

ARTICLES : SPECIAL ISSUE
A DEDICATION TO JACQUES DERRIDA - JUSTICE

Force and “Mystical Foundation” of Law: How Jacques Derrida Addresses Legal Discourse

By Petra Gehring*

A. Introduction

In the 1970s and 80s, the philosophical works of Jacques Derrida became known well beyond the borders of France and beyond the limits of the French language. It was a radical and disturbing new form of materialism which made Derrida's thought so notorious: a philosophy of writing, of *différance*, of the movements of negation which always escape our grasp – with the effect that all theoretical trust in the idea of “presence” is undermined. Derrida develops his thought relentlessly on the border between form and content. It could be said that he balances on this border. And he conceives these diverse, experimental balancing acts, which are portrayed as readings of other texts, as a procedure in its own right – a procedure, called “deconstruction”, which has a distinctly irritating effect on the reader.

Derrida's deconstructive “readings” pursue the project of a radical subversion of knowledge; and in this regard they share a certain kinship with the works of authors such as Foucault, Baudrillard, Lyotard, as different as they otherwise are. From a philosophical point of view, the project of deconstruction is directed against “the” entire tradition of (Western) metaphysics, and from a political point of view against the order of speech, perhaps more precisely against technique, the techniques of speech and of recording (including the techniques of renewal) in science itself.

I am not certain whether the euphoric phase of the subversion of knowledge in French thought, which followed structuralism, should be called a “movement.” At any rate, through books such as *De la grammatologie* and *La dissémination* (and,

* Prof. Dr. phil., Institute for Philosophy, Technical University of Darmstadt: www.ifs.tu-darmstadt.de/phil/. Professor Gehring specializes in the philosophy of law and published on Derrida in her book INNEN DES AUßEN - AUßEN DES INNEN. FOUCAULT, DERRIDA, LYOTARD (1994). Email: gehring@phil.tu-darmstadt.de.

Marges de la philosophie and *Glas*, and others) Derrida's "deconstruction" has settled since the 1970s into diverse academic disciplines (or orders of speech: discours, discourses) as their uninvited guest. And this uninvited guest, deconstruction, is not easy to deal with. Derrida's texts are insistent about the material of what is written, and each new reading dismantled what is specific about the contents of what was read until it seemed that these contents only referred to their own character of being written, their own readability. – And Derrida himself? He is regarded as the philosopher with a hammer who, like Nietzsche, wants to rupture philosophy's eardrum, its "tympanum", as it is put in one of Derrida's wildest texts dating from 1972: "Tympaniser – la philosophie."¹

Anyway, the accent of Derrida's writings shifted around the middle of the 1980s at the latest. Deconstruction is increasingly fascinated by ethical, political and social questions. The main track followed by deconstruction is no longer the sheer textuality of the texts, the threads leading back to the cocoon of materiality, which is stripped of the orthodoxy of reading from which the sense emerges. Through the self-references of writing, the focus is on the alien-ness of that which and on the Other who gets entangled in the text: whether it be the forms of creative art or the urgency of the political or the appeal of ethics.

In particular ethics. Derrida himself has emphasised the increasing significance of Emmanuel Levinas's radically ethical philosophical work (an ethics as *prima philosophia*, if we follow Levinas, prior to any ontological inquiry, and perhaps even any critical inquiry).² Thus, since the beginning of the 1990s the recurrent inquiries of deconstruction have revolved around phenomena or concepts such as "promise" (*promesse*), "witness" (*témoignage*), "responsibility" (*responsabilité*), "gift" (*don*), "justice" (*justice*), "hospitality" (*hôpitalité*) and "friendship" (*amitié*) – in addition to others, of course. There has been talk of a turn towards the other, of a

¹ Jacques Derrida, *Tympanon*, MARGES DE LA PHILOSOPHIE I-XXV, I (1972).

² Compare further the striking profession: "En ce moment même dans cet ouvrage me voici." (JACQUES DERRIDA PSYCHE. INVENTIONS DE L'AUTRE 159-202 (1987)). Derrida's early essay on Levinas (*Violence et métaphysique*, in L'ÉCRITURE ET LA DIFFÉRENCE 117-228 (JACQUES DERRIDA 1967)), by contrast, keeps a clear distance as far as the substance is concerned, dismissing the foundational claims of Levinas's ethics in their metaphysical aspects.

"performative turn,"³ and also, perhaps particularly striking, of a "transition from a problem of undecidability to one of undeconstructability."⁴

Against this background, it was surprising how Derrida made a move in 1989-1990 to apply himself to the legal context, namely in the text to be treated here: *Force de loi*.

*Force de loi*⁵ is a surprising text because it suddenly becomes apparent how little Derrida had had to say about law until then – although he seemed to write about almost everything. *Force de loi* is surprising inasmuch as law, after so many years, finally becomes a topic. And in particular, *Force de loi* is surprising for the vehemence with which deconstruction takes hold of law. The text has a tone of distinct identification. It seems that whereas on the one hand Derrida "deconstructs" legal discourse, that is, decodes the law with respect to what remains unthought, he simultaneously affirms the model of law; it may even be that he adopts it as a certain broken form of the justice of law, as a paradigm of deconstruction itself.

