

The Origin of the Force of Law:

‘A Rather Wittgensteinian Direction’

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Laws and Justice

Consider this internet meme that regularly gets posted on social media:

Apartheid was ‘legal’

Slavery was ‘legal’

Colonialism was ‘legal’

Legality is a construct of the powerful, not of justice.

This more or less anonymous text, countersigned by thousands, attests to at least three theses.

First, that there is a history of laws. Second, that the history of laws relates a history of

power. Third, that might is not right.

These theses together provide what is perhaps a fair if simple summary of the kind of thinking about law and justice that many legal theorists would, through some kind of self-authorization of their own insight into justice, like to endorse. And it is a summary that some have liked to see lying behind Derrida’s essay ‘Force of Law’ published in 1992, with its emphasis on the ‘irruptive violence’ internal to legal judgements and the founding of any legal authority (Derrida, 1992a: p. 27). However, the subtitle to that text (with quoted words guarded by little gates) ‘The “Mystical Foundation of Authority”’ complicates that summary simplicity. The simple summary might suggest that the foundation of the authority of the law is simply *external* to justice: it is power, political power, a power which is arbitrary in the sense that what it constructs as law is simply in the service of its power. Derrida’s subtitle will announce a complication to that (as one might call it) *political* conception. Rather than simply the political foundation of authority, Derrida’s subtitle speaks (in quotes) of the

‘*mystical* foundation of authority’. And within the space he subsequently opens, Derrida will also affirm that ‘it is *just* that there be *law*’ (*ibid*: p. 22). So, we should ask again (and we will keep Kafka in view here too) what is the *origin* of the force of law?

The Force of Law

I have argued in detail elsewhere (Glendinning, 2016), that the claim that will distinguish Derrida’s thought from the political conception of the simple summary is that the moment of irruptive violence which founds the law, is neither simply external to the law – nor is it something that might be eliminated by an imagined ideal law, one that, as the political conception might have it, is properly adjusted to the dictates of justice.

To go rather rapidly, the force that Derrida wants to talk about that is neither compelled by the justificatory discourse of any legal reasoning nor external to the law as an arbitrary power is akin to a performative force as analyzed by J. L. Austin: the force of utterances whose success conditions are their conforming to ‘an accepted conventional procedure’ and not truth (Austin, 1976: p. 14). But Derrida notes that with the instituting of the conventions and codes that the law depends on we are not reaching a source or origin from which we can derive the force of law. On the contrary, we would just be shifting the question one stage back and would have to ask where these conventions derive their force as ‘success conditions’ for the force of law.

Justification comes to an end somewhere – but not with something that, as it were, carries its force on its face, something whose singular countenance speaks the truth of justice, whether that comes from insight into justice itself or the truth that speaks truth to an external power. It is here that Derrida appeals to the idea of the “‘mystical’ limit” of his subtitle (*Derrida 1992a*: p.14), a limit that every discourse bumps up against in its effort to find the origin of the force of law.

At this point Derrida's argument shifts from Austin and the performative to another thinker of words as deeds: to Wittgenstein. While he takes the word from a conventionalist text by Montaigne, Derrida says he will 'take the use of the word "mystical"' that he finds in Montaigne's text 'in what I venture to call a rather Wittgensteinian direction' (*ibid*): a Wittgensteinian sense of the mystical limit.

The Mystical Limit

Derrida was likely thinking of the references to the mystical in Wittgenstein's early philosophy, the philosophy of the *Tractatus Logico-Philosophicus*. In an essay in which I first explored this idea, I argued that Derrida could have found what he was looking for in Wittgenstein's later writings too (Glendinning, 2021). Nevertheless, it is in that early text that Wittgenstein famously states that 'it is not *how* things are in the world that is mystical, but *that* it exists' (Wittgenstein, 1963: §6.44). And perhaps more significantly for us, he also says there are things that 'cannot be put into words, but which *make themselves manifest*', and that they are what is 'mystical' (*ibid*: §6.522).

At the limit of language, when the possibility of saying something with a sense gives way, there is *only* nonsense. (Not a nonsensical sense, but sheer senselessness.) At the end of the *Tractatus* Wittgenstein declares that 'anyone who understands me' eventually recognizes that wherever he has 'wanted to say something metaphysical' he has himself overstepped the limit: those propositions are themselves 'nonsensical' (*ibid*: §§6.53-4). Nevertheless, they can, he says, still serve 'as steps' to go beyond them (*ibid*: §6.54). Or again, as Wittgenstein put it at the end of a brief comment on Heidegger in conversation with the Vienna Circle, the inevitably misfiring attempts to *say* something about the world in its being – the upshot of wanting (as he put it in 'A Lecture on Ethics') to 'go *beyond* the world, and that is to say *beyond* significant language' (Wittgenstein 1993: p. 44) – may nevertheless be regarded as a

sort of *gesture*, a movement that, as he put it, ‘*points to something*’ (cited in Murray 1978: p. 80). Wittgenstein had called this running up against the limits of language ‘*Ethics*’ (*ibid*): with the words that are the results of philosophy we think we have our eyes open to the Good beyond what is the case. For Wittgenstein, these results are all ‘nonsense’ – but the attempt to say something ‘*points to something*’.

