LEGAL CULTURE

Book Review

Giovanna Borradori (Ed.), **Philosophy in a Time of Terror. Dialogues with Jürgen Habermas and Jacques Derrida** (Chicago and London, University of Chicago Press, 2003). ISBN 0-226-06664-9, 224 pages.

By Martti Koskenniemi

An international lawyer is in part pleased, in part embarrassed when philosophers contemplating the international order put their hope in international law. True, such declarations of faith are not normally for the law as it is but as a reformed ideal. But they do enact a routine move international lawyers have made since the late 19th century: one's faith is never to present law, but always to how it will be in a desired future.[1] Messianism may perhaps be interpreted as a defence to excessive expectations loaded on experts of a technical craft. But it must surely be taken seriously when manifested in dialogues with Jürgen Habermas and Jacques Derrida, two of Europe's most influential public intellectuals.

This book is not a discussion between Habermas and Derrida but between each and the editor, Giovanna Borradori, Professor of Philosophy at Vassar College. Each is invited to approach the significance of the terrorist attacks on the World Trade Center in 2001 from his own standpoint. The book does not develop into an encounter: perhaps this would have been too much to hope. But it does show the striking similarity of the political conclusions drawn by two philosophers, often seen as adversaries, from the attacks and their aftermath. The dialogues are framed by the editor in two lengthy exposés of the thought of each philosopher plus a commentary on each dialogue. These glosses usefully link the debate to larger themes though to suggest, as Borradori does, that the dialogues are about "the legacy of the Enlightenment in a globalized world" and that Habermas and Derrida "share an allegiance to the Enlightenment" is to have that word do too much work, a reflection of the editor's own project instead of her interlocutors'. To suggest that their agreement is about "the Enlightenment" depoliticises their positions in a way that is faithful to

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[1] See Martti Koskenniemi, 'Legal Cosmopolitanism: Tom Franck's Messianic World', 35 *New York University Journal of International Law and Politics*, 471-486, (2003).

neither, nor to the interest of situating them as participants in an on-going public debate about the transformation of international order.

The invocation by Habermas of the Kantian ideal of cosmopolitan law against American unilateralism after "September 11" follows from his discursive theory of politics: the dark (power) politics of the United States, understood as hegemony, against the (weak and uncertain) legalism of Europe.[2] Habermas joins most "old European" intellectuals in seeing the world endangered less by terrorism than by the US response and in complaining about Europe's failure to oppose "the self-centered course of a callous superpower" (27).[3] Though the International Criminal Court, the ABM Treaty or the Biological Weapons convention, all of which were rejected by the United States, are aspects of an old law, Habermas situates them firmly in a Kantian historical trajectory: "we have long found ourselves in the transition from classical international law to what Kant had anticipated as a state of world citizenry" (38). This is why there is need for American compliance, and why Europe will need to take on "the civilizing role" (27). The view of the tasks of international law, present and future, in the 18-page dialogue that Borradori conducts with Habermas is thoroughly familiar: a fragile voice of an integrating civilisation against the selfish egotism of the powerful.

But when Jacques Derrida confesses that he, too, will "take the side of the camp that, in principle, by right of law, leaves a perspective open for perfectibility in the name of the 'political', 'democracy', 'international law', international institutions, and so on (114)", it may be more difficult to situate this in the context of his philosophy of deconstruction. In this 51-page dialogue, international law appears both as a somewhat ineffective and ambivalent - yet necessary - set of present constraints and as the promise of a cosmopolitan future. Again, the main danger is not from isolated "terrorists" but from the technological modernity that helped bring terrorism about and receives legitimacy from the victimhood now offered to the world's most powerful political entity. Again, the promise of resistance and progress are embodied in a Europe conceived as the representative of law: "Without forsaking

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[2] The views of Habermas on the nature of the conflict between the morally inspired hegemonic unilateralism of the United States and the pluralistic universalism of (Kantian) international law is laid out with great clarity and force in his 'Interpreting the fall of a Monument', 4 *German Law Journal*, 701-8 (2003), available at: http://www.germanlawjournal.com/pdf/Vol04No07/PDF_Vol_04_No_07_701-708_European_Habermas.pdf, or at: http://www.germanlawjournal.com, *search author*: Habermas. The article was originally published in German in the FRANKFURTER ALLGEMEINE ZEITUNG on 17 April 2003.

