

Law, Colonialism and Violence I: Questions of Foundations

13th December 2004

That force and tyranny (*Gewalt und Tyrannei*) may be an element in positive right is contingent to the latter and has nothing to do with its nature. (G.W.F. Hegel *Philosophy of Right* trans. H.B. Nisbet para. 3 Remark)

A problematisation of the foundations of law morality and politics. This questioning of foundations is neither foundationalist nor anti-foundationalist. Nor does it pass up opportunities to put into question or even to exceed the possibility or the ultimate necessity of questioning, of the questioning form of thought, interrogating without assurance or prejudice the very history of the question and of its philosophical authority. For there is an authority—and so a legitimate force in the questioning form of which one might ask oneself whence it derives such great force in our tradition (J Derrida, *Force of Law: The ‘Mystical Foundation of Authority’* at 8)

Justice is a word from philosophy; at least if we leave aside, as we must, its legal signification which is entirely devoted to the police and the judiciary. Yet this word of philosophy is under condition. It is under the condition of the political. For philosophy knows that for the truths to which it testifies, it is incapable of rendering them real in the world (Alain Badiou *Infinite Thought: Truth and the Return of Philosophy* at 69-70)

Invitation

Under the title “Law, Violence, Colonialism I: Questions of Foundations” we wish to pursue questions of the foundations of law in an inaugural workshop of the Centre for Legal Theory at The Altonaer Stiftung für philosophische Grundlagenforschung. The workshop will take place at the Stiftung’s premises on **23rd—25th June, 2005**

The Stiftung

The Stiftung is an independent foundation and is located in Hamburg, Germany. Its commitment is to interdisciplinary work aimed at basic conceptual issues and practical problems in the areas of logic and metaphysics, legal theory and the ethics of science and technology. It is organised around three centres corresponding to these areas, which pursue the Stiftung's aims independently but with the hope, in time, of establishing points of contact. Its aims will be pursued, in part, through workshops and seminars for invited participants.

We have prefaced this proposal with quotations from philosophers, conceding that philosophy is the tradition within which foundations of thought and knowledge in western societies and cultures have been more or less continuously addressed over a period of several thousand years. But in the course of its history, philosophy has seen the departure from its academy, of sciences and disciplines with subject matters and foundational questions of their own. Nor have its relations with literature, mathematics and theology been constant. Questions of the nature of logic and of philosophy's relation to modern mathematical logic attend on the development of logic as a mathematical discipline. Via computer science and information technologies the tools and cultures of literary and intellectual production have undergone radical change. Thought about the foundations of law, morality and politics falls within this history albeit in ways which are differently conceived and mapped. The very idea (or meaning if that is preferred) of "foundations" as indeed of "theory" become topics for delineation and reflection.

They might be placed under the rubric of approach or method and perhaps, in interdisciplinary endeavours should be so placed. A certain anarchy of methods against the agreements, conventions and pretensions of established approaches, which is desirable for furthering the aims of the Stiftung, in no way precludes the use or advocacy of very strict methods (eg mathematical, hermeneutical) for particular tasks. It does however require attention to method and approach, as to genre and style. The workshop is envisaged as an occasion for furthering that requirement. For further information regarding the Stiftung see our website: www.asfpg.de

The Workshop ‘

"Law, Violence and Colonialism" names a research project of the Stiftung and an orientation of the Centre for Legal Theory. Insofar as one of the aims of the workshop is to set an agenda for further workshops "Law, Violence and Colonialism" figures in the title chosen for this one. The emphasis of the workshop however is on "Questions of Foundations" and participants are asked to bring their own perspectives and approaches to it. From some perspectives questions of law's foundations are questions of violence and colonialism, albeit in various senses of all terms involved. From others not or not in a relevant sense.

Legal theory that has ventured out of the mainstream over the past few

decades has tended toward ethical or narrative turns, hermeneutic or deconstructive approaches, or it has turned its interdisciplinary engagements toward sociology, political economy, psychoanalysis, anthropology, the natural and biological sciences, literature and so on. What is envisaged is reflection and exchange on approaches taken by participants in their own work: reflection and exchange which acknowledges the biographical contingencies accompanying choices of approach, takes in the effects of cultural transmission within academic institutions and still finds a place for articulating intuitions and grounds accompanying the commitment to and pursuit of an approach taken. (This could be seen as addressing the question of the “critical” in Critical Legal Theory — even if the label is somewhat rubbed.)

One delimiting perception is that globalisation and colonialism as features of world orders, present, past and past-present, contextualise the dynamics of local, national and international law. That serves as a contextualisation appropriate to a political economy or social theory of law. But further, and against a certain national parochialism in conventional jurisprudence and philosophy of law — a parochialism which might be seen as inhering in the constitution of modern law — my perception is that conceptual questions of the authority and legitimacy of law and laws also belong in this context. How that “belonging” is thought takes us back to questions of foundations — hidden, violent, mystical, fictitious, factitious, conceptual — and approach.