In the present paper I shall address three questions to this prominent text of Derrida's:

- How does Derrida portray law and legal discourse (to what extent does he perform a deconstruction of *law or legal discourse*?) (*Section B.*)
- How does Derrida project a model or his model of legal justice, of justice in the law? (*Section C.*)

³ Compare further Rodolphe Gasché, *A Relation called "Literary": Derrida on Kafka's "Before the Law"*, 2 ASCA. AMSTERDAM SCHOOL FOR CULTURAL ANALYSIS 17-33 (1995) (German translation: *Eine sogenannte "literarische" Erzählung: Derrida über Kafkas "Vor dem Gesetz"*, in EINSÄTZE DES DENKENS. ZUR PHILOSOPHIE VON JACQUES DERRIDA 256-286, 260 (Hans-Dieter Gondek, Bernhard Waldenfels eds., Antje Kapust trans., 1997); see also Hans-Dieter Gondek/Bernhard Waldenfels, *Derridas performative Wende*, id. at 7-18 (this formulation is also used).

⁴ Hans-Dieter Gondek, *Zeit und Gabe*, id. at 183, 186.

⁵ Jacques Derrida, *Force de loi: Le "fondement mystique de l'autorité"*, 11 CARDOZO LAW REVIEW 919-1045 (1990) (republished: Paris 1994) (German translation: *Gesetzeskraft. Der "mystische Grund der Autorität"* (Alexander García Düttmann trans., 1991)). The first publication is bilingual (French and English); therefore, I shall cite three page numbers: French and English separated by a slash, followed by the page number in the German translation. If indicated, this last shall be included in a footnote with an alternative German translation.

- In order to make of it a model for deconstruction, that is, to address law as a *paradigm for the process of deconstruction*. (Section D.)

It is obvious that of these three questions the first – how does Derrida grasp law, what theory of law does he intend to offer – is ultimately the most interesting one for legal theorists. Does deconstruction deconstruct law, is it possible with Derrida to conceive new paths, perhaps even a new legal theory? At the conclusion, I shall return to this question, for it is the question which I am most interested in: Derrida’s analysis, his text is directly addressed to legal discourse; what does it really have to offer for an analysis of law, of *juridicity*, upon which the juristic order rests?

B. Law and Legal Discourse

Force de loi is made up of two parts, each of which has its own specific perspective. In the first part of the text, Derrida explicitly addresses lawyers; it was written as a lecture for a colloquium of the Cardozo Law School in 1989. Here, Derrida “addresses” legal discourse from within – in a quite literal sense. The topic of this part of *Force de loi* is the question of the practical possibility of justice in law as law. The second part of the book consists of a reading of a classic of the political-anarchistic questioning of the constitutional state (*Rechtsstaat*). At issue is the controversial essay “*Zur Kritik der Gewalt*” which Walter Benjamin wrote in 1921. In this second part of his reflections, Derrida views legal matters – as Benjamin had – as it were from an external perspective. The topic from this perspective is both the question as to what law as law – that is, law as a whole – is based on as well as the question of the possibility of justice outside of law.

In contrast to the first part, which, as I have already indicated, is distinctly affirmative, the second part keeps more distance. Derrida inspects the lines of Benjamin’s diagnosis, and ultimately rejects it.

It is this the point at which I shall pick up the discussion: with Derrida’s fundamental reflections on the status of law, the order of law or the legal order,⁶ that is, with deconstruction’s external perspective on law and legal discourse. With the question of justice – whether extralegal or intralegal – I shall proceed so to speak backwards to the first part of the text, which immediately addresses legal discourse.

⁶ Benjamin speaks of positive law and uses the term *Rechtsordnung* (legal order) for it. Compare further Walter Benjamin, *Zur Kritik der Gewalt*, in *GESAMMELTE SCHRIFTEN II/1* 179-203 (Walter Benjamin 1977).

"*Le droit n'est pas la justice / law is not justice*"⁷ – with this Derrida takes the same point of departure as Benjamin (and it is also common to Emmanuel Levinas). The question of justice cannot be treated within law, it must be treated as the question of the justice of law. But law is force – and not just in the sense that in particular cases it ordains certain sanctions, but rather by virtue of the fact that law is based on the enduring possibility of a certain force or violence to enforce laws, that is, on a force (or violence) by means of which it ensures its "*applicabilité / applicability*"⁸: as law, as a rule. Walter Benjamin calls this "*rechtserhaltende Gewalt*", a law-preserving violence; and the point for him is that it is not a result of law, but rather is given with the very form of law. Of a law which preserves itself as an order only as a whole, thanks to a state monopoly on violence (which is tacitly presupposed in the application of law).

Derrida's reflections emphasise the same point. Law is per se and as such the bringing to bear of a rule, it is "*l'élément du calcul / the element of calculation*"⁹, and the validity of any rule is based on and even actualizes violence. Law has the generality of an act which does not address an addressee in the singular – and this aspect contains a sort of violence which is irreducible and inconsistent with the idea of full justice. Derrida draws a parallel between this generalizing violence of law and the violence of language. Language, too, is the application of rules and misses the singularity of a situation, of an "address". And indeed, reliance on law, on jurisprudence and on jurisdiction, presupposes the regularity of language, more precisely, the disposition to linguistic generalization.

But Derrida is not solely interested in this point, the dimension of "*violence conservatrice / the violence that conserves*".¹⁰ A second dimension is at least equally important for him, the dimension of a latent reference to violence which law contains from the very beginning. Benjamin emphasizes this aspect with the term "*rechtsetzende Gewalt*," which could be translated into English as constitutional or legislative violence. Derrida translates it into French as *violence fondatrice* (English: violence that founds) (see further on page 1006/1007). What is meant is that all law is based on violence inasmuch as there is no original law, but rather all law was instituted at some time. Inasmuch as the law presupposes the legitimacy of its own

⁷ Derrida, *supra* note 5 at 946/947 (German trans. at 33).

