

PART III: THE WRONG OF LAW

Preface: Images

Hegel and Marx were both much taken by Diderot's satire *Rameau's Nephew*. "Today" Marx wrote,

industrial supremacy brings with it commercial supremacy. In the period of manufacture it is the reverse: commercial supremacy produces industrial predominance. Hence the preponderant role played by the colonial system at that time. It was the 'strange God' who perched himself side by side with the old divinities of Europe on the altar, and one fine day threw them all overboard with a shove and a kick. It proclaimed the making of profit as the ultimate and sole purpose of mankind.¹

The strange god is refigured from a proclamation of the rights of the good, the true and the beautiful, made by Rameau's remarkable but nameless nephew whilst discoursing on the influence of Italian opera on French music.

The gates of hell will never prevail against the imperial power of nature and my trinity. The true establishes itself gently—it's the father and gives birth to the good, who is the son, and from him comes the beautiful, which is the Holy Ghost. The strange god sets himself up humbly on the altar beside the idol of the country. Gradually it gets stronger. One fine day it nudges its comrade with an elbow and bang, crash, the idol is on the floor. They say that's how the Jesuits planted Christianity in China and India. And these Jansenists can say whatever they please, but the political method that marches towards its goal quietly, without bloodshed, without martyrs, without a single tuft of hair being cut off, seems to me the best.²

Then he sings his thirty arias "Italian, French, tragic, comic—in all sorts of different styles He's a slave. He obeys. He calms down, he laments, he complains, he laughs, never straying from the tone, rythm or sense of the words or the character of the song".³

Hegel has taken his own way with Diderot's satire, inserting and inverting it in his *Phenomenology* to depict the self-alienated spirit of culture in eighteenth century Europe, its misrecognition of the relation between faith

¹ (Marx 1976) at 918 (Marx 1873) at 782.

²(Diderot 1762) at n.p.

³(Diderot 1762) n.p.

and insight and the Enlightenment struggle with superstition. Rameau's nephew is figured as the true spirit of this disrupted consciousness, to whose talk and performance the honest soul, Diderot's *Moi* in the dialogue, can only respond in dull platitudes.⁴ The strange god is reinscribed in Enlightenment's failure to grasp that in attacking faith it is attacking the content of its own pure insight — *be for yourselves* what you all are in *yourselves* — *reasonable*. Without then encountering resistance, the spirit of Enlightenment spreads, infuses itself like a perfume in an unresisting atmosphere; penetrates as an infection to affect every part of the old spirit, until “on one fine morning it gives its comrade a shove with the elbow, and bang! crash!, the idol lies on the floor”.

On one fine morning whose noon is bloodless if the infection has penetrated all organs of spiritual life; only memory then preserves the dead form of the Spirit's previous shape as a vanished history, vanished one knows not how. And the new serpent of wisdom raised on high for adoration has in this way painlessly cast merely a withered skin.⁵

Serpent of wisdom: the *topos* is religion and the transition is to morality in its Kantian conception. For Hegel, “the wonderful division of the spirit against itself”, is only in the biblical narrative solicitation from without. In actuality, “the entry lies in the opposition, the awakening of consciousness in the human itself and this same history is repeated in every human”.⁶

The mythology of the fall, the story of original innocence from which humans were diverted, brings into the thought of those peoples whose creation myth it is, an idea of perfection, another world, a paradise, life without sin, wrong, want or pain from which it is the human condition to have been expelled on account of its wrong-doing. The paradise was the creation of God and life in it was conditioned by a prohibition: not to eat the fruit of the tree of knowledge of good and evil. The wrongful act was breach of this prohibition: disobedience to divine authority. The outcome is equivocal: an exchange of immortality for likeness to God in knowledge of good and evil.

The genesis into which Marx sets *Rameau's Nephew* is that of the industrial capitalist: the idyllic dawning of capitalist production in the plunder, murder and enslavement of American, Asian and African peoples by European nation states. The transition he is tracing is from the forms of capital — usurer's and merchant's capital — of the feudal period and the agricultural capital secured by enclosure of peasants' land, to the systematic combination of “colonies, the national debt, the modern tax system and the system of protection” that occurred in England at the end of the seventeenth century.⁷ “These methods” he observes,

⁴ (Hegel 1977) at 317f; (Hegel 1807) at .

