The UK’s General Strike

Brexit and critiques of violence

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Introduction

With Brexit being so prominent a feature of today's legal and political landscape it is easy to forget that for much of the European Union's (EU) history it was thought that the unilateral exit of a Member State from the EU was not possible. Article 50 of the Treaty of Lisbon (2007), which confers upon EU Member States the right to withdraw from the Union, purportedly put questions over cessation to rest. However, far from bringing certainty over the question of the permanency or otherwise of EU membership, the new Treaty Article brought about a very proximate threat to the European Union's supremacy, and, therefore, to the EU legal system’s very survival. The threat became a reality when on 29 March 2017 the United Kingdom Government invoked Article 50. By invoking the Treaty Article, the UK became the first subject of the European Union *legally entitled* to challenge the European Union's right to sole rule over key areas of EU competence, including in respect to the movement of EU citizens.

This article argues that the tensions and conflicts which have attended the UK’s decision to exercise the Article 50 right of withdrawal from the EU are foreshadowed in Walter Benjamin’s 1921 philosophical text, *Critique of Violence* (1995: 277-300). Taking the example of the workers’ guaranteed legal right to strike, Benjamin examined the crisis brought about by the apparently revolutionary or extortionate use of a legal right by a subject of a legal order *against* the interests of the legal order which conferred upon the subject the legal right in question. Benjamin’s *Critique* did not anticipate the unique legal arrangement of the European Union according to which a sovereign state would become a subject of a legal order. My task, then, is to present an arguable case to the effect that since the triggering of Article 50 the UK's position in relation to the EU legal order has become structurally and conceptually analogous to the position of Benjamin's striking workers in relation to the domestic legal order with which the *Critique* was preoccupied.

What consequences will flow from what Benjamin describes as an “objective contradiction in the legal situation” (1995: 282), whereby an exercise of a legal right becomes, in his terms, “violent” (1995: 282) are difficult to predict, since the only viable response to an undesired use of a legal right is the deployment of *extra-legal* emergency measures by the legal order which sees itself as exposed to the violence of one of its subjects.

The difficulties inherent in any attempt to predict the outcome of the Brexit negotiations notwithstanding, this article draws some conclusions on how what it alludes to as the UK’s General Strike will impact on the free movement of European citizens. Counter-intuitively, perhaps, the article concludes that as a direct result of the Brexit conflict the radical path indicated by recent decisions of the Court of the Justice of the European Union in relation to the free movement of persons, as exemplified in the case of *Ruiz Zambrano* [2011], will expand -bringing the European Union much more quickly to the realisation of its promise of a core package of citizenship rights, de-coupled from the nation-state.

Structure of argument

The argument is arranged in the following four sections of this article. In the title section, (*the U.K.'s General Strike)*, the article prepares the way toward an analysis of Benjamin's *Critique of Violence* by identifying key moments in the processes of the U.K.'s planned exit from the EU which indicate that the UK is intent on something more profound than the passive withdrawal from the European Union which Lisbon Treaty Article 50 envisages. Once such moment is signalled in the case of *R v Secretary of State for Exiting the European Union* [2017]. *Violence and the exercise of legal right* then sets out as much of Benjamin’s *Critique* as is necessary to aid the reader who may not be familiar with this important text on the relation between law and violence. My reading of the *Critique* is supplemented by my early published work on the subject of law and violence, including the article: Individual Violence and the Law (2006). The section titled *Article 50 and the EU's monopoly of violence* sets out the premise upon which the strength of the argument of the paper stands or falls. It seeks to substantiate the claim that the *Critique* foreshadows the Brexit situation by exploring the analogies between the position of the UK vis-a vis the European Union legal order and the position of the striking worker vis-a-vis a domestic legal order. It aims to demonstrate that in conferring upon Member States the right guaranteed under Article 50, the European Union legal order has permitted its subjects to exercise violence in the precise sense in which the phenomenon of violence is understood in the *Critique.* The section titled t*he founding promise of the European Union* is key to understanding why the Brexit negotiations have been attended by such open hostility between UK Government officials and EU Brexit negotiators.