⁸ *Id.* at 924/925 (German trans. at 12). Literally translated into German as "*Anwendbarkeit*." What is meant is doubtless the wide field of conditions of what is classically called the "*Wirksamkeit*" (effect) of law as distinct from its mere "*Geltung*" (validity).

⁹ Derrida, *supra* note 5 at 946/947 (German trans. at 34).

¹⁰ *Id.* at 1006/1007 (German trans. at 90).

origin, it ultimately refers to an extralegal act, to an originating act of violence; and this unnamable instituting violence constitutes the groundwork of the authority of law whenever the law (or statute or an individual judgement) explicitly appeals to the “legitimacy” of its own institution. This historically equivocal dimension of the establishment of law is an obscure foundational secret which recurs in the performative character of legal speech; following Montaigne, Derrida calls it “mystical” in *Force de loi*.

Il y a là un silence muré dans la structure violente de l'acte fondateur / Here a silence is walled up in the violent structure of the founding act.¹¹ The “mystical” is an abyss in the heart of what is supposedly well founded: vanished cruelties at the moment of constituting a state, forgotten terror when new law comes into force, events which remain historically “ininterpretables ou indéchiffrables / uninterpretable or indecipherable”.¹²

This is the dimension which Derrida emphasises in his reading of Benjamin – *nota bene* because *Zur Kritik der Gewalt* addresses the violence which preserves law and that which establishes law not merely as attendant circumstances or as a background of law, but as a constitutive factor of what constitutes law as law, or, as I would like to put it, its juridicity, its juridic character as such.

Now, Walter Benjamin incorporates reflections into his criticism of violence (not violence within the law nor through the law, but the violence *of* law) which Derrida is only partly willing to follow. Benjamin regards the connection between the violence which establishes law and that which preserves it as a fatal mixture. To put it more precisely, there is a specific myth-making at work in both cases: concrete means of force or violence are placed in a context of justification so as to minimize their violent character, and abstract ends are instrumentalized in order to disguise the illegitimacy of the means. Benjamin calls this historical superimposition of means and ends a “mythical” violence in history; the historical forms of instituting and preserving legal orders, that latest of which is in the epoch of the state, constitute a “cycle” of legitimation for something which on principle cannot be legitimated.

¹¹ *Id.* at 942/943 (German trans. at 28) (“*Es gibt da ein Schweigen, das in die gewaltsame Struktur des Stiftungsaktes eingeschlossen ist.*”).

¹² *Id.* at 990/991 (German trans. at 78).

In *Zur Kritik der Gewalt*, Benjamin makes a radical step at this point. He is completely separating the realm of means from the question of ends – thus taking leave of the idea of legitimating ends: such "pure" ends are unreal, perhaps "divine," but at any rate inaccessible to humankind. Against this background, Benjamin's real interest is in the question of the possibility of "pure means," and in the attendant question as to whether such "pure means" – if they are conceivable – must without exception be qualified as violence, or whether there are certain conditions under which they need not be.

I shall only go into this point very briefly – it is a substantial topic in its own right (which, incidentally, I do not think Derrida himself really goes into in his reading of Benjamin). As is known, Benjamin affirms the possibility of pure means – that is, a practice which is situated fully on this side of the context of aims and legitimation, on this side of the horizon of (juristic?) legitimacy. The Criticism of Violence lists examples: virtues such as "kindness of heart, love of peace, inclination, trust"¹³ which are situational paths of individual communication, whether in diplomacy or in love; and paradigmatically: language where it consumes itself free of aims in dialogue as an end in itself, as a "technique of civil accord,"¹⁴ as he puts it in the text.

Derrida answers the question as to whether "non-violent resolution of conflicts is possible" (to which Benjamin says, "... doubtless"¹⁵) with a "no." This "no" is a matter of principle: *Force de loi* attacks equally the idea of non-violence as well as the idea of "purity" and the ideal of "criticism" in making a "distinction" or "decision" with which the "pure" might be distinguished from other things.

I shall defer the question to what extent Derrida's reading, which aporetically deconstructs these concepts and demonstrates them to be logically untenable,¹⁶

¹³ Benjamin, *supra* note 6 at 191.

¹⁴ *Id.* at 192; Derrida only quotes this formulation, prior to it the formulation "culture of the heart" (see further 1016- 1018/1017-1019, 99-100); surprisingly, he does not go into the idea of the pure means as a *technique* in any more detail. However, this point seems to be central for Benjamin – also with respect to language (writing?).

¹⁵ Benjamin, *supra* note 6 at 191.

¹⁶ Derrida confronts the anarchistic revolutionary Benjamin and the Jew Benjamin with certain questionable political implications of the metaphor of "purity"; these are passages in which his deconstruction can only be regarded as embarrassingly unsuccessful: for example, when Derrida juxtaposes the question of death without shedding blood (claiming that for Benjamin the lack of blood is the subliminal "decisive" indication of "divine" punishment) to the bloodless extermination technology of the "final solution" (compare further with Derrida, *supra* note 5 at 1026/1027); or when, in the

really does justice to Benjamin's text. I think it can be clearly seen that with the idea of the "pure means" Benjamin wants to point out something which is situated beyond legitimation (and perhaps beyond legitimability), to which however certain real practices correspond: that is, not just a singular practice, but also practice forms. The pure means would then be something which need not be completely free of generalization, but only free of any insidious goal orientation. It stands for a practice that at least in the moment of its coming to be reality is free of justification in any legal (for law or legitimacy reachable) sense.

