessions from employers or even to take control of state power, it is political and "the state will lose none of its strength" (Sorel as cited in CV, p. 291). On the other hand, retaining Sorel's distinction between the political and the proletarian general strike, Benjamin argues that the latter "sets itself the sole task of destroying state power" (CV, p. 291). With the general strike, furthermore, Benjamin presents an image of the power or violence he seeks to identify:

> While the first form of interruption of work is violent [*Gewalt ist*] since it causes only an external modification of labor conditions, the second, as a pure means, is nonviolent [*gewaltlos*]. For it takes place not in readiness to resume work following external concessions … but in the determination to resume only a wholly transformed work, no longer enforced by the state, an upheaval that this kind of strike not so much causes but consummates (CV, p. 291-2)

The problem of the character of the 'wholly transformed work' was, for Sorel (1999, p. 238), "the most difficult of all those which a socialist writer can touch upon." The question is how it is possible to conceptualize, let alone practice, "workshops where there are no masters" (Sorel, 1999, p. 238). Economic democracy, for Sorel as, one suspects, for Benjamin, is not adequate to the task, as democratic decisions would have to be policed in the same manner as the capitalist's commands. The democratic model is thus not able to break with the legal violence that enforces discipline as an "exterior constraint" (Sorel, 1999, p. 239). The individual worker is still coerced by law, embodied in other human beings, e.g. the police, whose ends, however, are not their own but those of the law. In this relationship, it is not only

the worker's 'natural ends' that are violated but also the police officer's: she is not acting of her own will, but in the role assigned to her by law.

To overcome this, Sorel takes his cue from the 'wars of Liberty.' What was remarkable about these was that "each soldier considered himself as an *individual* having something of importance to do in the battle" (Sorel, 1999, p. 240, emphasis in original). Rather than being a pawn in a game of higher forces, each soldier considered it his battle. The 'natural ends' of each individual, in Benjaminian terms, coincided perfectly with the collective ends of the revolutionary movement. In place of enforced military discipline, the soldiers saw themselves involved in a heroic battle of Homeric proportions, where each "soldier was convinced that the slightest failure of the most lowly soldier might compromise the success of the whole" (Sorel, 1999, pp. 241-2). In the class struggle, the general strike "is the most striking manifestation of *individualistic force in the rebellious masses*" (Sorel, 1999, p. 243, emphasis in original). What it promises to constitute, however, is not a new legal order but the workers' freedom to pursue work as an end in itself. In Sorel, Benjamin thus finds a conception of revolutionary violence that refrains from introducing any "kind of program, of utopia – in a word, of lawmaking" (CV, p. 292). The creative forces, the 'infinite wills' of people (Sorel, 1999, p. 244) are not harnessed for ends other than their own.

4. From lawmaking to power-making

One of the crucial difficulties associated with Benjamin's conception of law and violence is that it seems unable to address the question of how this freedom of natural ends can be sustained beyond the revolutionary moment. If lawmaking were introduced in order to secure the institutional foundations for exercising this freedom, it would simultaneously introduce the need for law-preserving violence. If this constituting moment is considered a realization of political freedom, then a violence that protects a legal order entered into freely might appear unproblematic. For Benjamin, however, the nature of law-preserving violence makes this unsustainable. Bringing together Sorel's heroism and Schmitt's depiction of the constituent power, Benjamin notes that "being primordial and paradigmatic of all violence used for natural ends, there is inherent in all [military] violence a lawmaking character" (CV, p. 283). However, "a duality in the function of violence is characteristic of militarism" (CV, p. 284). Its violence is not limited to its "simple application for natural ends" but is intimately linked to the "use of violence as a means of legal ends" (CV, p. 284). Benjamin, then, argues that the new legal

order can only be effective if it conscribes citizens to preserve it subsequently. As such, the individuals freely constituting it in accordance with their respective natural ends are re-inscribed in it as means for legal ends. The law ossifies and the now constituted subjects alienate the creative freedom exercised in the founding moment and become subjects of legal regulation.

In moving between military violence, the strike and the 'great criminal,' Benjamin seems to identify a potentiality in these forms of violence that nevertheless evaporates just as it manifests itself. The potentiality consists in the challenge they pose to the existing order but in so far as they are lawmaking they constitute the necessity for law-preserving violence. From this, Benjamin moves to the general point that "the origin of every contract … points towards violence. It need not be present in it as lawmaking violence, but is represented in it insofar as the power [*Macht*] that guarantees a legal contract is in turn of violent origin even if violence is not introduced into the contract itself" (CV, p. 288). While perhaps not explicitly manifest at the moment of the (social) contract, violence is the guarantor of its validity: "When the consciousness of the latent presence of violence in a legal institution disappears, the institution falls into decay" (CV, p. 288). Referring to the constituted power of parliaments, Benjamin claims that "[t]hey offer the familiar, woeful spectacle because they have not remained conscious of the revolutionary forces to which they owe their existence … They lack the sense that a lawmaking violence is represented by themselves" (CV, p. 288). Benjamin thus appears to suggest a 'solution' to the problem of the Weimar parliament at the time: integrate the constituted, legislative power [*gesetzgebende Gewalt*] of parliament with the more foundational constituent power to make it a permanent feature of political life. However, while "a flourishing parliament might be [desirable and gratifying] by comparison" (CV, pp. 288-9), Benjamin dismisses even this for its necessary link, both in origin and outcome, to violence.