⁵ Ibid at 332; 419.

⁶ Cf. (Hegel 1975) §24Z at 42f; (Hegel 1830) at 94 (my translation).

⁷ (Marx 1976) at 915; (Marx 1873) at 779.

depend in part on the most brutal violence (*Gewalt*), for instance the colonial system. But they all employ state power (*Staatsmacht*), the concentrated and organised violence of society, to hasten, as in a hothouse, the process of transformation of the feudal mode of production into the capitalist mode, and to shorten the transition. Violence is the midwife of every old society which is pregnant with a new one. It is itself an economic power (*Potenz*).⁸

In egalitarian Australia, land of the ‘fair go’, in 1957 within a national culture for which the right to strike was (still) an honoured gain of the labour movement, on Palm Island two generations after its establishment as an Aboriginal penal colony, a group of young men organised a protest against the Queensland government’s decision to cut wages on the island.

The police — the state commandeered the [Royal Australian Airforce] crash boat which was always in Townsville harbour and raided the island — went in the early hours of the morning, smashed doors down, dragged the leaders of the strike out, chained them, marched them through the community and then put them on the boat with the machine gun trained on them and took them away and exiled them — I mean literally — exiled them from their own community and their own families.⁹

In sunny Perth, Western Australia on Human Rights Day 1989, armed police raided an Aboriginal camp at Lockeridge. They burst into a toilet block where three young girls were showering guns trained on them. They threw a man and his child out of their bed guns trained on them. They coralled the people into one place and searched the camp. They searched for three armed Aboriginal men, having been informed by ‘a reliable source’ that they were there. They were not there. Indeed two of the names given named no one at all and a third named a man already in prison in South Australia.¹⁰

General Remark

On the Effects with regard to Rights that follow from the Nature of the Civil Union.

A people should not *inquire* with any practical aim in view into the origin of the supreme authority [*obersten Gewalt*] to which it is subject, that is, a subject *ought not to rationalize*

⁸ Ibid, modified translation.

⁹ (Waters 2008) at 33.

¹⁰ Affidavits sworn in the course of an inquiry into the raid by the Aboriginal Legal Service on file with the author.

for the sake of action about the origin of this authority, as a right that can still be called into question (*ius controversum*) with regard to the obedience he owes it. For, since a people must be regarded as already united under a general legislative will in order to judge with rightful force about the supreme authority [*Staatsgewalt*] (*summum imperium*), it cannot and may not judge otherwise that as the present head of state (*summus imperans*) wills it to.¹¹

And having observed that a subject who resolves to resist this authority, will be “punished, got rid of, or expelled (as an outlaw, *exlex*) in accordance with law, Kant continues:

A law that is so holy (inviolable) that it is already a crime even to call it in doubt *in a practical way*, and so to suspend its effect for a moment, is thought as if it must have arisen not from men but from some highest, flawless lawgiver; and that is what the saying “All authority is from God” means. This saying is not an assertion about the *historical basis* of the civil constitution; it instead sets forth an Idea as a practical principle of reason: the principle that the presently existing legislative authority ought to be obeyed whatever its origin.¹²

In response to a critic who expressed astonishment at Kant’s “most paradoxical of all paradoxical propositions: the proposition that the mere *Idea* of sovereignty should constrain me to obey as my lord whoever has set himself up as my lord, without my asking who has given him the right to command me”, Kant grants the paradox and hopes only “not to be convicted of *heterodoxy*.”¹³ His argument is, in a certain sense, logical. To the premise that an act or deed, taking control, is the condition and basis of right, he adds the principle that the *Idea* of sovereignty over a people constrains any individual amongst that people to unquestioning obedience, since the very existence of a people is given as an object of experience only via the (noumenal) Idea of sovereignty (“the Idea of the unity of a people *as such* under a powerful supreme will”).¹⁴

For Kant designating the Old Testament creation myth as ‘the fall’ bespeaks a moral point of view, a point of view for which the history of nature begins with goodness for it is the work of God, but that of freedom begins with evil for it is the work of man.¹⁵ The comment — in marked contrast to his metaphysics of right — is facetious, made in the context of an ironic refutation of Herder’s view that humankind derives its destiny from nature and therefore needs no master.¹⁶ I take its pretext to cue a first formulation

¹¹ (Kant 1991a) at 129; (?) at 318.

