ARTICLES : SPECIAL ISSUE
A DEDICATION TO JACQUES DERRIDA - JUSTICE

Violence, Justice, Deconstruction

*By Costas Douzinas**

In his famous talk "The Force of Law," given at Cardozo Law School in 1989, Derrida linked his work with the Critical Legal Studies movement. This lecture signposted a change of direction in deconstruction. Early deconstruction had been criticized for formalism, aestheticism and scant recognition of political realities. Derrida's (in)famous statement that "there is nothing outside of the text," was a rare philosophical sound-bite meaning that language, communication and social interaction cannot avoid, as commonly assumed, the uncertainties and ambiguities of the written text. But the aphorism was often misinterpreted to signify extreme idealism, disregard for the real world and literary and philosophical reductionism. But the "Force of Law" signified a clear turn towards political and ethical engagement, symbolized by the discussion of law and justice. After that talk, deconstruction became obsessed with questions of ethical responsibility, the meaning of friendship and the complex relationship with the other. Before his death, Derrida wrote a number of essays on contemporary political events. He denounced the Kosovo and Iraq wars and devoted a book to 'rogue' elements and states, in which he attacked the United States as the greatest rogue.[1] Just before his untimely death in 2004, Derrida had become preoccupied with the concept of sovereignty at the basis of the tragedies and abuses of modernity. It is this political and ethical turn of deconstruction that I would like to address in the context of critical legal theory.

The critical traditions associated with Marxism, realism or feminism have consistently asked the question: "whose interests are served by law"; what extralegal power imbalances and asymmetries –class, gender or race- are reflected in the operations of an institution which claims to be neutral, natural, above politics and the contingencies of everyday life? Deconstruction does not refute these critiques. Deconstruction de-sediments "the superstructures of law that both hide

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[1] JACQUES DERRIDA, VOYOUS (2003).

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and reflect the economic and political interests of the dominant forces of society."[2] But Derrida was concerned to go beyond that well-established critique in order to explore two crucial relationships that have determined the life of the institution: that between law and force and that between law and justice.

Law is intimately connected with force. There is no law, if it cannot be potentially enforced, if there is no police, army and prisons to punish and deter possible violations. In this sense, force and enforcement are part of the very essence of legality. Modern law coming out of the endless feuds of princes and local chiefs claimed a monopoly of violence in the territory of its jurisdiction and used it to protect the ends and functions it declares legal, but also to protect the empire of the law itself. This violence that follows the law routinely and forms the background against which interpretation can work is called by the philosopher, prophet and *flaneur* Walter Benjamin law-preserving. It guarantees the permanence and enforceability of law. There are two aspects to the violence that conserves the law.

"Every juridical contract…is founded on violence" says Derrida and the legal academic Robert Cover agrees: "Legal interpretation takes place in a field of pain and death."[3] Legal judgments are statements and deeds. They both interpret the law and act on the world. A conviction and sentence at the end of a criminal trial is the outcome of the judicial act of legal interpretation, but it is also the authorization and beginning of a variety of violent acts. The defendant is taken away to a place of imprisonment or of execution, acts immediately related to, indeed flowing from, the judicial pronouncement. Again as a result of civil judgments, people lose their homes, their children, their property or they may be sent to a place of persecution and torture.

The recent turn of jurisprudence to hermeneutics, semiotics and literary theory has focused on the word of the judge and forgotten the force of the word.[4] The meaning seeking and meaning-imposing component of judging is analyzed as reasoned or capricious, principled or discretionary, predictable or contingent, shared, shareable or open-ended according to the political standpoint of the analyst. The main if not

[2] Jacques Derrida, *The Force of Law. 'The Mystical Foundation of Authority'*, 11 CARDOZO LAW REVIEW 919 (1990).

[3] Robert Cover, *Violence and the Word*, 95 YALE LAW JOURNAL 1601 (1986).