Violence is thus not only present in the legal order as a violence that seeks to preserve it from attack. In the creative process of lawmaking the essential workings of violence are evident:

> the function of violence in lawmaking is twofold, in the sense that lawmaking pursues as its end, with violence as its means, *what* is to be established as law, but at the moment of instatement does not dismiss violence; rather, at this very moment of lawmaking, it specifically establishes as law not an end unalloyed by violence, but one necessarily and intimately bound to it, under the title of power. Lawmaking is power making, and, to that extent, an immediate manifestation of violence (CV, p. 295, emphasis in original).

Lawmaking is thus not only, like sovereign dictatorship, violent in its destruction of pre-exiting law. The law itself, however voluntarily entered into, can only be maintained through its implicit or explicit appeal to the threat of (blood-shedding) violence. Law (*Recht*), power (*Macht*), and violence (*Gewalt*) are thus in Benjamin's understanding intricately linked to the establishment of something, the act of fabricating and fixing in a definitive form the law governing the human community.

The collapse of lawmaking and law-preserving violence that this points to is most evident in police violence, a "spectral mixture," 'emancipated' from the dialectic (CV, p. 286). Far from pursuing only existing legal ends it has discretion to "intervene "for security reasons" in countless cases where no clear legal situation exists" (CV, p. 287). It accompanies citizens by regulating and supervising their lives through ordinances that have the force of law and yet no specified legal content (see also Agamben, 2005). In a passage strikingly reminiscent of both Schmitt's decisionism in the not yet published *Political Theology* as well as the constituent power in *Dictatorship*, Benjamin claims that while law "acknowledges in the "decision" … 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*" (CV, p. 287, emphasis added). In its "ghostly presence in the life of civilized states" (CV, p. 287), it represents not the law but power. In so doing, however, it reveals law's essence: the manifestation of the power of some over others.

5. Mythical violence as domination

The destruction of the dialectic brings Benjamin to the account of mythical violence, which "in its archetypical form is a mere manifestation of the gods. Not a means to their ends, scarcely a manifestation of their will, but first of all a manifestation of their existence" (CV, p. 294). The myth of Niobe illustrates this. Niobe's 'crime' was to boast about her progenitive superiority over Leto, the mother of Apollo and Artemis. This "calls down fate upon itself not because her arrogance offends against the law but because it challenges fate – to a fight in which fate must triumph, and can bring to light a law only in its triumph" (CV, p. 294). Apollo and Artemis' killing of Niobe's children thus "establishes a law far more than it punishes for the infringement of one already existing" (CV, p. 294). From this violence Benjamin derives the origin of law from the simple relation of domination (*Herrschaft*) of gods over humans. Niobe's crime was to challenge the 'self-evident' privilege and superiority of the gods. This violation of fate, the

mere act of attempting to transcend the barrier between the high and the low, necessitates the instatement of law, which institutionalizes the violence inherent in the relationship of domination to begin with. It necessitates setting down the law in order to state an example, *ein Exempel statuieren*.

But the killing itself would be too fragile, too transient. It would amount to a mere manifestation of anger and as such, perhaps, it would be all too human (CV, p. 294). The lawmaking character of the killing consists, rather, in that it spares the life of Niobe herself. The act of instating the law comes, then, not from the bloody violence as such, but from making Niobe's mourning and guilt permanent. She is left behind "both as an eternally mute bearer of guilt [*Träger der Schuld*] and as a boundary stone [*Markstein*] on the frontier [*Grenze*] between men and gods" (CV, p. 295). Her arrogance overstepped this boundary separating the rulers and ruled; it challenged the gods' *iura dominationis*. As a statue, a statute of the gods, she is condemned forever to serve as a reminder of the law governing the fate of – that which has been spoken and allotted for – the oppressed.

A practical application of this principle is, according to Benjamin,

> to be found in constitutional law [*Staatsrecht*]. For in this sphere the establishing of frontiers ... is the primal phenomenon of all lawmaking violence. Here we see most clearly that power ... is what is guaranteed by all lawmaking violence. Where frontiers [*Grenzen*] are decided the adversary is not simply annihilated; indeed, he is accorded rights even when the victor's superiority in power is complete (CV, p. 295).

The frontier in this passage cannot be only a territorial border. If that were so, the last sentence would be meaningless. The frontiers must also be those within the body politic. These boundaries are "in a demonically ambiguous way, "equal" rights: for both contracting parties [*Vertragschließenden*] it is the same line that may not be crossed" (CV, pp. 295-6, translation modified). Referring to Anatole France' famous dictum, the limits of the permissible are the same for everyone but the formal equality of the law is (intentionally?) blind to the real inequality and suffering that the limits reproduce. The law as a protection of the "citizenry from themselves and outsiders" (Breen, 2012, p. 22) is a protection not of citizens as such but of power relations within the citizenry as well as a way of governing its exclusions. Sorel is invoked again but this time for touching upon "a metaphysical truth in surmising that in the beginning all right was the prerogative/privilege [*in den Anfängen alles Recht* Vor*recht der…*] the kings or the nobles – in short, of the mighty; and that, *mutatis mutandis,* it will remain so as long as it exists" (CV, p. 296, translation modified). This passage is aimed at capitalism as a system of material and spiritual expropriation protected by property rights and the political institutions that protect it. In its relation to fate – the inescapability of one's position in the

hierarchy of privilege – this conception of law, however, also takes on a significance for the critique of constituent power, particularly that espoused by Schmitt in relation to sovereign dictatorship. Even when a new constitutional order promises emancipation, the very nature of law means that its "historical function" is to bring about new orders of domination, "the destruction of which thus becomes obligatory" (CV, pp. 296-7).