Here I explore whether the UK's use of Article 50 is merely abusive, or whether it has revolutionary potential in the sense of being able to alter the legal situation of the European Union. Taking the position that the UK is truly engaged upon a general strike, the article argues that what is at stake between the EU and the UK is the question of *ownership* of the European Union's founding promise of a core package of citizenship rights which would eventually exceed the state-centric claims of its members. The concluding section of the article returns to Benjamin’s text in order to illustrate why the conflict between the UK and the EU is likely to result in an intensification of the more enlightened jurisprudence of the Court of Justice in relation to disputes over the free movement of EU citizens.

The UK’s General Strike

As indicated above, it is to the next section of this article that the reader must look for a detailed analysis of Benjamin’s assessment of the consequences to a legal order of the perceived abusive or revolutionary exercise of a legal right it has conferred upon a subject. However, to set into context this section’s staging of key episodes in the Brexit saga it must be understood that for Benjamin the factor that signals potential abuse or revolutionary intent is the use of a legal right in ways not intended (1995: 280). The suspicion of abuse (or worse) has attended the UK Government’s proposed actions in pursuance of the right guaranteed under Lisbon Treaty Article 50 ever since the UK electorate delivered its surprising answer to the leave or remain referendum question. Needless to say, the most compelling indictment against the UK was that its proposed mode of exit from the European Union was not compatible with its own constitutional arrangements, and, therefore, was not in accordance with a core requirement of Article 50.

The United Kingdom Supreme Court (UKSC) decision on the arrangements for exiting the European Union did not support the UK Government’s position that ministers were entitled to exercise their prerogative powers as a way of complying with the Article 50 requirement to give formal notice of an intention of a Member State to withdraw from the European Union, thereby initiating the formal withdrawal process [2017:101]. Concluding that legislation was required before notice of withdrawal could lawfully be given, the majority of the UKSC reasoned that a prerogative power could not be deployed when to do so would bring about “...fundamental change to constitutional arrangements in the UK...” [2017: 78]. The UK’s withdrawal from the EU would result in the loss of “...an important source of UK law...” [2017: 78], and it went without saying that “...one of the most fundamental functions of the constitution of any state is to identify the sources of its law” [2017: 78].

For the purposes of the unfolding of the argument in this article, it is significant to note just how widespread was the view that the UK Government was intent on acting beyond its powers, necessitating the use of the Judicial Review action.

The judgement identifies those individuals and groups who supported the legal case against the Government, prompted by fears that a loss of rights would be suffered in the absence of appropriate constitutional safeguards. It is worth quoting the relevant section of the judgement in full:

> *"The applicants are supported in their opposition to the appeal by a number of people, including (i) a group deriving rights of residence in the UK under EU law on the basis of their relationship with a British national or with a non-British EU national exercising EU Treaty rights to be in the United Kingdom, (ii) a group deriving rights of residence from persons permitted to reside in the UK because of EU rights, including children and carers, (iii) a group mostly of UK citizens residing elsewhere in the European Union, (iv) a group who are mostly non-UK EU nationals residing in the United Kingdom, and (v) the Independent Workers Union of Great Britain"* [2017: 8].

The majority of the Court also rejected the UK Government's appeal to the democratic will of the people in justifying its desire to give notice of withdrawal from the EU without first enacting domestic legislation. The conclusion that in and of itself the referendum result had no legal force is irresistible. In the view of the Court, the referendum of the 23 June 2016:

> *"...did not change the law in a way which would allow ministers to withdraw the United Kingdom from the European Union without legislation. But that in no way means that it is devoid of effect. It means that, unless and until acted on by Parliament, its force is political rather than legal. It has already shown itself to be of great political significance"* [2017: 124].

Concern over the UK Government's use of the Article 50 right of withdrawal did not end with its proposed procedures for exiting the Union. European Union officials were (and remain) vociferous in their criticism of what they perceive to be an uncooperative and evasive approach by the UK toward its financial commitments to the European Union. The EU's lead negotiator on Brexit, Michel Barnier, has been barely able to contain his frustration over the UK's apparent lack of any coherent exit plan. However, the most intense level of criticism has been directed toward the various proposals advanced in respect to transitional immigration arrangements.

