

Werner Gephart

Why Law and Culture?

Speech for the establishment of the
“Chair of Philosophy Jacques Derrida ‘Law and Culture’”
at the University of Turin
and the installation of Michel Wieviorka

October 9, 2014, Turin

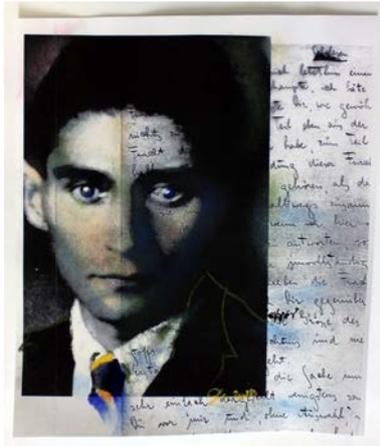
Magnifico Rettore,
gentili ospiti
gentile Madame Derrida
caro Maurizio Ferraris
caro Michel Wieviorka,

E' per me un grandissimo onore parlare in questa sede, in occasione dell'inaugurazione della Chaire Derrida. Ciò che mi ha dato il coraggio di parlare di fronte a un pubblico tale e così ricco di eccellenze è il fatto che il nome dato alla cattedra sia "law and culture". In questa sala si trovano tante persone, che hanno avuto la fortuna di essere state in contatto diretto con il maître penseur e che da lui sono state influenzate in quanto esseri pensanti. La mia esperienza personale con lui si limita - purtroppo - a pochi secondi sull'ascensore della Maison des sciences de l'homme quando la sede di questo istituto si trovava ancora sul boulevard Raspail. Lì i miei amici sociologi mi fecero notare : „tu as vu il est là“. In ogni caso: come sarebbe stato possibile non notarlo, con il suo aspetto così elegante e il suo carisma degno di una star del cinema? Permettetemi di raccontarvi un piccolo aneddoto: Quando Albert Einstein fa rientro a New York, viene accolto da Charly Chaplin. E pensate: vicino a questo genio, addirittura Chaplin a confronto sembrava sbiadito.

“Why Law and Culture“ si chiama questo compito assegnatomi qui a Torino da Maurizio Ferraris. Per quale ragione si può onorare Derrida facendo una connessione tra la sua opera ed il diritto? E, inoltre, operando una connessione ulteriore con il concetto di ‘Kultur’?

Forse può aiutarci un poeta davvero grande nel tentativo di comprendere il filosofo: Vorrei richiamare qui, oggi, la ricerca kafkiana del ‘fondamento del diritto’. Così può comprendersi il motivo per cui abbiamo bisogno della nozione di ‘Kultur’: per afferare la ragione stessa dell’esistenza del diritto.

Franz Kafka racconta dal punto di vista di un giurista-letterato, disilluso dal diritto, il quale fa intravedere un'altra istanza dietro alla ‘legge’.



Werner Gephart
*Franz Kafka, dem die Furcht
auf die Stirn geschrieben steht*
2010

The inextinguishable illumination of the law: Franz Kafka

The man from the country had not expected such difficulties. Because while the law is meant to be accessible to everyone at all times, Kafka places a gatekeeper before the door that is supposed to give entry into the law. Only he who receives permission can find the right way to the law – and it is not an easy path. It is not adherence to formal or informal procedures that opens the door to the law, including the bribes which the gatekeeper merely accepts so that the seeker of the law does not feel that he has left anything untried. Behind each procedural hurdle lurks a further barrier to the law, each of which is defended by a more powerful gatekeeper. It is an entry into an area of increasingly dense omnipotence, allowing the seeker of the law glimpses of an illumination “which breaks inextinguishably out of the gateway to the law.” But why is he the only one who has searched for entry into the law all these years, the man from the country asks himself. Before his death, he collects all of his experiences into one devastating question which he has not yet asked the gatekeeper: “Everyone strives after the law [...], so how is it that in these many years no one except me has requested entry?”¹ We know the reply of the gatekeeper who indicates that there is no general access to the law, no universal admission, but rather a very individual doorway to the law that only permits a reflection of justice which is unbearable for men. This law, however, is no longer determined procedurally; furthermore it is not created procedurally, nor is it accessible through procedures. As it unfolds in Kafka’s *Trial*, it evades all procedural rationality. Neither is it simply ‘unjust’ because it contains another scale of justice than the inward-looking tenets of legal validity; it is *the* law that merges with the ‘holy’ and deflects all standards of procedural rationality. Is this the secret of the validity of the law, its ‘mystical’ foundation?