This notion of power is specifically *power over*. It is the power of privilege over disadvantage. Correspondingly, it is an understanding of law as command, an imperative backed by the threat of violent sanctions that compels the oppressed to obey. The constitution of a legal order thus at the same time institutes relations of domination; a legal system where, ultimately, the power over life and death is the structuring condition. In Benjamin's understanding, constituent power manifests itself in mythical violence the moment it constitutes something; the moment it seeks to construct permanent foundations, the moment it lays down the cornerstone, the boundary stone, of the legal structure. Following Schmitt, in order for a *Gewalt* to be constituent, it must result in a constitution. The product reflects back on the process and defines it in its own terms. The means-ends logic of constituent power thus limits, abrogates, the radically emancipatory potential of a *Gewalt* purified of its product, law. What must be rejected, according to Benjamin, is a conception of *Gewalt* that insists on its evaluation in terms of the legitimacy bestowed retroactively by the newly constituted powers, the new oppressors, who now hold the monopoly on truth and justification.

6. Divine violence: creation through destruction

'To constitute' is constructed from *con-*, derived from *cum*, and *statuere* or *statuo. Con-,* of course, means 'with' or 'together.' As such, the prefix indicates that *one* never constitutes. The constituting subject is always in the plural. *Statuere/statuo,* in turn, is the act of making something stand, of erecting, establishing and/or fixing something, and shares roots with the words statue, statute, and, state. Literally, 'to constitute' therefore "denotes the act of *founding together, founding in concert,* or *creating jointly*" (Kalyvas, 2005, p. 235, emphasis in original; see also Valpy 1828: 111, 444 and Lewis & Short 1879), it is the act of making something stand together with others. 'To institute,' on the other hand, does not require a plurality as it means simply 'to establish,' 'to make something stand.' It is precisely this act of making something stand, whether in its singular or plural form, that Benjamin characterizes as mythical violence. The "Critique," then, can be read as a powerful rejection of the very notion of a

constituent power seeking to erect structures of permanence because this inescapably introduces relations of domination.

However, with divine violence, Benjamin nevertheless introduces a peculiar sort of power/violence. It is destructive but in destroying it at the same time provides the foundations for a new beginning. This duality is captured by two characters found in some of Benjamin's later writings: the barbarian and the destructive character[6]:

> Barbarism? Yes, indeed. We say this in order to introduce a new, positive concept of barbarism. For what does poverty of experience do for the barbarian? It forces him to start from scratch; to make a new start … to begin with little and build up further, looking neither left nor right (Benjamin, 1999, p. 732).

> The destructive character sees nothing permanent. But for this very reason he sees ways everywhere … But because he sees a way everywhere, he has to clear things from it everywhere. Not always by brute force; sometimes by the most refined. Because he sees ways everywhere, he always stands at a crossroads. No moment can know what the next will bring. What exists he reduces to rubble – not for the sake of the rubble, but for that of the way leading through it (Benjamin, 1978, p. 302-3).

The former passage contains the element of new beginnings so central to the constituent power. In the latter, the focus is on destruction, not for the sake of destruction, however, but for "the way leading through it." It is a continuous violation and questioning, violent or not, of that which stands. The statutes of law, the Niobe statues marking the boundaries between high and low, are constantly reduced to rubble.

The barbarian and the destructive character represent the continuous dialectic between creative and destructive force. The barbarian is the beginner, the creator, who constantly seeks to make something from nothing. The barbarian is free of the prejudice and self-discipline that comes with experience because the world of yesterday has lost its meaning. The destructor, on the other hand, tears down what has been constructed. But immanent to the destruction is a process of constant renewal and inherent to the act of destroying is the act of making room, of creating "fresh air and open space" (Benjamin, 1978, p. 301). This creative dimension of destruction is central to the notion of divine violence. The annihilating violence of divine violence is never only destructive. Immanent to the destruction is the creation of something

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[6] These characters are presented, respectively, in "Experience and Poverty" from 1933 and "The Destructive Character" from 1931. In discussing the potentials for overcoming and moving beyond Empire, Hardt and Negri (2000, p. 215) combine these two characters in the figure of 'the new barbarians' who "destroy with an affirmative violence and trace new paths of life through their own material existence." A discussion of the relation between Benjamin's text and Negri and Hardt's conception of constituent power and counter-empire is regrettably outside the scope of this article.

new, a new beginning. Divine violence, however, is creativity itself and bears no relation to that which is created.

In developing this alternative to mythical violence, Benjamin returns to Sorel's revolutionary general strike. Destroying state power, the general strike at the same time "nullifies all the ideological consequences of every possible social policy; its partisans see even the most popular reforms as bourgeois" (Sorel as cited in CV, p. 291). This pure, non-violent means (Butler, 2006, 2012; Critchley, 2012) is without programme and as such it is not lawmaking but simply consummating, making the full realization of something that was already there possible by purifying it of law. This description of the revolutionary general strike is strikingly similar to the depiction of divine violence:

> If mythical violence is lawmaking, divine violence is law-destroying; if the former sets boundaries, the latter boundlessly destroys them; if mythical violence brings at once guilt [*verschuldend*] and retribution [*sühnend*], divine power only expiates [*entsühnend*]; if the former threatens, the latter strikes; if the former is bloody, the latter is lethal without spilling blood (CV, p. 297).