Derrida, however, sees no possible practice, no reality behind the concept of "pure" non-violent means. The concept is probably different (different in breadth) for the two authors – and maybe for systematic reasons. I will not try to invent the dispute one could imagine between Benjamin and Derrida over this point. What is more important here is Derrida's conclusion: In *Force de loi* the fundamental "no" which deconstruction pronounces on the ontological possibility of a "pure" means is followed by a fundamental "yes" to the irreducibility of law – which must essentially also be understood in a quasi-ontological sense. It seems that the same consequence is necessarily entailed when Benjamin establishes the "*Unentscheidbarkeit aller Rechtsprobleme*," the "ultimate insolubility of all legal problems;"¹⁷ and Derrida draws a parallel to the impossibility of deciding the question of violence for language itself inasmuch as in the order of language nothing can transcend communication. If the means-end structure of language cannot be transcended, all that remains is a certain movement within language itself, a movement which may be ruptured in a new manner. Thus: If the means-end structure of the legal sphere appears to be irreducible as does that of (linguistic) sense in general, then all that remains is a certain movement within law itself, a movement which may be ruptured in a new manner. "Law is not justice." I quoted Derrida with this remark at the beginning. Indeed, Benjamin could have said this as well. We can see how Derrida – nevertheless – attempts to set off his solution from Benjamin: Against the decidability of questions of justice outside of law, deconstruction banks on the undecidability of meaning as such – thus returning to the medium of law: only within law is it possible to take account of the impossibility of justice.

I emphasize the point "only within law," because I do not think it is compelling. Derrida presupposes a parity of the linguistic order and the legal order which does

postscript, Derrida raises the tormented question as to what Benjamin "would have thought, in the logic of his text ... of both Nazism and the final solution" (see further *id.* at 1040).

¹⁷ Derrida: "ultime indécidabilité qui est celle de tous les problèmes de droit" (Derrida, *supra* note 5 at 1020/1021 (German trans. at 102)); compare further Benjamin, *supra* note 6 at 196.

not hold for Benjamin: parity with respect to their irreducibility. Neither of them sees justice within law or "justifications," legitimacy outside of law. The impossibility of a "pure" outside of an order only results in the transcendental necessity of remaining within the order if the order at issue is identical with the fact of order as such, such that, for example, there are no alternative orders of a different character, neighboring orders beyond the legal order as the order of that which is founded as legitimate. Although for Benjamin justice outside of a legal order may well not be possible, language and non-violence are; hence, the demonstration that a pure outside of language is not possible does not block out the idea of a pure outside of law. For deconstruction, however, the motions are analogous: If the pure means disavows itself in language, which cannot deny its "mystical foundation," then the hope of a breach with the "mystical foundation of the authority" of law is also disavowed.

C. (Legal) Justice

"Ultimate insolubility of all legal problems"¹⁸ - this is also the point of departure for the first part of *Force de loi*. Law admits no pure solutions, no good decisions, and in this sense it must admit to being violent just as, according to Derrida, language - everything in which mediation is somehow at work - is necessarily "contaminated." *Force de loi* speaks of a „contamination différentielle / a contamination différentielle“.¹⁹ Thus, the means which are supposed to lead to justice are contaminated with the violence which (as Benjamin pointed out) is proper to law *as law*, and this contamination is immediately associated with the basic philosophical idea of deconstruction: the fundamental movement of difference itself has - in regard to that - a certain structure, difference as *différance*, as Derrida puts it with a modification of spelling which cannot be heard. And this structure of mixture, of ungraspability, of a movement which can never be conceived as pure presence, as ultimate, as decidable, as clear-cut, or the simple movement of something slipping away from our grasp, showing that the character of something being some thing is a metaphysical illusion, such that something strange, alienating, the impression of an other (perhaps a trauma) remains - in sum, this structure of difference/*différance* irrevocably returned in the practice and dilemmas which characterize *droit* and *justice* in French, in English law, legal

¹⁸ Derrida, *supra* note 5 at 1020/1021 (German trans. at 102).

¹⁹ *Id.* at 996/997 (German trans. at 83).

discourse and the tradition of justice which they open, in the German *Recht*, *Rechtsdiskurs* and *Justiz* as well as *Gerechtigkeit*.²⁰

Even though justice within law and outside of law is impossible, can there then still be something like justice? Both Derrida and Benjamin pose this question. Even the structure of the problem is paradoxical. It makes a doubling of the concept “just” necessary. Within law, inasmuch as it has been seen to be violent, there can be no justice in the normal sense of the word; law is de-legitimized for deconstruction as well as for the Criticism of Violence so that the juristic category of legal justice: justice within law, the justice of law is inapplicable. Is it nonetheless possible to conceive a kind of “justice without law”?²¹

Benjamin resolves the paradox of unjust legal justice by changing the level: the question of the non-violent character of violence (and, if you will, the hope for its ‘just’ character) is decided in the historical dimension. In this realm, the mythical violence which has already been mentioned reigns: the “cycle” of patterns of justification, the recourse to historical goals which already begins when history is narrated as history; for historical accounts are stylizations with the aim of legitimating the past. The point of the fact that Benjamin continues to entertain the possibility of conceiving events which breach this “cycle” has to do with the philosophy of history. Such breaches, in which only the “fateful violence” (or power: *Gewalt*) of history becomes manifest will defy memory. They have no place “in” history. This shifts the question of what is just to the field of tragic paradox, to an impossible future perfect (“sometime it shall have been historically the case ...’ – but then it cannot have been just). Nothing remains than the contingency of a historical present which is quite incapable of knowing itself in historical categories, a kind of “unconscious,” a passing now-moment (“it shall not become historical’ – and then as far as knowledge after the fact is concerned, it did not take place at all, the just event is unknown).