So acute were these concerns that the Brexit coordinator felt compelled to remind the UK Government that it remains subject to European Union law pertaining to the free movement of persons during the full period between the triggering of Article 50 and the UK’s formal exit from the European Union.

The conflicts and tensions attending the Brexit negotiations are well-documented elsewhere and considerations of space preclude further elaboration of them here. However, before moving to the next section of this article in which the conflicts are placed within a broader philosophical context, I will conclude this section with the passing thought that the choice to engage Article 50 through the referendum process may itself amount to an abuse. The referendum result, compelling as it did the UK Government to do what it neither expected nor desired, has all the appearance of "a bitter revolutionary general strike", and not that of a passive withdrawal or estrangement (Benjamin 1995: 282).

Violence and the exercise of legal right

Posing to himself the question: toward what means can violence be justified? Walter Benjamin responded in 1921 with the now classic statement that:

> *”All violence as a means is either lawmaking or law-preserving.*
> *If it lays claim to neither of these predicates, it forfeits all validity”*
> (1995: 287).

The arguement in this article rests upon acceptance of the validity of Benjamin's fundamental proposition that ”violence” is only ever justified as a means to bring about law (law-making violence) or as a means to subordinate the citizen to law (law-preserving violence). Immediately one must qualify these assertions with the intelligence that for Benjamin ”violence” as a phenonemon cannot be restricted to conventional understandings which would equate violence with the enactment of traumatic physical injury. Indeed, Benjamin’s analysis of the deployment by ”organised labour” of the legal right to strike as always carrying the potential of violence cannot be understood unless it is accepted that the notion of ”violence” can extend to non-physical force, such as ”extortion”. As well as appreciating Benjamin’s more nuanced use of the idea of violence, the reader must also understand that although Benjamin uses the term ”legal system” to describe what can be legitimately inaugurated and preserved through violence, he makes clear that ”legal system” is not to be equated with ”legal ends” or the ”legal executive” (1995: 280). In the *Critique*,”legal system” designates the entire political entity within which all ends (including legal ends) are pursued. Arguably, until the inaguration of the European Union legal system, the nation-state provided the classic instance of Benajmin’s legal system.

So, for Benjamin, violence directed toward an objective other than the creation or preservation of a legal system is illigitimate *per se*. It follows that a legal system may legitimately use violence to preserve its existence. But merely to deploy violence itself in the interests of its preservation is not sufficient guarantee of the legal system's survival.

To ensure for itself the best chance of survival, the legal system must repell the use of violence by any person or entity subject to it. Further, so invested is the legal system in its self-preservation that it cannot risk a categorical differentiation between violence deployed as a means towards *legal* ends and violence deployed as a means toward *illegal* ends. Such distinctions inevitably appear and acquire force when a legal order loses its exclusive right to deploy violence. A legal order loses its exclusive right to deploy violence when an individual subject exercises violence in defiance of the dictates of the legal order, or - in the situation which is the focus of this article – when the legal system exceptionally confers upon a subject the right to deploy violence. To avoid these exceptions arising in the first place, the legal order:

"...tries to errect, in all areas where individual ends could be usefully pursued by violence, legal ends that can only be realised by legal power..." (1995: 280). This because*"... law sees violence in the hands of individuals as a danger undermining the legal system.*...(1995: 280). As if to bring home the point that Benjamin is not concerned with the legality or morality of any deployment of violence, he continues *"... a danger nullyinfying legal ends and the legal executive? Certainly not: for then violence as such would not be condemned but only that directed to illegal ends" (*1995: 280).