As in "The Destructive Character" the emphasis is on the inherent creativity of destruction, but not in the sense that it constructs something. Rather, it releases, it "purifies the guilty, not of guilt, however, but of law" (CV, p. 297). In doing so, it creates the conditions for a life free of guilt, a life free of the institutionalized means of oppression: "Mythical violence is bloody power [*Blutgewalt*] over mere life (*bloße Leben*) for its own sake, divine violence pure power [*Gewalt*] over all life for the sake of the living" (CV, p. 297). The atonement [*Sühne*] demanded by mythical violence is for its own sake. It demands the acknowledgement of the right of the oppressors as justified, an acknowledgement of the debt owed to the oppressors. Divine violence, in contrast, absolves [*entsühnend*].[7] Like the ancient Jewish Jubilee that cancelled all debts, it demands no act of recognition of guilt, no repayment, it strikes directly at the guilt [*Schuld*] itself and leaves the person free from enforced and historically entrenched forms of subordination and subjectivation. As Judith Butler (2006, p. 203, emphasis in original) puts it:

> Divine violence is unleashed against the *coercive force* of [the] legal framework, against the accountability that binds a subject to a specific legal system and stops that very subject from developing a critical, if not a revolutionary point of view on that legal system.

As such, "[d]ivine violence does not strike at the body or the organic life of the individual, but at the subject who is formed by law" (Butler, 2006, p. 211).

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[7] See Weber (2012, p. 16) for a discussion of the difference between *sühnend* and *entsühnend* in "Critique."

Divine violence, however, does not only strike at the guilt of the living, "innocent and unhappy" (CV, p. 297). Against the myth of Niobe, Benjamin places

> God's judgement on the company of Korah. It strikes privileged [*Bevorrechtete*] Levites, strikes them without warning, without threat, and does not stop short of annihilation. But in annihilating it also expiates [*entsühnend*], and a deep connection between the lack of bloodshed and the expiatory character of this violence is unmistakable. For blood is the symbol of mere life (CV, p. 297).

Underlining the revolutionary character of the notion, the 'mighty' – on whose prerogative and privilege all law [*Recht*] was founded – are annihilated. The fact that it, like the general strike, is bloodless, however, stresses that it is not the 'mere life' of the privileged that is threatened but their status in the hierarchy of power. In the wake of the destructive character of divine violence, the barbarian can thereby emerge. Negating the 'tradition that weighs like a nightmare on the brains of the living,' the creative power of life is set free 'to make its own history.' Through the annihilation of power hierarchies and subjectivities formed by law and protected by state power, "a new historical epoch is *founded*" (CV, p. 300, emphasis added).

In this, there is a clear parallel to the "Theses on the Philosophy of History": History is the story of the victors, the oppressors, and the state of emergency which empowers the ruling class – whether capitalist or otherwise – against the wider population is "not the exception but the rule" (Benjamin, 2006, Thesis VIII). Benjamin, then, calls for "a conception of history that is in keeping with this insight. Then we shall clearly realize that it is our task to bring about a real state of emergency." This "*weak* Messianic power" that "every generation" is "endowed with" (Benjamin, 2006, Thesis II, emphasis in original) is closely linked to the conception of divine violence and the departure from law in its imperative form. The founding of a new historical epoch, made possible by the weak Messianic power of new generations which bring about a state of emergency that signals the end of the state and the domination of law [*die Herrschaft des Rechts*]. In doing to, it introduces the question of a collective, generational agency having a force-of-constituent power that never petrifies, that never sets itself in stone.

7. The guidelines and the living constituent power

A constituent power that never constitutes faces a challenge that is not easily overcome: what makes people able to live together and refrain from establishing new forms of oppression without some kind of institution, some kind of guardian, to enforce (dis)order? Even if one adopts a naïve anthropology that claims that people are inherently good and merely corrupted

by society the challenge of how to hinder people from entering society, once society has been annihilated, still remains. Even for Benjamin, who, following Marx, sees the destruction of the *ancien régime* as the beginning of a new, radically different historical epoch, this question imposes itself: "The premise of such an extension of pure or divine power [*Gewalt*] is sure to provoke, particularly today, the most violent reactions, and to be countered by the argument that taken to its logical conclusion it confers on men even lethal power [*Gewalt*] against one another" (CV, p. 298). Benjamin responds by invoking the sixth commandment: "Thou shalt not kill." For Benjamin, however, this commandment "exists not as a criterion of judgement, but as a guideline for the actions for the acting person or community [*sondern als Richtschnur des Handelns für die handelnde Person oder Gemeinschaft*] who have to wrestle with it in solitude, and, in exceptional cases, to take on themselves the responsibility of ignoring it" (CV, p. 298, translation modified based on KG 61).

Richtschnur[8] refers to a 'mason's line,' that piece of string used to demarcate where to place the foundations when building a structure. The line is used in order to ensure that the building materials are placed in a straight line. Depending on the ground underneath the desired structure, the line can and sometimes must be violated in order to make the foundations more stable. It is, perhaps, this function of the *Richtschnur* that Benjamin is alluding to. In that case the commandment is to serve not as the foundation but as that which demarcates how the foundation is to be set. But Benjamin refuses to set the foundation 'in stone' and the foundation of his new historical epoch is never made permanent. Instead a more fragile building material is employed: the actions of the acting person and community. The individual acts of *responsible* (Butler, 2012; Critchley, 2012) persons and communities are, in other words, the building blocks from which the new society, the new historical epoch, will emerge. Stripped of "law-preserving, administrative violence [*verwaltete Gewalt*]," such actions are pure, unmediated: "Divine violence, which is the sign and seal but never the means of sacred execution, may be called sovereign violence [*mag die waltende heißen*]" (CV, p. 300, KG, p. 64).