There is more than one way to read Benjamin’s ambiguous mobilization of history, but it does not provide a solution for the justice deficit of the law as law. Derrida makes a different decision. He does not take leave of the possibility of justice, but rather devotes himself to the problem of the “mystical foundation” in a discussion of the perspectives of nonetheless deciding and judging as justly as possible; he proceeds by regarding legal discourse as a discourse within the setting of the

²⁰ In contrast to the English word “justice” and “justice” in French (the language of *Force de loi*), German distinguishes terminologically between “Justiz” and “Gerechtigkeit,” that is, between the institution which delivers justice and justice itself.

²¹ Derrida, *supra* note 5 at 1024/1025 (German trans. at 104).

aporetic structure of justice which has to come to terms in its own way with the dilemma of law – under the aspect of the impossibility of deciding on the one hand and on the other hand under the aspect of the binding necessity of acting nonetheless: the necessity of passing judgement.

Force de loi shows – remember, at this point we are looking at the first part of the text – that within the law, including law in the concrete sense of the institutions of justice, the logic of justice runs idle with this paradoxical programming. The text gives three examples. In the first place the principle of legality, that is the norm orientation of judges' actions: it is contained in the "*l'épochè de la règle / the épokhè of the rule*".²² Fundamentally, the law is suspended in the judgement because legal acts are not only the application of norms, but also the setting of norms. In the second place, the ideal of the just decision: it is subject to the "*hantise de l'indécidable*," or "the visitation of the ghost of the undecidable" (see further page 962/963, 49) inasmuch as the rule which is supposed to be applied necessarily falls short of the concrete case in its singularity. In the third place the assumption that as the basis for juristic deliberation knowledge is in principle complete: such an epistemic horizon is closed off to judgement due to time limitations, due to "*l'urgence qui barre l'horizon du savoir / the urgency that obstructs the horizon of knowledge*".²³ It is fundamentally the case that the decision always comes too early for the juristic deliberation and always interrupts it at an untimely moment because justice "does not wait", or, as the text also puts it, "*une décision juste est toujours requise immédiatement / a just decision is always required immediately*," right away.²⁴

According to Derrida, precisely factors such as these, which as far as Benjamin is concerned would seal the "pointlessness" of law, contain a specific, ambivalent chance. Derrida interprets the fact that legal discourse cannot follow its own logic in aporias such as those named as an "*Indéconstructibilité / undeconstructibility*,"²⁵ as a specific constitutive dilemma; and for him it is precisely this point which contains, more precisely incorporates an enormous, alien "opening" to justice which is not subject to regular legal process. The fact that it can happen that law encounters the aporetic of its own limitation becomes the starting point for a definition of the possibility of justice by way of the opening of the order which has thus become manifest. Derrida does not shy away from using the term "idea" for

²² *Id.* at 960/961 (German trans. at 46).

²³ *Id.* at 966/967 (German trans. at 53) ("*Die Fälligkeit, die den Wissenshorizont versperrt.*").

²⁴ *Id.* at 966/967 (German trans. at 54) ("*Eine gerechte Entscheidung ist immer unmittelbar erforderlich.*").

²⁵ "*Undekonstruierbarkeit.*"

this logically demonstrated undeconstructability (actually undeconstructabilities in the plural) – an idea of justice which shows itself precisely in this undeconstructability. The “idea of justice” would be the possibility, the “there is” of the undeconstructable.²⁶ It is immediately apparent that this definition is consciously circular, specifically with respect to the procedure with which the undeconstructable is exposed, that is, deconstruction itself. And indeed, Derrida writes: “*La déconstruction est la justice / Deconstruction is justice,*”²⁷ and this provocative sentence caused quite a stir. I shall return to its implications later. This “idea of justice” becomes apparent in the pure negativity of the failure of a logic in the opening of legal discourse (in the practice of its opening); but beyond this Derrida makes a more precise determination of justice; and this is the point which I shall now dwell on.

He calls it “infinite” (with Levinas) – in the sense of an ethical requirement which can never be satisfied. The idea of justice is not quite similar to the idea in the Kantian sense of a fixed regulative idea; rather, it is temporally determined, it is something that remains “in coming”: “*La justice reste à-venir, elle a, elle est à-venir / Justice remains, is yet, to come, à-venir, it has an, it is à-venir,*” Derrida writes, it transcends the now in the mode of “*peut-être / perhaps.*”²⁸

In addition to this ethical determination, more precisely: determination in terms of the logic of human alterity, there is also a practical determination. For Derrida, the idea of justice corresponds to indecidability in the sense of an “experience.” In its ambivalence as revealed by deconstruction, justice, which is neither within nor outside of the law, is concretely experienced as “undecidability”: this is the thesis – or is it a postulate? – with which *Force de loi* directly addresses legal practice, concretely: the situation in which judges make judgement. Justice is “*l’expérience ... de l’aporie / the experience of aporia,*” “*l’expérience de ce dont nous ne pouvons faire l’expérience / the experience of what we are not able to experience,*” “*une expérience de l’impossible / an experience of the impossible.*”²⁹

²⁶ See, e.g., Derrida, *supra* note 5 at 944/945 (German trans. at 30-31).