[4] The linguistic and interpretative aspects of the law were always a part of legal theory. They were somewhat neglected during the heyday of legal positivism, but they have been reinstated within jurisprudence. Law is often now seen as an exclusively linguistic and meaningful construct and various types of hermeneutics and literary theory have been adopted to explain and justify the operations of the "prison house of language." For a critique of these theories see DOUZINAS & GEAREY, CRITICAL PHILOSOPHY OF LAW Chapter 13 (2005).

exclusive function of many judgments is to legitimize and trigger past or future acts of violence. The word and the deed, the proposition and the sentence, the constative and the performative are intimately linked.

Legal interpretations and judgments cannot be understood independently of this inescapable implication in violent action. In this sense, legal interpretation is a practical activity, other-orientated and designed to lead to effective threats and - often violent - deeds. This violence is evident at each level of the judicial act. The architecture of the courtroom and the choreography of the trial process converge to restrain and physically subdue the body of defendant. From the defendant's perspective, the common but fragile facade of civility of the legal process expresses a recognition "of the overwhelming array of violence ranged against him and of the helplessness of resistance or outcry."[5] But for the judge too, legal interpretation is never free of the need to maintain links with the effective official behavior that will en-**force** the statement of the law. Indeed, the expression "law enforcement" recognizes that force and its application lies at the heart of the judicial act. Legal sentences are both propositions of law and acts of sentencing.

Legal interpretation then is bonded, bound both to the deeds it triggers off and the necessary conditions of effective domination within which the sentence of the law will be enforced. Without such a setting that includes a formidable array of institutions, practices, rules and roles - police, prison guards, immigration officers, bailiffs, lawyers etc - the judicial word would remain a dead letter. All attempts to understand legal judgments and judicial decision-making as exclusively hermeneutical are incomplete. Legal interpretations belong both to horizons of meaning and to an economy of force. Whatever else judges do, they deal in fear, pain and death. If this is the case, aspirations to coherent and shared legal meaning are liable to flounder on the inescapable and tragic line that distinguishes those who mete out violence from those who receive it. Legal decisions lead to people losing their homes or children, being sent back to persecution and torture: legal interpretation leads to people losing their lives.

But there is also the violence of language itself. The law is full of examples in which people are judged in a language or an idiom they do not understand. This is the standard case with asylum-seekers who are routinely asked by immigration officials to present their case and to recount the brutalities and torture they have suffered in a language they do not speak. "The violence of an injustice has begun when all the members of a community do not share the same idiom throughout,"[6] states Derrida.

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[5] Cover, *supra* note 3 at 1607.

[6] Jacques Derrida, *Declarations of Independence*, 15 NEW POLITICAL SCIENCE 15 (1986).

For Jean-François Lyotard an extreme form of injustice is that of an *ethical tort* or *differend*, in which the injury suffered by the victim is accompanied by a deprivation of the means to speak about it or prove it.

> "This is the case if the victim is deprived of life, or of all liberties, or of the freedom to make his or her ideas or opinions public, or simply of the right to testify to the damage, or even more simply if the testifying phrase is itself deprived of authority ... Should the victim seek to by-pass this impossibility and testify anyway to the wrong done to her, she comes up against the following argumentation, either the damages you complain about never took place, and your testimony is false; or else they took place, and since your are able to testify to them, it is not an ethical tort that has been done to you."[7]

When an ethical tort has been committed the conflict between the parties cannot be decided equitably because no rule of judgment exists that could be applied to both arguments. In such instances, language reaches its limit as no common language can be found to express both sides. The violence of injustice begins when the judge and the judged do not share a language or idiom. It continues when all traces of particularity of the person before the law are reduced to a register of sameness and cognition mastered by the judge. Indeed all legal interpretation and judgment presuppose that the other, the victim of language's injustice, is capable of language in general, man as a speaking animal. But as the Scottish poet Tom Leonard put it:

> "And their judges spoke with one dialect,
> But the condemned spoke with many voices.
> And the prisons were full of many voices,
> But never the dialect of the judges.
>
> And the judges said:
> 'No one is above the Law.'"[8]

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[7] JEAN-FRANCOIS LYOTARD, THE DIFFEREND 5 (1988).