How does this all apply to the Brexit situation? The Brexit case is situated within the exception to the general proposition that the legal system does not permit (sanction) subjects of a legal order to exercise violence towards ends particular to those subjects. In Benjamin's time, the one exception was that of organised labour. The legal system confers on organised labour the right to exercise violence in the form of the *withdrawal* of its labour. The legal right to strike is permitted in spite of the fact that the right has the potential to threaten the preservation of the legal system. More pertinently for our case, it is precisely in the exceptional case in which a subject is given a legal right to exercise violence that the legal system sees the most potent threat to its survival. To put the position in Benjamin's own words:

> *By what function violence can with reason seem so threatening to law, and be so feared by it must be especially evident where its application, even in the present legal system, is still permissible* (1995: 281).

However, as the following passage from the *Critique* makes clear, the legal right to strike carries violent *potential* only. It presents the legal system with the *threat* of violence, and therefore a threat to its existence, but such threat may never be *realised*.

> *”Organized labor is, apart from the state, probably today the only legal subject entitled to exercise violence. Against this view there is certainly the objection that an omission of actions, a nonaction, which a strike really is, cannot be described as violence. Such a consideration doubtless made it easier for a state power to conceive the right to strike, once this was no longer avoidable. But its truth is not unconditional, and therefore not unrestricted. It is true that the omission of an action, or service, where it amounts simply to a "severing of relations," can be an entirely nonviolent, pure means. And as in the view of the state, or the law, the right to strike conceded to labor is certainly not a right to exercise violence but, rather, to escape from a violence indirectly exercised by the employer, strikes conforming to this may undoubtedly occur from time to time and involve only a "withdrawal" or "estrangement" from the employer” (1995: 281).*

Benjamin’s analysis of the latent violence of the right to strike presents us with a tool with which to read anew the text in which is expressed how a member state might sever relations with the European Union. The relevant provisions of Article 50 read as follows:

> *1. Any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements.*
>
> *2. A Member State which decides to withdraw shall notify the European Council of its intention. In the light of the guidelines provided by the European Council, the Union shall negotiate and conclude an agreement with that State, setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union….*
>
> *3. The Treaties shall cease to apply to the State in question from the date of entry into force of the withdrawal agreement or, failing that, two years after the notification referred to in paragraph 2, unless the European Council, in agreement with the Member State concerned, unanimously decides to extend this period.*

Common to the right to strike as analysed by Benjamin and the right contained within Article 50 of the Lisbon Treaty is the fact that both involve a "withdrawal" or "severing of relations" (Benjamin 1995: 281). In his important supplement to Benjamin's *Critique*, Jacques Derrida spoke of a"cessation of activity" (1992: 987) when describing the nature of the acts needed to realise a legal right of the kind comprised in the right to strike. For both Benjamin and Derrida the strike is only *apparently* non-violent.

In the first place, the non-action of withdrawal cannot without more escape the category of violence because, as Derrida reminds us, force takes many forms: "whether this force be direct or indirect, physical or symbolic, exterior or interior, brutal or subtly discursive and hermeneutic, coercive or regulative…" (1992: 927). Second, as Benjamin claims, in some circumstances a seemingly passive withdrawal from the operations of the extant legal order may nevertheless be a form of passive violence in the sense that it amounts to extortion, or may carry a sufficient threat to the legal system as to amount to the kind of active violence that might lead to the system's effective demise (1995: 281). Yet, a legal right consisting of a right of "cessation" or "withdrawal" (such as is the example of Article 50) has significant qualities. Because the action of withdrawal *appears* non-violent the legal system may concede the right too readily. According to Derrida *"…certain people may have thought that since the practice of the strike, this cessation of activity… is not an action, we cannot here be speaking about violence. That is how the concession of this right by the power of the state… is justified when the power cannot do otherwise."* (1992: 987).

It is hard to resist the conclusion that the response of EU officials to Brexit is indicative of regret over a too hasty concession of right, the implications of which were not sufficiently thought through in advance.

Almost echoing Derrida's observations, Eva Maria Poptcheva of the European Parliamentary Research Service recently stated *"The introduction of the withdrawal clause was a compromise necessary in order to reach agreement on the Constitutional Treaty…it was a 'political' signal to anyone inclined to argue that the Union is a rigid entity which it is impossible to leave"* (February 2016).