²⁷ *Id.* at 944/945 (German trans. at 30).

²⁸ *Id.* at 970/969-971 (German trans. at 56-57). It is well known that elsewhere Derrida indeed accepted the term “messianism” to characterise deconstruction. Without a “*quasi-‘messianisme’ aussi inquiet, fragile et démunie / uneasy, fragile and disarmed quasi-‘messianism,’*” a “*‘messianisme’ toujours présumé, un ‘messianisme’ quasi transcendentale / a ‘messianism’ which is always presupposed, a quasi-transcendental ‘messianism’*” there would only be “law without justice.” JACQUES DERRIDA, *SPECTRES DE MARX* 267 (1993) (German translation: *MARX’ GESPENSTER* 264-265 (Susanne Lüdemann trans., 1996).

²⁹ Derrida, *supra* note 5 at 946/947 (German trans. at 33).

If we attempt to imagine that, then we see the decision as it were at the crossing of at least two experiences: First, there is the experience of something undeconstructable which is immanent to the law, something which can be felt precisely where the aporias of the juristic realm reveal the pretensions of legal discourse to render justice to be absurd such that nothing more than a "mystical foundation" appears, and the only thing left is a "désir / desire" for justice. And second the experience of undecidability - which for the protagonists of legal discourse amounts to the paradoxical necessity of performing an act which is actually impossible; and of performing it responsibly, needless to say.

At this point, *Force de loi* - and that is interesting - has to insert an additional, political-moral argument (a consequentialist argument) to withdraw the suspension of the legal decision from pure decisionism. The vastness of justice, its ultimately imponderable character must not serve as an alibi, for otherwise it could adopt "*le calcul le plus pervers* / the most perverse calculation". Thus, it follows from the idea of the decision without a rule that, "*la justice incalculable commande ... de calculer* / ... incalculable justice requires us to calculate."³⁰ One must remain as close as possible to the law even if there is no justice in it: there is thus a further justice in addition to the "idea" of justice as a transcendence which is supposed to orient juristic efforts. This is the justice which sets fundamental limits for the suspension of judgement, and which requires an affirmation of the law as a whole. The intellectually decisive keystone of *Force de loi* would then be an almost Kantian figure: The idea of justice refers for its part to a sort of obligation towards the law. The specific, suspending responsibility which deconstruction aims at cannot be had at random; rather, it is supposed to a responsibility in legal form. And: the necessity of this responsibility also has to be experienced - so that a third aspect of the "experience" of justice arises.

I emphasize this conception because it is just this that makes *Force de loi* consistent as legal theory, that is, as a theory of specific legal justice, beyond a general ethics or morals. Nonetheless, the text lacks a clear concept of justice in this sense. Derrida's usage remains confusing, for example when he calls the "demand", the "call" for justice itself "just," or when he crowns the idea of an ethical infinity with paradoxical formulations such as "*Il faut être juste avec la justice* / One must be just with justice."³¹ In addition to the question of this convergence of - different? analogous? - justices (in the plural), there is of course also the question as to who or what is meant by the expression "one must" in such a sentence.

³⁰ *Id.* at 970/971 (German trans. at 57).

³¹ *Id.* at 954/955 (German trans. at 40) ("*Man muß mit/gegenüber der Gerechtigkeit gerecht sein.*").

D. Deconstruction and (Legal) Justice

*“Cette justice-là, qui n’est pas le droit, est le mouvement même de la déconstruction / This kind of justice, which isn’t law, is the very movement of deconstruction”*³² – this conflation of the goal and the path will probably not be as surprising at this point as it would have been had I quoted it at the beginning of my talk. But it is still a coup. By virtue of Derrida’s specifically demonstrative reading, justice emerges with multiple ruptures in legal discourse, and *Force de loi* links the concern for justice in this sense immediately with the procedure of deconstruction itself.

In the first place, this makes a claim that would have to be called morally daring. The process of critical diagnosis itself takes the place of that the lack of which it reproachfully attempts to demonstrate. That sounds like sophism, and it has to provoke philosophical mistrust, even if there are authors such as Levinas who explicitly justify such a procedure and who wish to theorise on the basis of the *“révélation / revelation”* of a transcendence (transcendence of the ethical).³³

In the second place – and this is a remarkable point – it seems that Derrida wants to grant law priority as the paradigm of deconstruction before the pure immediacy of a political realm with no juristic anchoring (as Benjamin has it); and by the same token legal justice before the justice of pure ethics or morals (as Levinas has it). *Force de loi* repeatedly stresses this. Lawyers’ discourse is particularly close to the discourse of deconstruction. Deconstructive *“questionnement / questioning”*, he writes, is *“plus at home dans des law schools ... que dans des départements de philosophie et surtout dans des départements de littérature / more at home in law schools ... than in philosophy departments and much more than in the literature departments.”*³⁴ The point is to intervene, to change things. A constellation (configuration, conjunction, conjuncture) which is *“sans doute nécessaire et inévitable entre une déconstruction de style plus directement philosophique ou plus directement motivée par la théorie littéraire, d’une part, la réflexion juridico-littéraire et les ‘Critical Legal Studies’ d’autre part / no doubt necessary and inevitable between, on the one hand, a deconstruction of a*

³² *Id.* at 964/965 (German trans. at 52).