[8] Tom Leonard, *Situations Theoretical and Contemporary*, quoted in Willy Maley, *Beyond the Law: the Justice of deconstruction*, 10 LAW AND CRITIQUE 49, 59-60 (1999).

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But force has another important role in law's life: force institutes and founds law. Most modern constitutions were introduced against the protocols of constitutional legality that existed at the time of their adoption, as a result of defeat in war, popular uprisings or colonial occupation. Revolutionary violence suspends the law and constitution and justifies itself by claiming to be founding a new state, a better constitution and a just law to replace the corrupt or immoral system it rebels against. At the point of its occurrence, violence will be condemned as illegal, brutal, evil. But when it succeeds, revolutionary violence will be retrospectively legitimized as means to the end of social and legal transformation. Most legal systems are the outcome of force, the progeny of war, revolution, rebellion or occupation. This founding violence is either re-enacted in the great pageants that celebrate nation and state-building or forgotten in acts of enforcement of the new law and of interpretation of the new constitution.

The French revolution has been retrospectively legitimized by its *Declaration des droits de l'homme*, the American by the Declaration of Independence and the Bill of Rights.[9] But these founding documents will carry in themselves the violence of their foundation, as they move from the original act to its representations. The American Bill of Rights is an obvious example. The violence of the militias, so important in the war of independence, is perpetuated in the constitutionally protected right to bear arms, which, some two centuries after the revolution, still keeps the United States in a state of war. Similarly, capital punishment reproduces the founding violence of war in every execution, which accompanies legal operations as the dark and empowering side of legal normality. But these repetitions of the traumatic genesis of the new law are re-interpreted as demands of legality and the original violence is consigned to oblivion. Indeed one of the most important strategies in this politics of forgetting is the creation of a dominant approach to legal interpretation. Once victorious, revolutions or conquests produce "interpretative models to read in return, to give sense, necessity and above all legitimacy to the violence that has produced, among others, the interpretative model in question, that is, the discourse of its self-legitimation."[10] For Derrida, therefore, the founding and conserving violence of law cannot be separated as Benjamin and Cover tried to do. The two types of violence are intertwined and contaminate each other, as contemporary acts of legal "conservation" or interpretation repeat and re-establish the original law-making violence which establishes the new law.

Even within well-established and democratic legal systems, popular violence shadows that of the state and moves the law in unpredictable and undesirable for

[9] COSTAS DOUZINAS, THE END OF HUMAN RIGHTS Chapters 5 and 6 (2000).

[10] Derrida, *supra* note 2, at 993.

the powerful ways. The law accepts a limited right to protest and strike and in this sense acknowledges, in a reluctant and fearful manner, that violence cannot be written out of history. During recent public disorders and protests in the miners strike, the poll tax riots and the anti-globalization demonstrations, many commentators condemned the protesters calling them undemocratic. The argument was that in western democratic and rule of law states, people have sufficient instruments to put pressure on governments and change policies and laws through the available democratic channels. And yet, the history of Britain and the West is replete of protests and riots and strikes which, condemned as they were at the time, contributed hugely to the freedoms and rights we take for granted. The Diggers and Levellers, the Gordon riots and the Reform protests, the *suffragettes* and the civil rights movements, the protesters in East Germany, Prague, Bucharest and Belgrade, to name only a few obvious cases, have changed constitutions, laws and governments.