While *waltende* is translated as 'sovereign violence,' the verb *walten,* from which both *Gewalt, waltende* and *verwaltete* are derived, can be translated as 'to govern,' 'to rule,' or even 'to reign.' The contrast between mythical and divine violence is thereby placed in relation to

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[8] See also Critchley (2012, p. 218), who translates *Richtschnur* as 'plumb line' or 'thumb-line.' However, since plumb lines have a plummet at the end they rely on the laws of nature for their usefulness. In contrast, mason's lines derive their validity and usefulness solely from the people who place them. What 'thumb-line' refers to outside Critchley's text is unclear but Critchley likens the guideline to a "rule of thumb" and the neologism, accordingly, seeks to capture a kind of common sense approximation of the appropriate course of action rather than "absolute, categorical law."

the difference between governing and administrating: mythical violence is administered [*verwaltete*], invoking a form of violence measured *for* something and thus a means. Divine violence, on the other hand, is a living, governing [*waltende*] power that is an end in itself and thus open ended. This notion invokes Schmitt's account of the constituent power as an 'illimitable primordial force,' which incessantly gives rise to, and destroys, new forms of ordering political life (D, p. 123). In Benjamin, however, the sovereign power of the living is never transferred to the artificial person of the state and as such remains a living power of (self-)governing claiming for itself neither *iura dominationis* nor *imperium,* the power to command.

While the sovereign-governing power never alienates itself through the constitution of a bearer of sovereignty exterior to living people, Benjamin reintroduces a notion of law with the *Richtschnur*. He introduces it, however, not as a universalizing imperative but as a directive, a guideline that is followed most of the time but can be ignored in particular and extraordinary circumstances. This conception of law shares important elements with that presented by an early thinker of the becoming-concept of the constituent power as popular sovereignty; an affinity that is underlined by a shared use of the Decalogue as the *Richtschnur* guiding the actions of persons and communities.

In the early 17th century, the Calvinist thinker Johannes Althusius developed a distinct critique of the Bodinian notion of sovereignty as the power to command. The Bodinian doctrine of the sovereign state arguably "emerged to refute the rebellious claims and the self-assertion of the many against the few, with the explicit purpose of imposing obedience through the coercive command of a centralised state power" (Kalyvas, 2016, p. 66). Against this, Althusis (1995, p. 73) asserted the primacy of the power to constitute: before any power to command, any power over, stands the power to constitute the power to command. The privilege to exercise this power can therefore always be revoked by those who initially subjected themselves to it.

With divine violence, Benjamin in many ways reinvigorates this tradition claiming an alternative form of sovereignty and power to the one that has dominated political modernity since Bodin and Hobbes (Kalyvas, 2016). In so doing, he strikes upon a notion of law not as an imperative but as a guideline, which also resonates with that propounded by Althusis. Not trusting that people could constitute 'symbiotic' life *ex nihilio*, Althusius (1995, p. 81) introduced the Decalogue as the "moral law" that the legal code explains to the "inhabitants of the realm." However, Althusius does not accept the Decalogue as such but rationalizes why it should be considered not a self-evident absolute but a guideline for man-made laws: "[s]uch laws, because of circumstances, can therefore differ in certain respects from the moral law, either by adding something to it or taking something away from it" (Althusius, 1995, p. 81).

There is thus a link from the Calvinist thinker of the constituent power, who defined politics as "the art of associating (*consociandi*) men for the purpose of establishing, cultivating, and conserving social life among men" (Althusius, 1995, p. 17), to the Messianico-Marxist intellectual, who seems to shun establishing, cultivating, and conserving but (perhaps) proposes a living constituent power that never ends the process of associating, that never settles, but continuously oscillates between destruction and creation in its sovereign-governing power. He arrives at a weak constituent power that simultaneously takes shape and disintegrates through the deeds of individuals and communities who wrestle with the words of the commandment.

The link to Althusius does not associate Benjamin with a specific tradition of constituent power thinking. It also introduces one of the crucial difficulties that thinkers and actors of the constituent power tend encounter concerning new beginnings: the problem of the absolute. What both Althusius and Benjamin fail to escape is a certain pre-given, pre-political, foundation of political actions. As such, something external – in this case something theological in what might otherwise be quite materialist, worldly conceptions of political power – is introduced in order to solve the problem of how to ensure a 'good' politics. As such, the problem with Benjamin's text is not that it is ""[l]ess possible and also less urgent for human kind …to decide when unalloyed violence has been realized in particular cases" (CV, p. 300). A more fundamental problem is that Benjamin's *Richtschnur* is placed not by the people who "wrestle with it" but, somewhat like in the Greek *polis,* a mythical, pre-political lawmaker, whose lawmaking "precedes the deed, just as God was "preventing" the deed" (CV, p. 298). In place of Sorel's myth of the general strike, Benjamin introduces God as the supreme but, paradoxically, weak Legislator. Benjamin's conception of divine violence, of sovereign power, thus ultimately falls back on a pre-constituted notion of morality and closes itself by appealing to a moral code set, according to its myth, in stone.

8. The power of opinion and the worldly guideline

The problem with Benjamin's theological turn (see Hanssen, 2000, p. 3; for a secular reading, however, see Marcuse, 1965, p. 100) is that it seeks the foundation of political life in something external to it. The question, then, is whether the guideline can guide us to an understanding of law that is not based on (the threat of) blood-shedding violence and 'power over' without a theological element, without something pre-given. Is it possible to strike at the 'divine' in divine violence without losing its quality as a challenge to entrenched subjectivities and

relations of domination in all aspects of life? Without introducing another arbitrary moral denominator in its place, that is. Is it possible to arrive at a *Richtschur* that is never set in stone but that is continually and democratically re-constituted and which derives its validity from the very activity of 'wrestling' with it?