³³ Compare further EMMANUEL LEVINAS, TOTALITE ET INFINI. ESSAI SUR L’EXTERIORITÉ chapter I (1961) (republished 1991) (German translation: TOTALITÄT UND UNENDLICHKEIT. VERSUCH ÜBER DIE EXTERIORITÄT (WOLFGANG NIKOLAUS KREWANI TRANS., 1987).

³⁴ Derrida, *supra* note 5 at 930/931 (German trans. at 18).

style more directly philosophical or more directly motivated by literary theory and, on the other hand, juridico-literary reflection and 'Critical Legal Studies.'"³⁵

I shall be brief on this point. As a whole it is more likely of interest to philosophers, perhaps only to those specialists in philosophy dealing with the subtle strategies of the self-disclosure which Derrida calls "deconstruction" – which is, of course, his procedure. This procedure had always been concentrated on the production of an undecidability, and in this connection on the avoidance of any self-commitment. This aim is served in particular by the many elaborate intersections of contrary, paradox double perspectives. I have already intimated that this is also the case in *Force de loi*. Derrida speaks of two "voies / ways" or "styles / styles" along which deconstruction equally proceeds: there are logical-formal aporias and there is the reading of texts with a view to the historical dimension, a careful interpreting which Derrida calls "genealogical" (which I do not think should be regarded in the proximity of Michel Foucault's *généalogie*). In this sense, deconstruction has always moved back and forth between complementary "necessities" as it were in a kind of no man's land: between the necessity of active intervention (a destructive, random intervention in texts which is directed against their declared meanings) and the necessity of an intervention which the text concerned itself makes as it were: "opération ou plutôt l'expérience même / operation or rather the very experience" which a text "fait d'abord lui-même, de lui-même, sur lui-même / does itself, by itself, on itself"; Derrida calls the fusion of both movements to form as it were one an "auto-hétéro-déconstruction / auto-hetero-deconstruction".³⁶ It is this gesture – that there is no positive decision in the deconstructive reading, at least none that is not at the same time opposed by a negation that crosses it out – which made deconstruction famous. Deconstruction owes a great deal of its provocative force to this gesture. But also a certain intangibility and (if you permit) a special form of philosophical redundancy.

The perspective of *Force de loi* turns the thought of undecidability towards a new unambiguity. If deconstruction "is" or at least can be justice – by making a decision which cannot possibly be "just" but which is striving after justice, a decision in view of undecidability after the model of legal justice – then the situation has changed. In fact, Derrida indicates a form in which what previously took place at best as a pure, singular event removed from any order now occurs. Linked to law, deconstruction would no longer be just a general strike on the part of meaning

³⁵ *Id.* at 932/933 (German trans. at 19) ("...zweifelloser notwendiger und unvermeidbarer Art – zwischen einer Dekonstruktion, deren Stil eher philosophisch oder durch die Literaturtheorie angeregt ist und einer juristisch-literarischen Reflexion und den 'Critical Legal Studies.'").

³⁶ *See, e.g., id.* at 980/981 (German trans. at 68).

(crossed with radical ethical intimations which suggest a situation-bound outside). Rather, deconstruction relates its own paradoxical double movement specifically to an order in which “responsibility,” including the political responsibility of its work, would find an optimal framework on the peripheries of discourses.

It is not law and statute which stand for this, but the specific, professional pragmatics of legal discourse. Perhaps it can be put this way: Derrida has discovered a sort of paradigm, and this paradigm is close to the institutional facts of the constitutional state. He writes that deconstruction is not “*une abdication quasi nihiliste devant la question ethico-politico-jurique de la justice / a quasi-nihilistic abdication before the ethico-politico-juridical question of justice*”,³⁷ but rather “*responsabilité / responsibility*.” In this connection, responsibility is supposed to be for its part a double movement: on the one hand “*responsabilité devant un héritage qui est en même temps l’héritage d’un impératif ou un faisceau d’injonctions / responsibility in face of a heritage that is at the same time the heritage of an imperative or of a sheaf of injunctions*”;³⁸ and on the other hand an anarchistic responsibility towards the “*singularité de l’autre / singularity of the other*”,³⁹ a responsibility which is irresponsible with respect to all preconditions. On the one hand, responsibility towards tradition, for example legal traditions, which one has to follow as a good judge – as far as one can. And responsibility as a factor which renounces tradition, thanks to which one can, when in doubt, break with legal doctrine – like a good judge.

Force de loi does not really make it clear to what extent deconstruction does not only want to identify with a certain “legal” idea of justice, but also with its institutional reality – with the European? Anglo-Saxon? or even a “critical”? justice system. At any rate, democracy is a subliminal, but important topic in the text. Derrida identifies “politicization” as its goal: the politicization of all fields which impinge on law and from which law cannot be separated. This is supposed to take place as a revision and reinterpretation of legal foundations. As examples, the text cites the Declaration of the Rights of Man and the abolition of slavery – that is, legal reforms and not the overthrowing of the state (Benjamin’s “*Entsetzung*” (abrogation) of law). “*Rien ne me semble moins périmé que le classique idéal émancipatoire / Nothing seems to me less outdated than the classical emancipatory ideal*”,⁴⁰ declares Derrida at the end of the first part of his book, distinguishing the “*territoires identifiés de la*

³⁷ *Id.* at 952/953 (German trans. at 40).

³⁸ *Id.* at 954/955 (German trans. at 40).