¹ Franz Kafka, “Vor dem Gesetz” [Before the Law], in: *Erzählungen, Gesammelte Werke*, ed. Max Brod, Frankfurt a.M. 1983, p. 121.



Werner Gephart
Jacques Derrida
2014

The ‘mystical foundation’ of the law: Jacques Derrida

In his deconstruction of the law, Derrida refers to the ‘mystical foundation’ of the law. According to him, Pascal and Montaigne were witnesses to a ‘demystification’ of the law that sees the foundation of the law in no other mystery than its own facticity. If we follow reason, he argues, then there is nothing that is in itself just. “La coutume fait toute l’équité, par cette seule raison qu’elle est reçue. C’est le fondement mystique de son autorité.”² (Pascal) When reading Montaigne, the results are no less disillusioning: “Les Lois se maintiennent en crédit non parce qu’elles sont justes, mais parce qu’elles sont Lois. C’est le fondement de leur autorité, elles n’en ont point d’autres.”² (Montaigne)

Is this not a disillusioned interpretation of Weber’s “belief in legality”, which so many scholars have labored to interpret?³

Max Weber phrases it this way: “Today’s most widespread form of legitimacy is the belief in legality: the docility towards *formally* correct statutes that have been established in the usual form.”

Derrida does not leave it at that, but sees the reference to the mysticism of the factual as an indication of another ‘force’ or ‘force de droit’. According to him, the process of the formation of the law implies another kind of force:

non pas cette fois au sens où le droit serait au service de la force, l’instrument docile, servile et donc extérieur du pouvoir dominant, mais où il entretiendrait avec ce qu’on appelle la force, ou le pouvoir ou la violence une relation plus interne et plus complexe.⁴

For Hans Kelsen and, as I was able to show, for Georg Simmel, the logical original act of non-deductible legal creation is an anti-circular means against a naïve judicial deductionism. For Derrida, too, it is the understanding of the original act of creating the law that is

² Michel de Montaigne Zitiert nach Jacques Derrida, Force de loi: Le “fondement mystique de l’autorité”, 11 Cardozo Law Review 919-1045 (1990), S. 938-939.

³ Cf. in particular the excellent interpretation in Weyma Lübke, *Legitimität kraft Legalität. Sinnverstehen und Institutionenanalyse bei Max Weber und seinen Kritikern* [Legitimacy through Legality: Understanding Sense and Institutional Analysis in Max Weber and His Critics], Tübingen 1991.

⁴ Jacques Derrida, Force de loi: Le “fondement mystique de l’autorité”, 11 Cardozo Law Review 919-1045 (1990), S. 940.

problematic. A creation metaphor – which may already contain the seed to the solution of the problem – describes the non-deductible, for which no justifying discourse may assume the role of a meta-language. This can be used to argue against a discourse theory of law and hence against all the social contract theories pertaining to the creation of the state, society and law: “Le discours rencontre là sa limite: en lui-même, dans son pouvoir performatif même.”⁵ Or else, as in Habermas, following John Searle and Austin, language has to shoulder the burden of the mystical foundation of law, and as a result of a reversal of a ‘linguistification of the sacred’,⁶ language itself becomes sacred. Here, the illocutionary ‘force’ of a speech act is supposed to achieve the miracle of a binding rule of law!