In contrast to Benjamin, on of Hannah Arendt's (e.g. 2006a) main concerns it the question of how to constitute a framework within which the experience of the political freedom of the founding, revolutionary moment can be continually secured. In so doing, Arendt, like Benjamin, is critical of the conception of law as command within a state form based on hierarchically organized relations of domination. However, in contrast to Benjamin, Arendt explicitly, albeit not systematically, develops a conception of law that stresses its function as creating a realm in which politics, acting together, can take place (e.g. Arendt, 1958; see also Volk, 2015). Arendt thereby, like Benjamin, addresses the question of the problematic relationship between the living power of people and the legal code. She does so, however, from a perspective informed by the observation of the precariousness of life denuded of law (Arendt, 2017). For Arendt, law is thus more than a system of ordering human relations. It is something that ensures 'the right to have rights' and constitutes the mark of belonging to a political community (see also Birmingham, 2006).

Arendt never commented on the "Critique." Did she find her friend's essay "an intellectual embarrassment" (Bernstein, 2013, p. 164-5)? Was Benjamin's programme of "political metaphysics and aesthetics" (Schöttker & Wizisla as cited in Volk, 2015, p. 10) too antithetical to her own to be amenable to a sympathetic critique on her part? Did it, like for Derrida (1990), represent an appraisal of a violence that was uncannily close to the worst? Whatever the reason, some have argued that particularly *On Violence* (OV) can be read as response to Benjamin's conception of both law and power/violence (Birmingham, 2010, p. 8; Volk 2015, p. 11). While this may be stretching the point somewhat, in the present context the question is whether Arendt's notion of the constituted, of law, can speak to the guideline for a living constituent power that shuns violence except for the immediate 'short term goal' (OV, p. 79) of overcoming relations of domination.[9]

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[9] Intended as a 'correction' of the theological dimension of Benjamin's thinking, the present reading of Arendt's work is highly selective and cannot do justice to the richness of her thought on the question of the constituent power and law (for more extensive appraisals of her thoughts on this, see Goldoni & McCorkindale, 2012 and Volk, 2017).

One of the fundamental problems that Arendt continuously seeks to address throughout her work is how to conceptualize a legitimate politics in the absence of absolutes (see also Breen, 2012; Wilkinson, 2012):

> out of the specific conditions of our contemporary world, which menace us not only with nothingness but also with no-bodyness, may grow the question, Why is there anybody at all and not rather nobody? These questions may sound nihilistic, but they are not. On the contrary, they are the antinihilistic questions asked in the objective situation of nihilism where no-thingness and nobodyness threatens to destroy the world (Arendt, 2005, p. 204).

A relativist 'anything goes' is thus fundamentally misguided and political thinking and acting must face the nothingness of the world in order to establish not only something but something that is legitimate and good. This is at the center of Arendt's theory of constituent power as developed in *On Revolution* (OR):

> What saves the act of beginning from its own arbitrariness is that it carries its own principle within itself, or, to be more precise, that beginning and principle, *principium* and principle, are not only related to each other, but are coeval. The absolute from which the beginning is to derive its own validity and which must save it, as it were, from its inherent arbitrariness is the principle which, together with it, makes its appearance in the world. The way the beginner starts whatever he intends to do lays down the law of action for those who have joined him in order to partake in the enterprise and to bring about its accomplishment (OR, p. 205).

Arendt thus implicitly rejects Benjamin's invocation of the Decalogue: in the face of the 'objective condition of nihilism,' a claim to base legitimacy on an appeal to the word of God is nonsensical (see also OR, p. 178ff). In so far as the political realm is concerned, God is dead. As such, Arendt goes further than Benjamin and accepts no moral codes or principles derived from outside the current worldly realm. It is in the real, concrete actions of people that the 'absolute' rests and from which it is, by posterity, derived (OR, p. 176). The legitimacy of the political order can only be based on the principles according to which people act when constituting. These principles come into being through the constituting act itself. The legitimacy of the principles, in turn, is derived solely from the fact that it is a joint effort, it is *con*stituent. Those who join in, accept and concur with the principles that the acts of others confer, thereby constructing the 'grammar and syntax'[10] (OR, p. 167; see also Volk 2015) of

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[10] Interestingly, Benjamin conceives of language as a realm of human understanding inaccessible to violence (CV, p. 289). By invoking the structuring conditions of language, Arendt transposes Benjamin's insight to her own conception of politics as a realm free of violence. Like with language, absolute freedom in political life, the complete absence of any kind of ordering and rules, would make political action not anarchic but simply chaotic. Only through a system – which emerges from use, not imposition – that specifies the relation between words/acts can meaningful interactions be maintained. Benjamin's 'mistake,' in this reading, is to assume that when it comes to political life all such systems are premised on violence and domination.

acting together to generate a 'power to.' The act of the first, the *princeps,* only becomes constituting once there are others who join in. As such, the constituting act itself is non-violent and it generates the seeds from which the power of the community will grow (OR, p. 166). The collective actions of individuals and communities thus build the societal structure through these very same acts and their validity and legitimacy is based on the fact that the values and opinions that they reflect are shared by others. The legitimacy of the power which is "inherent in the very existence of political communities" (OV, p. 52) thus derives from the principles immanent to the constituent act; the act 'lays down the *law.*'

Arendt's conception of violence, power, and law is closely linked to this understanding of constituent power. Power does not rest on an unequal structure of domination but on the support of equals ('we hold') for a particular set of principles ('*these* truths') from which laws and institutions are derived (OR, pp. 192-4). This conception of the foundations of power allows Arendt to turn Benjamin's conception of institutions decaying in the absence of a consciousness of the latent presence of violence (CV, p. 288) 'off its head and unto its feet':

> It is the people's support that lends power to the institutions of a country, and this support is but the continuation of the consent that brought the laws into existence to begin with ... All political institutions are manifestations and materializations of power; they petrify and decay as soon as *the living power of the people* ceases to uphold them (OV, p. 41, emphasis added).