¹² (Kant 1991a) at 130; (?) at 319.

¹³ Ibid at 175

¹⁴ Ibid at 176.

¹⁵ (Kant 1787) at 227.

¹⁶ (Reiss 1991) at 197.

of the wrong of law. The wrong of law works to maintain this moral point of view. It works to maintain judging, blaming and shaming, not only as *law's* response to harm and suffering but, prescriptively, 'imperationally' in Bentham's term, as the proper response *of us all*. It holds thought numb. For whether, in legal thought, the prescription is disowned and displaced to morality or utility in the instant of its issue or represented as authorised or as balanced by it, this wrong is to secure law's right — indeed its obligation — never to allow itself to be surprised in thinking itself as right.

1. Theses on the wrong of law

I.

Modern law's claim to right rests on the 'foundation' of a constitution that is written over thought's dialectical and speculative logical foundation *and* over the historical and material circumstances and conditions of that constitution's coming into being.

II

The surprise, the event, which in being ruled out by law is that without which the wrong of law is not to be thought, catches thought in its very own realm. It stumbles over itself, surprises itself and is surprised by itself, is caught in the breach of its very own laws of thought.

III.

Thought flies free of the mundane world. It flies free and creates figures and fantasies, concepts and illusions. It leads and it misleads. It is in excess of the material, habitual, finite world of everyday life. It cannot escape its own being as being at odds with itself but it can, by artifice, bracket out the world its has flown and abide with its own makings and doings. If this is the impulse to turn metaphysics to a science of logic that will replace metaphysics, the bracketed space, 'the formal' is the excess objectified, separated by artifice from material life.

IV

Purely technical innovations — things which do the trick, solve a problem, bring something new to light or life — *as* purely ('merely') technical are witness to and expressions of a power in artifice that is unknown to the artificer. They may thus make common cause with mystical and magical objects and phenomena against ideas of complete and certain foundations of knowledge.

V

The question that is posed by the *techné* or skilful doing of mathematical reason in the formal logical realm is a question of form and formalisation. Why have 'empty' forms and 'merely' technical methods disclosed so rich a content in strictly formalised logical systems?

VI

The gap or gulf between philosophy and mathematics holds contemporary thought in the trammel and sway of a conception of reason — the thinking and its (conceptual) product — that is stuck in the failure and the failure to comprehend the failure of the absolute universality of its laws of thought. It is the trammel and sway of a transformation of formal logic, its shift to mathematics, which does not reach its concept in the dynamic of that transformation.

VII

That ‘we’, that ‘I’, are as much possessed by as in possession of categories that shape knowledge and action and that in consequence an irreducible double character or ambiguity haunts the desire for complete and certain knowledge is the standpoint of dialectical reason. It links back to the idealist supposition of a constitutive role of antinomies of pure reason in theory of knowledge (justification), conceives ‘logic’ as theory of concept formation and interprets fetish phenomena as a dialectic of form and content operative in the sensuous-supersensuous or social realm.

VIII

In its modern form, law weaves the stuff and matter of social life into the gold of doctrine (rules, principles, norms) — ‘the law’ — which is applied and enforced as an authoritative determination of right. The force of this form, its genius if you will, is to submerge its historical and geographical particularity in the universality of its claim of right: in the universality, it may be said, of itself as *the* form of right.

IX

The voices that would object to this claim cannot be heard in the courts of this law. They have been robbed of their language in the very name of language. In colonial contexts they have been robbed of their law in the very name of law. Yet as an expression of the wrong of law this fails. Caught within the frame or schema or circle of meaning that the law exists to impose, this wrong is not wrong. It is the very act which the exercise of jurisdiction is ‘entitled and indeed obliged’ to perform.

X

The phrase "...is entitled and obliged to..." exempts and absolves its subject from responsibility for harm suffered or damage done by the act in question. It completes or closes a sphere of meaning within which the court does no wrong, *can* do no wrong because its word and judgement determines wrong.