If discourse is eliminated as a basic founding principle of law, then the bottomless search for the foundation of the law is reopened. The foundation of the law has to lie beyond itself. Like a number of legal theoreticians, Derrida also sees the ‘origin’ of the creation of the law in ‘force’, or ‘violence’: “L’origine de l’autorité, la fondation ou le fondement, la position de la loi ne pouvant par définition s’appuyer finalement sur elles-mêmes, elles sont elles-mêmes une violence sans fondement.”⁷

And this is the act of deconstructing the law, to trace and prove the violent origin of its respective circles and loops of reasoning. This deconstruction reaches its own limits whenever new bottomless acts of foundation, whose nature – in contrast to legal positivism – does not unfold in *pure* force but points towards a further dimension of force, which leads it away from facticity to a non-deducible sphere of validity. Violence is closely associated with the ‘sacred’,⁸ a non-justifiable ‘justice’ such as that which can be produced by religions but not by secular systems.

Is the bottomless foundation of law then to be sought in an unspecified sphere, in which the archaic mixture of René Girard’s ‘La violence et le sacré’ is merely used to support and justify a supposedly deconstructive disillusionment of the law and to create a subtle new model of risky religious legitimization?

In Derrida’s description of what ‘justice’ is supposed to mean, the proximity to the religious sphere becomes evident. ‘Justice’ is “infinie, incalculable, rebelle à la règle »⁹ i.e. the complete opposite of a ‘formal-rational law’, yet without representing ‘arbitrariness’.

⁵ Ibid, p. 942.

⁶ Cf. Jürgen Habermas, *Theorie des kommunikativen Handelns* [Theory of Communicative Action]

⁷ Ibid.

⁸ Cf. René Girard, *La violence et le sacré*, Paris 1972.

⁹ Jacques Derrida, Force de loi: Le “fondement mystique de l’autorité”, 11 *Cardozo Law Review* 919-1045 (1990), S. 958.

Acknowledging the kinship with Levinas' concept of 'boundless law', Derrida says that justice "Ce n'est pas l'égalité, la proportionnalité calculée, la distribution équitable ou la justice distributive mais la dissymétrie absolue."¹⁰ This absolute asymmetry is not unknown to us. We can find instances of it in the Jewish conception of God. The linguistic similarity between 'justice' and 'sacred' in Hebrew is only one example of the connection between the two.¹¹ With this, we turn to a specific legal culture in order to demonstrate a more general interrelationship.

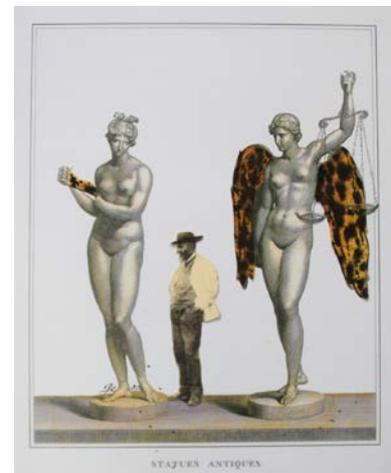
From a Weberian perspective, this proximity can be read as follows.¹² According to this view, Yahweh is not merely a God of association, he is also the creator of the law. In the beginning was not injustice; rather, the connection between Yahweh and his 'voluntarily' chosen people rests on a *covenant*, a contract that regulates the adherence to specific duties, thus bringing about an unusual double guarantee of norms, as Weber describes in his study of ancient Judaism:

All violations of the holy statutes were not only breaches against rules that he guaranteed, just as other gods did, but violations of the most solemn contractual obligation to him personally.¹³

The law is thus statutory, but created by *divine statutes*, adherence to which is watched over by Yahweh himself. Hence legal statutes and judicial control become one in a positive law of sacred origin created for Israel.¹⁴

In this "legal culture", as we at the Center for "Law as Culture" in Bonn say, the legal and the religious spheres permeate each other: religious acts are legal, oriented towards adhering to commandments, and the law has a sacred origin. The 'berith' constitutes the religious community as a *community of law*.

But what precedes this act of constitution? Is it equally violence-ridden, perched on the *precipice of a bottomless foundation of the law*?



Werner Gephart
*Zwischen Recht und
materialer Gerechtigkeit*
2007-2012

¹⁰ Ibid.

¹¹ Ibid, S. 959.

¹² This reading is also based on the brilliant analyses of this interpretation by Eckart Otto, *Max Webers Studien des antiken Judentums. Historische Grundlegung einer Theorie der Moderne* [Max Weber's Studies of Ancient Judaism: Historical Basis of a Theory of Modernity], Tübingen 2002.