To Arendt, power is thus not something that can be adequately captured through a juridical definition. It is a phenomenological power; it exists only through people who (re)create the laws themselves or choose to lend their support to them because they are in accordance with their values and opinions. Laws and institutions stand not as petrified relations of dominations, reinforced by the threat of blood-spilling violence, but because the living power of people stops short of their destruction and leaves them standing.

Citing Madison's "all governments rest on opinion," Arendt goes on to make the crucial distinction between violence and power: "power always stands in need of numbers, whereas violence up to a point can manage without them because it relies on implements" (OV, pp. 41-2). Power and violence are thus, in their 'extreme forms' diametrically opposed: "power is All against One" based on the opinions of people, "violence is One against All" based on the command of superior instruments and technologies of oppression (OV, p. 42). Therefore, even a constitutionally unrestrained democratic majority's oppression of minorities and opposition (OV, p. 42) is not a manifestation of violence but of power.

Recognizing, perhaps, the potentially pernicious nature of such absolute majority rule, Arendt notes that while this kind of power "needs no justification, being inherent in the very

existence of political communities; what it does need is legitimacy" (OV, p. 52). The power of the majority opinion is thus not *eo ipso* legitimate. Power, as it were, "springs up whenever people get together and act in concert, but it derives its legitimacy from the initial getting together rather than from any action that then may follow" (OV, p. 52). The legitimacy of laws and governmental institutions thus rests in the relationship between their current practice and the principles embodied in the constituent act. If government strays from these values and opinions it loses its legitimacy and becomes tyrannical where violence ensures obedience. On the other hand, if the values and opinions of people change too much, the constitution – along with its derived laws and institutions – is no longer upheld by the power of the living and as such it will "petrify and decay" paving the way for a new constituent process, a new *principium*.

Law as a guideline for living and acting together must, in accordance with the above, be based on and in the relationship between the founding principles of the community and the values and opinions of the living. This, however, raises the question of sanctions. In contrast to Benjamin, Arendt asserts that the violence of the legal system, which compels obedience, is not its essence (OV, p. 97). On the contrary, ideally speaking, a violation of the laws is a violation of the opinions and values of the constituents of the community. Such violations, however, may not be rejections of the values embodied in the laws as such but may rather express the wish of individuals to "make an exception for themselves; the thief still expects the government to protect his newly acquired property" (OV, p. 97). Sanctioning thereby becomes the way in which the community of values and opinions protects itself and its principles from individuals or groups who seek a limited 'state of exception' for reasons of self-aggrandizement and/or enrichment. Such acts, however, amount to a form of voluntary self-exclusion from the community of values and opinions: "by breaking the law, the criminal had put himself outside the community constituted by it" (OV, p. 97). In Benjaminian terms, this describes a situation where the 'natural ends' of an individual enter into conflict, not with the legal ends of the state, but with the natural ends of the community as a whole expressed in guidelines for actions. The sanction may well be a form of law-preserving violence enacted against attempts at lawmaking violence. In Arendt's understanding, however, its end is not to perpetuate relations of oppression but to protect the values and opinions of the community of equals against infringements that threaten its political freedom.

On this basis, Arendt derives a conception of laws as directives rather than imperatives. Arendt (OV, p. 97) develops this from Passerin d'Entrèves's (1967, p. 129) notion of laws "which are 'accepted' rather than 'imposed', and whose 'sanctions' do not necessarily consist in the possible use of force on the part of a 'sovereign.'" Such laws, unlike the traditional notion

of the imperative nature of state law, can be likened to "the rules of a game," which are observed not because they are promulgated by a higher authority or because of the threat of sanctions but "because for me, unlike others of my fellow citizens, these rules are 'valid' rules, even though they may not be so within the legal system of the State" (Passerin d'Entrèves, 1967, pp. 129-130). This reflects Passerin d'Entrèves's (1967, p. 4) general concern to arrive at a 'notion of the state' not defined by its necessary association with repressive violence; an attempt to overcome "the most frequent explanation of the obligatory character of laws," namely that they are "derived from the end they secure, the discipline of human relations without which human life would hardly be possible." Instead, "a no less plausible explanation may also be derived, and is often derived, from the claim that laws are the expression of a value called 'justice'. It is the presence of such value that makes obedience to the laws a duty" (Passerin d'Entrèves, 1967, p. 4).

This understanding of laws emphasises their human character and, more importantly, that laws are constituted by the community to which they apply. It is not merely the end which justifies them, they are inherently legitimate because they reflect a value judgement on part of the constituents: justice is a reflection of the values people hold and in general people obey not because of the threat of violent sanctions but because they consider the laws just as such (Passerin d'Entrèves 1967, p. 5). Relating this back to the Decalogue as the guideline for people's actions, which in turn are the building materials of the political community, the guideline is only valid as long as people find it just. The contestable nature of laws and guidelines is thus derived from their character as directives and their relation to the values of the constituents.