³⁹ *Id.*

⁴⁰ *Id.* at 972/971 (German trans. at 58).

juridico-politisation / territories of juridico-politization” from marginal zones which must continuously show themselves as the other of law.⁴¹

Let me come to a conclusion: in comparison, concrete legal practice and, as Derrida puts it, the “excess of the performative” within it seem to be exemplary. But what does this mean? Does deconstruction answer for justice in the style of a lawyer representing a party? Or more in the manner of a judge’s judgement? More with a view to “cases” as in Anglo-Saxon case law? Or more with a view to the law as in continental law? Against the background of continental European legal theory, it is not least Kant who comes to mind. It is tempting to speak of a union of freedom and necessity in the form of a (legal) obligation. Derrida would quite probably reject such a parallel – a parallel to Kant as the thinker of the Western logos as such! But I think it exists. *Force de loi* speaks of “*l’épreuve de l’indécidable* / the trial [or test] of the indecidable.”⁴² Kant also has a trial or test, but here reason sits in judgement, a logos as the moral law and court of last appeal.

In the part on Benjamin, *Force de loi* vigorously rejects the paradigm of “criticism,” of distinguishing and deciding. But to the extent that deconstruction approaches legal decision with the pathos of an impossible and yet possible decision, it questions this distance from “criticism” and to violence as a “critical” arbitrariness. To the extent that a discourse authorises the execution of justice in its own name – as does Derrida’s discourse in *Force de loi* – it does not just quote legal discourse, but rather adopts the legal gesture as its own. Freedom becomes the obligation to accept what is valid for all – for example as the movement of a reading (which perhaps may be objective?).

E. Conclusion

With that I come to an end, and I hope that my thesis has become clear. If in accordance with the ambiguity of “*justice / justice*” not only the perspective of justice, but also the legal perspective is not external to deconstruction, then for Derrida’s texts the question of violence must indeed be posed (from a philosophical standpoint) as the question of the violence of the legal form. The specific rhetorical, discursive, perhaps also institutional features which, if it can be put this way, make up the juridicity, the juridic character of the law would then be characteristic of the deconstructive procedure.

⁴¹ See, e.g., *id* at 972/973 (German trans. at 59).

⁴² See, e.g., *id* at 962/963 (German trans. at 50).

On the other hand, there is some doubt as to this point – that is, whether the juristic character of the law is touched at all. In the introduction, I mentioned this question, which now brings us back to the beginning of my paper. What does deconstruction mean, who or what does it deconstruct when it addresses the law and legal discourse? I think that the inspection of Derrida’s concept of law as well as his concept of the idea of justice (and the half aporetic, half genealogical reading as a “process”) have shown not least one thing: that he has a certain metaphysics of symmetry foremost in mind, and that he reveals its “aporias” in order to question it under the sign of the other – an Other who is “beyond the law and even more so beyond the juristic” – for in other texts Derrida makes another determination of justice: quite apart from law.

Thus, it could be asked whether the law serves in *Force de loi* as a foil for a theory of responsibility in general devised with the means of the criticism of metaphysics – and thus not specifically legal. Is the point only to cite the legal sphere in order to set something off against Levinas’s ethical immediacy (and if this works out, then ultimately at the cost of an undesired proximity to Kant)?

I think lawyers would have no problem affirming the “aporias” of the legal sphere which Derrida and Benjamin worked out and presented as contradictions. These paradoxes are not new for legal discourse. To the extent that legal discourse sees itself as a normative discourse (in contrast to metaphysics) and is capable of reflecting accordingly, it is aware of its own inconsistencies (as well as of its violent character). Even when law regards itself as “application” of laws and as hermeneutics, it is not naïve. It does not believe that it is producing truth (in the sense of freedom from paradox or simply of consistency).

In other words: However powerful a certain model of law for deconstruction’s pragmatic idea of justice (as a philosophical procedure) may be, deconstruction cannot be readily applied to a specific “reading” of law devoted to the law as law, to the traces of its juristic character. As a procedure, Derrida’s deconstruction is dependent on the construction of logical “undecidabilities” which can only be brought to bear against texts the existence of which is linked to the idea of truth. Does the “aporetic” experience, the shock effect of which Derrida conjures, occur in legal discourse at all? The law is not a logical discourse, it makes other claims. The fact that Derrida overlooks this has to do with the fact that he treats the order of law analogously to the order of language – to the order of a language which strives to be true and to be legitimate in terms of founding.

By contrast, I suspect that the legal order only aims to be true to a very partial extent, that it only produces a discourse of truth in parts, that it may even be that it functions only to a very partial extent as a “discourse” at all (in Foucault’s sense) – this is precisely the specific point of explicitly for themselves claiming to be nothing

more than in a legal sense "normative" texts, of juristic discourse and his style to construct his specific phenomena in general. Derrida treats foundational paradoxes of the law, but the juristic character of the law remains obscure, because the paradoxes he dismantles are arbitrary for the legal dispositiv.

I think that this situation of deconstruction is unfortunate, because I think that the juristic character of the law should be and can be the subject of inquiry.

When Jacques Derrida addresses legal discourse, one thing above all becomes apparent: that as a subject the law impinges upon the limits of deconstruction. There is no new legal philosophy to be expected with *Force de loi*. Deconstruction was made for truth discourses, not for the in a quite different way organized discourse of law, the – as one may say – jaded normativity of legal affairs.⁴³

⁴³ Special thanks to David Kennedy for his help to find the word.