¹³ Max Weber, "Das antike Judentum" [Ancient Judaism], in: *Gesammelte Aufsätze zur Religionssoziologie* [Collected Essays on the Sociology of Religion], vol. 3, Tübingen 1988 (1921), p. 140.

¹⁴ Cf. my own similar interpretation in *Gesellschaftstheorie und Recht* [Social Theory and Law], p. 555-557.

Derrida refers to Kafka's parable mentioned above and adds the dimension of time to it. 'Being-before-the-law' is interpreted temporally as a reference to the arrival of the law that will come one day. As a result, he says, *this* law "reste à venir, elle a, elle est à-venir, la dimension même d'événements irréductibles à venir"¹⁵ And only in the future will it become 'readable' and interpretable as the past; its incomprehensibility makes theological sense.

Thus the blank space in the foundation of the law seems to be occupied by both the 'sacred' and 'violence' at the same time. Only a distinction within the forms of violence in the creation of the law can distinguish between a 'destructive genesis of law' – as it emerges prototypically out of the injustice of National Socialism – and the constructive development of a legal system.

In this respect, the 'foundation' of the law has to be understood through the prism of violence as a culturally creative force, so as not to give the 'culture of injustice' a retroactive appearance of having a 'foundation'. Analyzing the abysses of violence hence becomes a touchstone for an enlightened search for the foundation of the law that does not lose itself in a religious-sociological universal suspicion or fall prey to the fascination with violence.

That is why we need a thinking that takes a closer look at "the uncanny", as Freud calls it; i.e. a new kind of thinking about violence.

Michel Wieviorka has delivered considerable insights and set new standards on this subject. Out of Michel Wieviorka's many works on the subject of violence, let me mention just one – his theory of 'violence identitaire'. "La violence identitaire," writes Michel Wieviorka,

est bien plus rarement ou partiellement qu'on croît pré ou anti-moderne, et bien davantage post-moderne, fruit alors de la crise ou de l'échec de la modernité. Elle prend un tour radical lorsqu'elle incarne en les combinant fortement le rejet de la modernité, et son éclatement, lorsque l'acteur est tout à la fois dans le regret du passé, de la tradition détruite, brisée, fragmentée, mais pas totalement disparue, et engagée dans un processus de construction de lui-même qui l'inscrit dans un communautarisme post-moderne.¹⁶

As such, I see in Michel's work, not least in *La différence*,¹⁷ a sociological consequence of Derrida's analyses of a *differend* that does not need the Other as an object of hermeneutically identifying, understanding mercy, but gives the non-identical the right to be "different".

Permettetevi di riassumere brevemente:

¹⁵ Jacques Derrida, Force de loi: Le "fondement mystique de l'autorité", 11 Cardozo Law Review 919-1045 (1990), S. 970.

¹⁶ Michel Wieviorka (ed.), *Un nouveau paradigme de la violence*, Paris 1997, p. 53.

¹⁷ Michel Wieviorka, *La différence*, 2001.

La ricerca del „fondamento del diritto“ porta a una cosa, per la quale Jacques Derrida ha trovato un’immagine magnifica: porta alle tracce, „les traces“. Ed esse - a mio avviso - sono, per Derrida, connesse all’idea del fondamento del diritto, il quale è intrinsecamente legato al sacro. Se quindi la Chair Derrida è descritta come „Law and Culture“, la dimensione religiosa non va certo trascurata. Ma dal discorso non può nemmeno sottrarsi il problema della giustizia, quella parte non decostruibile che ci conduce fino agli abissi della distinzione tra giustizia e ingiustizia. Qui però dobbiamo rigettare una nozione di „Kultur“ che scivoli nell’aberrazione del relativismo culturale.

Sono sicuro si debba continuare lungo il cammino indicatoci da Jacques Derrida. E’ dunque circostanza particolarmente felice ed appropriata, che un ricercatore di questo livello s’incammini per primo sul tracciato della Chair Derrida, intitolata appunto al grande Maestro: Michel Wieviorka.



Werner Gephart
Deconstructing traces (Jacques Derrida)
2014