Protests mostly challenge the conserving violence of law, breaking minor public order regulations in order to highlight greater injustices. As long as protesters ask for this or that reform, this or that concession however important, the state can accommodate it. What it is afraid of is the "fundamental, founding violence, that is, violence able to justify…or to transform the relations of law and so to present itself as having a right to law."[11] But the characteristic insecurity the law feels in the face of its own foundation makes it portray radical protests and desperate attempts to bring about reform by unconventional means onto challenges to its founding authority, acts of revolutionary upheaval. The American civil rights marchers were often painted as communists, the striking miners were called the "enemy within" and the protesters of Eastern Europe agents of the CIA. This exaggerated response to popular protest shows however that "for a critique of violence – that is to say, an interpretative and meaningful evaluation to it – to be possible, one must first recognize meaning in a violence that is not an accident arriving from outside law."[12]

Justice and law

There is no law without enforcement but the force necessary for law's operation is exercised in the name of justice. Indeed the force of law can be interpreted as either necessary application or as violence through an act of judgment. There is no natural or physical violence despite phrases like "violent earthquake"; violence is an unacceptable use of force and belongs to the symbolic order of law and morality. Force can be evaluated, assessed and condemned as violence according to moral

[11] *Id*. at 990.

[12] *Id*. at 991.

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criteria, highest amongst them justice. Law and justice are not opposed; they are linked in a paradoxical way. When law violates its established procedures and harms someone; when it does not recognize or uphold rights which have been given already or are reasonably expected; when it breaches basic principles of equality and dignity – in all these cases the law acts unjustly according to its own internal criteria of justice. We can call this first type of justice, legal justice because it is internal to the law and operates when the law matches its own standards and principles.

But legal justice is only one facet of justice. A different conception of justice starts from the statement of the Jewish philosopher Emmanuel Levinas that justice exists in relation to the other person. The other is a singular, unique finite being with certain personality traits, character attributes and physical characteristics. But to me, she is also an infinite other, this finite person puts me in touch with infinite otherness. As phenomenology has argued, I cannot know the other as other, I can never comprehend fully her intentions or actions, I can never have an appropriate adequation or presentation, because no immediate access or perception of otherness exists. The otherness of the other means that she is never fully present to me; I can approach her only by analogy of the perceptions, intentions and actions available to my own consciousness. As a result while I have to be just to the other as a finite being with specific demands and desires, I can never be fully just because the infinity of the other makes the giving of justice impossible. We need criteria in order to be just to the other but these do not correspond to the demands of justice. Indeed any attempt to turn justice into a theory (as some Marxists did) or a series of normative statement and commands (as Kantians do) is necessarily a violation of justice. Theories and laws need to be applied; but every application would turn the uniqueness of the other into an instance of the concept or a case of the norm and would immediately violate their singularity. The only principle of justice is respect the singularity of the other. It takes the form of a universal imperative, an absolute command, but this is a strange law indeed law may be a misnomer, because unlike other theories of justice it gives no advance instructions or advice except to say be unique in your encounters with singular others.

The infinite dwells in the finite, justice dwells in the law but also challenges the law since the law must forget the infinity of the other. The law has to deal with many others and it must compare and contrast them. To do that it puts them on the same scale, it compares them by using tools like, rights, duties, common denominators that will allow the different to become similar and the other same. Justice is immanent to the law but this immanence means that law is unequal to itself, it contains within itself what opens to a new law, a new politics, a new place or non-place (utopia). Justice lies within the law as a gap a chasm, which judges both specific instances of injustice and violence but also the overall direction of the law.

Both inside and outside, justice is the horizon against which the law is judged both for its daily routine failings and for its forgetting of justice. Whether we see the law as a historical institution or as a system of rules and decisions, its operations can be subjected to deconstruction which either discovers the violence of origins in daily operations or unravels the ordered bi-polarities (fact-values, public-private, objective-subjective) and shows that they cannot stabilize the legal system. But this deconstructive operation is precisely the work of justice about which we cannot say that here it is, in front of us, full and fully revealed.[13] Deconstruction is justice.

[13] DOUZINAS & WARRINGTON, JUSTICE MISCARRIED Chapter 4 (1995).

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