[3] Here would be a representative view: "[C]'est la véritable victoire du terrorisme que d'avoir plongé tout l'occident dans l'obsession sécuritaire, c'est à dire dans une forme voilée du terreur perpetuelle", Jean Baudrillard, *Power Inferno. Requiem pour les Twin Towers. Hypothèses sur le terrorisme. La violence du mondial* (Galilée, 2003), 59.

its own memory, by drawing upon it, in fact, as an indispensable resource, Europe could make an essential contribution to the future of international law…"(116).

To be sure, neither thinker believes that politics could be replaced by international law, even in the future. In addition to Kant, both take up the name of Carl Schmitt. Habermas accepts that invoking universal law may also sometimes work as an apology of hegemony. To counter the Schmittian reduction of universalism into a smokescreen over particular interests, he insists on democracy's self-correcting character, its nature as *Bildung*. Habermas accepts that the model of discursive democracy, coupled with loyalty to basic constitutional principles, works internationally in a more fragmented, distanced environment than the domestic order. The difference is one of degree, however, not of principle, and recent developments towards the legalization of some aspects of international politics have worked to diminish it.[4] In any case, for Habermas, the hegemonic danger is checked by a logical fiat embedded in a truly democratic international public realm: "any deconstructive unmasking of the ideologically concealing use of universalistic discourses actually presupposes the critical viewpoints advanced by these same discourses. Moral and legal universalism is, thus, self-reflexively closed in the sense that its imperfect practices can only be criticized on the basis of its own standards" (42).

Derrida, too, is conscious of the limits of law. He accepts Schmitt's view of the irreducibility of the (political) decision to any anterior structure but turns decisionism on its head. Deconstruction reveals that a universal democracy is always unfulfilled, always a democracy to-come. There is no closed system of ready-made responses that could only be "applied". Every decision, every political, legal, or administrative act will thus raise the question of justice in terms of the personal responsibility of the one who decides. As Derrida has often argued, justice does not end with but only begins with law. The fact that the universal is always also particular, the legal also more than just "legal", does not open the way to the Schmittian nightmare: it is the precondition for there to be something like a realm of politics in which issues of right, good and just can be meaningfully debated and approached. There is no closure. The universal is always a horizon that recedes as it is

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[4] Earlier, Habermas had accepted Schmitt's critique as it concerned the *unmediated* moralisation of politics and offered against this what he calls the "decisive moment" of mediation by "an authority that judges impartially and fulfills the conditions of neutral criminal punishment", 'Kant's Idea of Perpetual Peace with the Benefit of Two Hundred Years' Hindshight', in James Bohman and Matthias Lutz-Bachmann, *Perpetual Peace. Essays on Kant's Cosmopolitan Ideal* (MIT Press, 1997), 147. Habermas is surely right when he observes that drawing attention to the danger of moralisation provides no reason to discard attempts towards institutional regulation. Whether today's multilateral institutions effectively exemplify such authority, may however be debated.

approached.[5] This seems to be not too far from the Kantianism of Habermas - despite Derrida's reservations about the use of the notion of "regulative idea" to characterise such openness (133-5).

Habermas and Derrida share an image of international law that is very familiar for international lawyers because of the juxtaposition with "politics" it entails, because of the gradual dissolution of that juxtaposition the more concrete one's argument becomes, and because the threatening collapse of law into politics is checked by the displacement of present imperfection by future promise. The problem, however, lies in the initial juxtaposition, a certain unwillingness to see how international law is always *already* meshed with present politics. The law is not - or is not only - the fragile European humanitarianism that is timidly opposing American empire. It is also that empire, its wars and its violence, and the conditions that make something like September 11 possible. Sovereign statehood and globalisation, non-intervention and intervention are all parts of a ubiquitous framework of legal norms and structures some of which create good, some bad consequences. As Anne Orford has recently shown, international law is not a white knight waiting in some (European) capital to intervene when politics goes wrong. It is always *already* there structuring the private and public relations within which material and spiritual resources are distributed in the world.[6] In this regard, international law is both the disease and the cure and merely putting one's hopes in it makes no sense as a political programme.