It has not yer been established that the UK's exercise of the right contained in Article 50 is in fact violent. It has not yet been established that UK's actions around Brexit amount to passive extortion or to a the kind of active violence sufficient to alter the legal situation of the European Union. Before this question can be properly addressed, I need to explain how Benjamin's fundamental proposition as to the means by which a legal system preserves itself is demonstrated in the European Union legal system's constitutional arrangement.

Article 50 and the EU's monopoly of violence

In the doctrine of the supremacy of European Union law we see instantiated in the European Union legal system the fundamental premise that the self preservation of any legal system depends on its assurance that its subjects will pursue objectives only though the legal means which the legal system authorises.

Expressed in conventional terms, the origins of the doctrine of supremacy lie with the decision of the European Court of Justice in the case of *Costa v Enel* [1964].

From this case we understand that when there is conflict between European law and the law of a Member State (including in relation to norms enshrined within the constitution of a Member State), European law prevails. Supremacy is often justified on the basis of the effectiveness of EU law, but the language of the Court in *Costa* is particularly instructive. In *Costa* it was said:

> *"…the law stemming from the treaty, an independent source of law, could not, because of its special and original nature, be overridden by domestic legal provisions, however framed, without being deprived of its character as community law and without the legal basis of the community itself being called into question…"*

There is nothing in the positing of the European Union to suggest that it stands outside of the logic of Benjamin's thesis that would assert that the European Union's interest in supremacy is that of its self-preservation. To cast the *Costa* quotation in the language of Walter Benjamin, the doctrine of supremacy prohibits the deployment of national legal means in substitution for the means of European law-at least within those increasingly expanding spheres of European Union areas of competence. The pursuit of domestic national legal means would undermine the European Union as a legal system *per se*.

Benjamin's *Critique* did not envision a situation in which sovereign states would become subjects of a legal order. Yet we know from *Van Gend en Loos* [1963] that the genius of the European Union was to make its Member States as well as those Member States' citizens subjects on which the European Union legal system would enact its self-conserving violence. As famously stated in *Van Gend en Loos*:

> *"The Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields and the subjects of which comprise not only member states but also their nationals. Independently of the legislation of member states, community law therefore not only*

> *imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage. These rights arise not only where they are expressly granted by the treaty, but also by reason of obligations which the treaty imposes in a clearly defined way upon individuals as well as upon the member states and upon the institutions of the community"*.

As stated in the introduction to this article, until the ratification of the Treaty of Lisbon in 2007, neither Member States nor their citizens were granted the legal right to exercise violence against the legal system of the European Union. To be precise, before the Treaty of Lisbon. there was nothing in the system of European Union law analogous to the workers' guaranteed right to strike (Benjamin 1995: 281).

If we follow the logic of Benjamin's *Critique*, we would conclude that Article 50 posed a threat to the European Union legal order from the moment it was ratified. Brexit made the threat a reality but it has yet to be determined whether the UK is engaged in a mere weak form of extortion or whether its actions amount to something in the nature of a revolutionary general strike. It is to this question that the next section turns.

The founding promise of the European Union

As intimated in the title to this article, I see the UK's actions around Brexit as indicative of an intention to acheive more than the passive withdrawal from the European Union which Treaty Article 50 intended.

Put bluntly, what is at stake in Brexit is *ownership* of the founding promise of the European Union legal order. Article 50 conferred upon Member State subjects of the European Union the potential to challenge the EU's ownership of that promise by using Article 50 in ways other than to withdraw quietly and passively from the European Union legal order. The UK has exploited the potential inherent in Article 50 to alter the legal situation within the EU by attempting to appropriate the EU's founding promise. It is time to name the promise. So, here it is: at the foundation of the legal order we call the European Union lies the promise of a permanent species of individual rights the force of which is such as to confound any rival claims and inducements of the nation state.