XI

The warp and weft of form and content are threads of a fabric of meaning that the law exists to impose on action. Formalised (given conceptual as distinct from narrative form) and written, a content taken from social life gains forms of appearance and expression to which validity or value are attributed in the justificatory practices of their return on social life through the exercise of jurisdiction and the coercive enforcement of decisions.

XII

The rites and rituals of symbolic power surrounding the judiciary attest a precariousness or contingency affecting modern law, a possible failure of imposition which threatens it and which institutionalisation, while claiming success, does not wholly succeed in banishing. The right of coercion vested in the nation state, can be taken as intrinsic or extrinsic to conceptions of modern law. Narratives of legitimacy and the skilful weaving of concept and narrative in legal reasoning are yet or in consequence instrumental to its recognition and acceptance.

XIII

If the question that is posed by the *techne* or skilful doing of mathematical reason in the formal logical realm is how 'empty' forms and 'merely' technical methods can disclose so rich a content, the question that is posed by a *techne* of jurisdiction is somewhat the reverse: how does a content taken from the ways of life of some become an ideal of legality for all?

XIV

The 'wrong' of the wrong of law is before the law or it is unthinkable or inexpressible. Its closest approximation in contemporary theory is the notions of fetishism or mystification which however tend to deny the irreducible ambiguity of thought at odds with itself and thus eschew its formal logical investigation and implementation. On the other side, conceived as unthinkable or inexpressible it appears as a *différend* or the aporia of right as (positive) law and right as justice.

XV

That there is *or may be* a realm of stable, propositional truths, which as resources (assumptions) may be used arbitrarily often in reasoning is, for a formal (mathematical) system of dialectical and speculative logic, a conjecture rather than a presupposition. Determination of the extent of any such realm thus falls within the envisaged scope of formal logical derivation.

XVI

The event of the breach of the absolute universality of traditional logic's laws of thought which *happened* with the emergence of antinomies in higher order mathematical logic and set theory opened mathematical logic to the construction of a plurality of formal logical systems and reconfigured reflective and constructive thought in foundations of mathematics and logic. *In* the event of that breach, formal logical practice is confronted, on proof theoretical grounds, with strict alternatives. If classical logic, with the powerful deductive apparatus afforded by the structural rule of contraction (in other calculi, *tertium non datur*, the principle of bivalence or their equivalent expressions) is to be preserved, abstraction must be restricted. If unrestricted abstraction, with its unlimited expressive power is to be kept, classical logic must be abandoned.

XVII

That the former, almost universally taken and frequented by classical and non-classical logicians alike, since it opts against unlimited expressive power, is not the avenue from which failures of expression can be redressed is a conjecture .

XVIII

This strict alternative posed to logical practice by the paradoxes has indeed a binary form. The practical question of response depends on whether the possibility of logical antinomies having epistemic significance is admitted. If it is, a foundational question which challenges traditional conceptions of foundation, not with their anti-foundationalist mirror, but with a different conception of 'foundation', enters the scene. A formal logical system which is trivialised by antinomy is better served by anti-foundationalist approaches. It can rely on tradition, authority and an established hegemony to safely enough advocate logical pluralism. What it cannot do is admit the epistemic significance of antinomy. The 'wrong' of the wrong of law has the generic sense of that limitation.

XIX

The agency of the form of modern law determines this wrong as the ‘wrong of law’ and is thus the subject of theory aimed at that concept. Conceived as the force of form, the thinking of this agency is liable to lose hold of the activity (or ‘genius’) of the form of modern law in just the measure of success of that activity. What then appears is the incontrovertible claim of whatever, single principle of vision and division is thought to constitute a field, to which logic as language games and common sense offer an anti-foundationalist counterpoint.

XX

If, as regards fetish phenomena attaching to commodities, the particular and peculiar thing-ness of the commodity is the question at stake; and if to get at it it is first necessary to link the prejudiced connotation of the terms ‘fetishize’ and ‘fetishism’, not only to narrative but also to a conceptual discourse which as logic or as metaphysics repeats its inability to grasp its own concept, the particular and peculiar not-thing-ness of persons remains constitutive of the law’s form and genius. If the gold of doctrine now trades in derivatives a question of logic, of theory, *poiesis* and practice of abstraction, construction and derivation is the question wanting address.

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