It is not then a question of “foundational” and “anti-foundational” approaches. Quite to the contrary, a binary modelling of positions on this question (as indeed on many others) is, to my mind, too flattening an aggregation of diverse concepts of “foundation” even within philosophy. At one level, this opens onto logical and methodological issues of binary systems, their strength, value and validity; at another, onto representation and the forms and structures of genres of discourse. In the latter respect, for example, the interaction of conceptual or argumentative and narrative discourses in law might be contrasted with approaches remaining within one or the other. And if, to open yet another line, foundations of law are tied to the foundation and re-foundation of states then the condition of politics is brought to the fore.

Or one might question Badiou’s conceptualisation, which in any case concerns the relation of philosophy and politics, as one might question his imperative suspension (or exclusion) of legal significations of justice. What are the stakes of, for example, Derrida’s or Foucault’s ‘ethical turns’ or, after Levinas, of nominating ethics as *πρῶτη φιλοσοφία* (first philosophy)? What motivates locating legal theory in social theory or in cultural theory or in social and cultural theory? Is there a hope here of figuring the theoretical and the political differently, of politically performative theory? It may be contended that thought is at odds with itself and that the contradictions of self-reference involved in thought thinking itself open the realm of logic and metaphysics; that conceptual foundations are set into this realm and need to be explored by means of mathematical and philosophical methods; that otherwise legal theory risks leaving the power of mathematics and science unexplored or at the service of constituted and instituted power,

I would begin with a thesis: the spirit of the law is not fully conscious of itself. It passes over that of which it cannot or will not speak in silence and this silence is then filled with narratives and theories of legitimacy. You might say: the law that is and is enforced and is autonomous enough in a life or right of its own to be better seen in terms of a social sub-system indifferent to questions that are not addressed by its program. Or you might say: perhaps law knows that its justice, if it is to be just at all, can only happen under conditions which limit the questions it will tolerate and maintains its silences in fidelity to this truth

Law is actual and practical and has positive and pragmatic dimensions. In a quite specific sense, violence and colonialism contextualise my own and others' work on the common law of Australia (or Britain's other "settled" colonies) and its imposition on aboriginal peoples. But common law is just one form of modern law and colonialism extends past British to modern European, back to ancient colonialism and across nations and peoples. Globalisation may be considered as its latest form.

The shock of the invasion of Iraq was not for me the shock of the unpredicted or unpredictable, but of the reiteration and synthesis of crusade and economic plunder, of pre- and post- sixteenth century forms of colonialism. A certain aftermath of the British settler colonialism struck me as inherent in the alliance of instigators and, in the Australian case, willing participants. I wondered at what has been termed the "namelessness" of colonial violence. I wondered whether this namelessness, in the context of the foundation and re-foundation of states and their constitutions, bespeaks HLA Hart's view that "all that succeeds is success" and what then "success" might be. Perhaps, echoing Kant, the authority/violence of law is, as law's *a priori* principle or unknowable origin, a limit which cannot be put into question without destroying the subject matter of concern and inquiry. But if so, can (or should) it not be asked whether crimes against humanity can be recognised as crime in the face of a "law so sacred that it is practically a crime to cast doubt on it and thus suspend its effectiveness even for an instant" (Kant, *The Metaphysics of Morals*)?

That question might be turned to the very idea of crime or to specific crimes, such as treason and sedition, or to the theory and doctrine and practical problems of human rights, to the original acquisition of property, to sovereignty or contract or constitution, and with that into the categories and structures, institutions, conventions and doctrines of legal discourses. Or to quite specific practical problems of legal regulation, prohibition and enforcement.

Or to justice and violence: whether the violence of this invasion as of earlier invasions is of the kind that is deemed unjust, of a kind that "we" know is unjust, raises questions of subjectivities and of time that appear in discourses of justification, victimisation, resistance, survival and most recently reconciliation. There are also questions of objectivities, of knowing, of the logics and structures, relations and technologies which are at work in conceptualising the dynamics of social and legal change. There is a question of how objectivities and subjectivities interact that takes thought back to its assumptions and frames while it is yet busy with framing, narrating, and conceptualising.

This last question brings a certain closure on what is being asked of participants: whether from my formulation of it or one of their own and in keeping with the many other questions of this proposal, to take that turn back to the assumptions and frames of their own work, either completed or in progress.

The workshop will be relatively informal. We are experimenting. Participants will be asked in May to submit an abstract of the work done or in progress which they will bring to the workshop. Short papers, suggestions and outlines of topics for discussion, of a text for analysis and discussion may also be submitted.

The Stiftung will support participants financially by paying travel costs (economy), accommodation for three nights and a modest per diem.

Please let us know, at your earliest convenience, if you wish to participate in this workshop. If you cannot attend but wish to remain informed of the Stiftung's activities please say so.

Possible participants

Kathy Bowrey
Bill Bowring
Emilios Christodoulidis
Barry Collins
Tariq Kochi
Qdsia Mirza
Stewart Motha
Tim Murphy
Colin Perrin
Alain Pottage
Veronique Voruz
Bert van Roermund
Burkhard Schafer
Anton Schutz
Scott Veitch
Irene Watson

Valerie Kerruish
Hamburg.