The European Union's founding promise is largely evidenced in the jurisprudence of the Court of Justice of the European Union pertaining to the principle of the free movement of persons. To explain the significance of this jurisprudence, I turn to Derrida's key area of

development of Benjamin's philosophical account of the relation between law and violence. Derrida was to proclaim Benjamin's distinction between law-making and law-preserving violence "interesting" but "radically problematic" (1992: 981). For Derrida, there is no tidy separation between the violence that inaugurates a legal order and the violence which preserves it. The relation between law and violence is better understood if we acknowledge that legal violence appears in the world as "repetition" or "iteration" (1992: 981). It is repetition of the founding promise that simultaneously inaugurates and preserves a legal order. To be precise:

> *"A foundation is a promise. Every position…permits and promises…and even if a promise is not kept in fact, iterability inscribes the promise as guard in the most irruptive instant of foundation"* (1992: 997).

Anyone used to reading the judgements of the Court of Justice of the European Union will be struck by how often the declaration that the EU constitutes a new legal order, the subjects of which are both Member States and individuals, is repeated.

The body of jurisprudence is precisely an instance of the self-conserving repetition, which reveals the force underlying all law –albeit in the case of the European Union's jurisprudence the violence is of the "…indirect' subtly discursive and hermeneutic…" variety (1992: 927). In this sense it would be hard to claim that even *Van Gend en Loos* [1963] marks the origin of the promise. Difficulties of identifying the point of any origin aside, what we learn from Derrida is that the "origin" is required "to repeat itself originarily; to alter itself so as to have the value of the origin, that is, to conserve itself" (1992:1007).

The jurisprudence on EU citizenship and free movement is a familiar one, It is not primarily the purpose of this article to engage a doctrinal analysis. Yet, key moments in the EU's repetition of its founding promise must be noted, beginning with the decision in *Martinez Sala* {1998] in which the Court denied the German authority the right to limit access to child benefits to those in possession of a residence permit. Residence permits were granted only on proof of involvement in economic activity or proof of independent economic means, which *Sala's* child caring responsibilities did not facilitate. Later the Court in the case of *Rudy Grzelczyk* [2001] declared Union citizenship to be the fundamental status (and thus to contain the fundamental rights) of nationals of EU Member States. The decision in *Rudy Grzelczyk* enabled the student claimant temporary access to social assistance of a monetary kind. The case of *Rottman* [2010] is thought by many commentators to indicate the Court's most radical assault on Member States' nationality laws. Here the Court co concluded that EU law, and not national law, would determine whether a German national

who had lost his original birth nationality of Austria when acquiring German nationality through naturalization was properly exposed to the loss of his acquired German nationality. It was not in dispute that after having been granted German citizenship the German authorities discovered that *Rottman* had criminal convictions which he wrongfully and knowingly failed to disclose. Without the intervention of the Court, which determined that *Rottman's* situation fell within the scope of EU law, a situation of statelessness would have emerged. *Rottman's* right to nationality (in this case acquired German nationality) became ultimately a question of EU and not (as hitherto thought) a question of national law. Finally, in *Ruiz Zambrano* [2011], a third country national parent of children who had EU citizenship secured a work permit in the Member State of residence on the basis that the parent's lack of permit would negatively impact on the right of the children to enjoy their status as EU citizens.

Whilst subsequent cases have confined the Rottman/Zambrano doctrine to those instances where, without the intervention of EU law, an individual would face being completely ousted from any of the territories of which the European Union is comprised, the jurisprudence outlined in this part presents a pointed assault upon the counter claims of the nationality and immigration laws of the Member States.

More pertinently, the jurisprudence performs the necessary task of repeating the EU's founding promise, and (per Derrida) such repetition is the means through which the European legal order is conserved. I have only touched the surface of this jurisprudence, and have omitted discussion of other landmark cases such as *Baumbast* [2002]. Suffice to say, these cases function at once to re-state the founding promise and to note that the promise has not been fully achieved.