Arendt, however, 'drives' Passerin d'Entrèves's notion of laws as the rules of the game 'further' and highlights that "in practice I cannot enter the game unless I conform" (OV, p. 97). But communal life is not 'a game;' in reality there is little alternative to accepting the rules "and since men exist only in the plural, my wish to play is identical with my wish to live" (OR, p. 97). We are born into a world that is shared and which exists only through constituted rules. We may not be happy with these rules, "as the revolutionary" or "the criminal," "but to deny them on principle means no mere "disobedience," but the refusal to enter the human community" (OV, p. 97). We must, in other words, wrestle with them. However, to jump to the conclusion that these rules must, therefore, rely for their legitimacy on "an immortal, divine legislator, or [that] the law is simply a command with nothing behind it but the state's monopoly of violence – is a delusion" (OV, p. 97). Rather, Arendt claims, "[a]ll laws are "'directives' rather than 'imperatives'"" and their validity cannot, in accordance with her conception of

power and violence, be guaranteed by force alone. The instruments of violence, Arendt reminds us, can "change hands – sometimes … within a few hours" (OV, p. 48). As such, "the ultimate guarantee" of the validity of the rules "is contained in the old Roman maxim *Pacta sunt servanda*" (OV, pp. 97-8) and "in domestic affairs, violence functions as the last resort of power against criminals or rebels … who … refuse to be overpowered by the consensus of the majority" (OV, p. 51).

The conception of the law as a directive, a guideline, thereby comes with a significant limitation: for most people, most of the time, obeying is not a question of opinion. It is the fundamental condition of life. The acceptance of the guidelines, constituted through mutual promises to honour the pact, is an imperative for the individual even though guidelines as such are directives. In Benjamin this obligation is equally evident: people "*have to* wrestle with it in solitude" (CV, p. 298, emphasis added). The difference between the two in this regard is thus not related to the question of the character of law as guidelines but that Benjamin presents the value order embodied in the guideline as something internal and eternal, something that is ingrained (by God) in the individual before she enters the realm of acting together. In contrast, Arendt's law is only effective in the relation to other people; it is conditioned by interactions between I, we, and you. This is a difference between (theologically) pre-constituted values and the conception of the human character of the guideline. While the former may accept temporary suspension, the latter promises to leave open a space for the continuous political experimentation, for political freedom within the structuring condition of acting together, creating meaning and communicating meaningfully (see also Habermas, 1996, pp. 147ff). Due to the human condition of plurality, the guideline cannot exist in the singular. It is never something that individuals or even communities struggle with in solitude. The presence of others always conditions the 'wrestling.'

9. Conclusion

Arendt would hardly disagree with Benjamin's notion about the responsibility of sometimes ignoring the guideline (see Arendt, 2006b, pp. 265-6). Agreements must be kept but sometimes they must be broken. The question is how the 'weak Messianic power' to begin something new, which we possess by virtue of natality (OR, p. 203; see also Wilkinson, 2012, p. 40), can be translated into a change of the laws guiding societal life.

Benjamin's essay is a powerful critique of the dialectic between constituent and constituted power. By focussing on the difficult relationship between law and violence, Benjamin highlights that even the most freely constituted legal orders soon succumb to the necessity of introducing violence to sustain them. The violence of law, Benjamin argues, manifests and reproduces relations of domination and a system in which life is subjected to the demands of reproducing the inequality between the commanders and the commanded. This critique, however, might not be aimed at constituent power and law as such, but at particular conceptions of power and of law: power as command and law as an imperative. From the starting point of this critique, Benjamin develops an alternative conception of power that emphasizes the power to violate and annul the legal order and its entrenched relations of domination. This power unleashes a creative potential to develop new ways of living together, free of enforced patterns of subjectivation. Striking at the imperative nature of law, this power is nevertheless not anomic but is associated with a particular conception of legality: law as a guideline for action.

Benjamin, however, relies on a source external to the current human realm for the value order embodied in the guideline. His critique of the constituent power thus fails to address the question of how the values according to which people live are constituted. By failing to do so, he ignores the question of whether and how such values might change. This theological element of Benjamin's thinking can be corrected through inserting Arendt conception of the constituent moment as containing within itself the principles according to which the political community is constituted. By identifying the emergence of the fundamental values of political society from the experience of acting together, Arendt introduces a conception of legality that is derived from the fact of political sociality and from the opinions and values that emerge in the meeting of equals.

Merging Arendt's and Benjamin's conceptions of power and law inserts the extraordinary politics of the constituent moment within the ordinary politics that takes place within the constituted legal institutional structure. The resulting conception of politics is one that allows for the constant scrutiny, questioning, and contestation of constitutional structure by all affected by it. As such, law sheds its imperative nature for the community as a whole but not for the individual who wishes to 'make an exception for himself.' However, even for the individual (criminal) act, each violation of the laws must be taken seriously as a politically motivated expression of dissensus, a contestation of the principles guiding the law. If not, who decides whether a violation is criminal act or a new beginning? Only those who choose whether or not to follow in the footsteps of the beginner, the first, the *princeps*, can make this call. All

legality in that sense, as Benjamin pointed out, rests on violation, if not violence, but the more the legal institutional order governing political life is divorced from the living power of opinions and values, the more it must resort to violence for its perpetuation. The legitimacy of the constitution must be continuously reproduced and recreated in the encounter between the living values of the community and the principles embodied in the law. The violation of these principles by individuals or groups in accordance with their 'natural ends' thereby serves as the test of their continued relevance and validity. The relevance of Benjamin's notion of divine violence is thus to be found in its potentiality to manifest the living constituent power of people against the existing legal structure and its orderings of social relations. The question which no theoretical exposition of the concept can answer, however, is whether its absence is a sign of the constitutional order being sustained by power as the congruence of opinions and law or the threat of overwhelming physical violence.

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