An experience of the inadequacy of existing *laws* implies a claim about what would be more *just*. But if that sense of inadequacy is to be stated in a way that does not go beyond intelligible language it will *make sense* only insofar as one can appeal to another more adequate law (whether that is the projection of a new law or an existing ‘higher’ law). But now, just as (we might reasonably say) this intelligible articulation of the sense of justice illuminates the inadequacies and shortcomings of the law as we find it, so we might imagine undertaking an attempt to articulate our sense of justice itself: to open our eyes to the truth of justice, the sense of justice that guides our sense of legal inadequacy. The Wittgensteinian sense of the mystical limit urges us to come to terms with the fact that there is no such coming to terms with justice itself, or justice as such or the Good as such beyond being. The law or laws through which we (intelligibly) express our sense of the inadequacy of existing laws seems to speak to the fact that ‘our eyes are open to justice’. But Derrida calls this an experience of justice *without* experience of or in-sight into anything present or presently given to experience or to thought. On the contrary, it is the ‘experience of justice’ as ‘the experience of the impossible’ (Derrida 1992a: p. 16).

And yet it is nevertheless *right there*, in the midst of law, where justice makes itself manifest, it is ‘there where, even if it does not exist (or does not yet exist, or never does exist), *there is* justice’ (*ibid*: p. 15). The ‘unpresentable’ *there is* of justice (*ibid*: p. 27) thus both beyond and yet internal to the ‘presentable’ experience of an ‘inadequation’ in always revisable laws and codes of law (*ibid*: p. 20) – this is what we might call an acknowledgment

of the mystical limit. The ‘Wittgensteinian direction’ of this argument is, I think, fundamental to Derrida’s reading of the relation between law and justice. And it is something Derrida urges us to read in Kafka’s fable ‘Before the Law’ too. To conclude this short essay, I will indicate the direction we might take on this.

Before the Law

In the midst of law – in the language, the conventions and codes of law and laws – the ‘*there is*’ of justice *makes itself manifest*. And if you were to say ‘our eyes are opened to justice’ in this context you would have to say equally that *nothing is given to be seen*. This is the basic outline of Derrida’s thought on the origin of the force of law and its relation to the strictly non-present justice which nevertheless, as Kafka’s text puts it, ‘streams inextinguishably from the gateway of the Law’ (Kafka, cited in Derrida 1992b: p. 184). In the midst of law – law which is *both* perfectible, improvable, capable of being made more impressively refined *and* corruptible, abusable, capable of becoming tortuously ‘Kafkaesque’.

In every here and now, in the midst of law, justice is ‘given’ only as something to come. But it is precisely *this openness of the law to an assessment of its inadequacy*, its toleration of revision and perfectibility, its openness to the autoimmunity of *self-critique*, that leads Derrida to say that it is ‘*just* that there be law’. Law, in all its generality, applying, as Kafka’s fable recalls, to everyone and at all times, is, Derrida argues, the best way, the most just way we have for organizing a response to the irreplaceable and unsubstitutable singularity of each ‘fresh’ case, a singularity before which we are called to do justice: ‘incalculable justice requires us to calculate’, insists Derrida (*ibid*: p. 28).

Yes, all reasoning (calculating), including all legal reasoning, has to come to an end somewhere: at some point we have to decide. This is the ‘structurally finite’ character of judgement (*ibid*: p. 26), the very element of our ‘finitude’ (*ibid*: p. 44). One must decide.

However, at that moment, at the moment of greatest responsibility, at the moment of decision, there where calculation comes to an end, and must come to an end, then – if the outcome is not simply the output of a purely mechanical programme nor simply the inventive whim of pure caprice – then what takes place in the moment of judgement or the instant of decision is a moment of ‘madness’: not an insight into or intuition of justice, but a leap beyond the calculable in the midst of the calculable.

Justice is never guaranteed by instituted laws – that is the truth of the simple summary – but it is in the midst of law that the experience of the unrepresentable ‘*there is*’ of justice belongs to our finite lives: it ‘streams inextinguishably from the gateway of the Law’. Derrida calls this the most ‘religious’ moment in Kafka’s fable (*ibid*). He could also have said, taking it in a more Wittgensteinian direction, the most ‘mystical’.

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