The UK has always shown itself to be less than faithful to this European Union's founding promise, exempting itself from several of the EU's laws and policies relating to the movement of persons. Ostensibly through Brexit, the UK seeks to escape entirely from what it perceives in the EU's jurisprudence as a form of discursive, hermeneutic violence. There are several examples of such justifications for the Brexit vote and for the UK Government's stated determination to give effect to the vote. In stating the UK's intention to take back control of its borders, the claim that free movement rights had exceeded or supplanted the founding Treaties was a constant refrain. It was said that free movement rights are exercised in disregard of the intentions of Member State Governments. It was claimed that after several failed negotiations only a complete withdrawal from the European Union would enable appropriate levels of border control. Yet, the UK's planned exit comes with the demand that UK citizens and second country nationals resident in the UK exercise free movement rights after the end of the transition period is reached, and the operation of Article 50 (3) means that the EU Treaties no longer apply to their situations. By its insistence that the free movement rights of its nationals can (and should) remain

fundamentally unaltered post Brexit, the UK has at the very least introduced an element of extortion into the Article 50 bargain. Has the UK gone further than to indulge in mere extortion? All along the UK has sought to keep in abeyance the EU's founding promise. Now it seeks to fulfil that promise for UK citizens and second country nationals resident in the UK. We might say, in the terms of Benjamin and Derrida, that the UK seeks in this double gesture to appropriate the EU's core idea of citizens' rights that exceed their instantiation in any single Treaty, and in so doing the UK reveals its revolutionary ambitions.

Concluding thoughts

I trust I have done sufficient to convince the reader that there is a case to be argued that the UK's referendum process, its attempt to initiate the Article 50 process in disregard of its own constitutional arrangements, and its current phase of transitional negotiations severally and collectively indicate the deployment of the right contained in Article 50 in ways that were not intended. Benjamin marks such a deployment as "violence" because it constitutes an abuse (1995: 282). Derrida speaks of a "misinterpretation of the original intention..." (1992). The UK would refute the suggestion of abuse or misinterpretation and would claim simply to be exercising a right which all Member States acquired with the Lisbon Treaty.

"In this difference of interpretation [Between the EU legal order and the UK, which, we must not forget, remains a subject of the legal order for another two years*] is expressed the objective contradiction in the legal situation, whereby the [state] acknowledges a violence whose ends…it sometimes regards with indifference, but in a crisis [the revolutionary general strike] confronts inimically..."*(Benjamin 1995: 282*).*

If the use of Article 50 by the UK is a threat to the conservation of the EU, it must be understood that it is the fact that the UK is exercising a legal right that gives the threat potency. Unlawful, even criminal, actions could not threaten the EU as does (potentially at least) the invocation of Article 50. Derrida reminds us that "the threat does not come from outside", "..law is both threatening and threatened by itself" (1992: 1003).

When a subject of a legal order is confronted with an interpretation of his/her/its exercise of legal right as violence, she/he/it is effectively left without the defence of the positive law. In such a situation, the sanctioned violence (the legal right) is treated as if it were *unsanctioned* (unlawful), but precisely because of the undeniable existence of the legal right, now in dispute as regards its appropriate usage, the legal order is left with nothing in

terms of repulsive action other than to invoke its emergency powers, with all the uncertainty and contingency that accompanies the exercise of such powers.

One is apt to think of the emergency powers of a legal order being always of the most draconion. Such would be a misconception. All that is imported in the notion of emergency powers is that the powers are outside the framework of the positive law, or, in the case of the Brexit negotiations, outside the norms of conventional diplomacy. The emergency sanction may be quite banal – relatively speaking – such as a denial of personal or professional standing.

EU Brexit negotiators may deploy all kinds of emergency tactics in an effort to undo Brexit, and, in so doing, preserve the European Union legal order. However, they would be advised to attend to Benjamin and Derrida's simple and straightforward advice to any legal system that "falls into decay" (Benjamin 1995; 288). The advice is to remember the …violence from which (it) was born..." (Derrida 1992: 1015). What this means for the European Union as it confronts the UK's General Strike is that it must guard against the temptation to depart from the path which cases such as *Ruiz Zambrano* have opened. For it is precisely at this moment that the European Union can *co-opt* the UK in the service of its founding promise.

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