Much of what the two philosophers say - when they do *not* seek to enlist international law *tout court* for their cause - indirectly underwrites this. When Borradori asks both interlocutors about whether "September 11" should be seen as an event of world-historical significance, neither provides a straight answer. For Habermas as well as Derrida, an obsessive concentration on that date directs attention away from what made it possible and from what it legitimised as a reaction. As Habermas points out, "fundamentalism" is thoroughly conditioned by the modernity it opposes. Yet its desperate protest against secularism fails as a serious political claim: it cannot overcome the enemy it attacks. But as it leads to an "overreaction" and a "playing of the terrorists' game" by the US Government, it calls for a defence of political modernity. And that defence takes up most of the contribution by Habermas. This seems fine, with one reservation, however. Surely one aspect of that

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[5] I have tried to articulate something like this as part of international law's political project in Martti Koskenniemi, 'What is International Law For?', in Malcolm Evans (ed,), *International Law* (Oxford University Press, 2003), 105-111.

[6] Anne Orford, *Reading Humanitarian Intervention. Human Rights and the Use of Force in International Law* (Cambridge University Press, 2003).

modernity is also the fact of governance through secular legal rules, and one aspect of September 11 is a challenge to the way these rules uphold the North/South opposition that Habermas agrees provides the context within which Muslim fundamentalism must be understood. Instead of an appeal to law, why not a critique of law?

Derrida, too, refuses to focus on "9/11". Far from being an "event" in the philosophical sense that juxtaposes it with (mere) "being",[7] that signifier has now become part of a political discourse appropriated for varying purposes. Approaching it through deconstruction, Derrida's discussion of the 9/11 "event" is, like that of Habermas, ideology criticism. Terrorism now becomes an "autoimmunity disorder": produced by the United States during the Cold War and after, a kind of "suicide of those who welcomed, armed and trained [the terrorists]" (95) - a product of that which it rejects, mirror-image of its target.[8] The prognosis is sombre: product of the violence that seeks to suppress it, terrorism created a trauma that cannot be relieved by mourning because the heart of the trauma is not the *past event* but the fear for the *future event* whose catastrophic nature can only be guessed. Imagination is here fed by a media without which there would have been no "world-historical event" in the first place. The circle is almost unbreakable: terrorism and that which it is against are locked in a reciprocal game of destruction where causes may no longer be distinguished from consequences.

Both philosophers discuss terrorism in the context of globalisation, or as Derrida insists, *mondialisation*. For Habermas, this provides an occasion to indict the injustice of the global system. To reconfigure the international as a democratic political community must begin "through the improvement of living conditions, through a sensible relief from oppression and fear" (36). This is absolutely necessary as a precondition of an atmosphere of trust and truthfulness within which discursive democracy may emerge. If the West is to have a "civilizing impact" (36), it will have to renounce a politics (of identity) that allows inclusion only by assimilation or conversion. However difficult this may be in the international context, one should aim for shared understandings, the hermeneutic moment of a fusion of horizons between that which is and that which is not "the West".

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[7] The opposition between the radical break of "l'événement" to the bourgeois tranquillity of "l'être" which derives from Heidegger is a much-debated theme of recent continental philosophy. See e.g. Alain Badieu, *L'être et l'événement* (Paris, Seuil, 1988). See also the book review, Martti Koskenniemi, *Alain Badiou D'Un désastre obscur: sur la fin de la verité de l'ètat* (1998) *and Ethics: An Essay on the Understanding of Evil* (2001), XI Finnish Yearbook of International Law, 430-442(2000).

[8] Likewise, Baudrillard, *supra* note 3, 14-18, 38.

Derrida accepts that it may be impossible to capture the present conflict in traditional categories, war, civil war, even "partisan war". The events are situated in an environment of semantic instability. "Terrorism" cannot be fixed in a definition. And yet, he points out, following Schmitt, this is one aspect of the politics of law: the attempt by the dominant power "to impose and, thus, to legitimate, indeed to legalize (for it is always a question of law) on a national or world stage, the terminology and the thus the interpretation that best suits it in a given situation" (105). [9] The moment is, clearly, one of re-interpretations, of novel and deterritorialised ideas and concepts: "…radical changes in international law are necessary, but they might take place in one generation or twenty" (106). What is needed, Derrida now suggests, is "accountability from those in charge of public discourse, those responsible for the language and institutions of international law" 106).

Such conventional cosmopolitanism must, however, recognise the ambivalence of legal concepts and institutions, including the Janus-sided nature of territorial sovereignty and its *mondialised* counterpart. In the first place, "wherever it is believed globalization is taking place, it is for better and for worse" (123). And then "[i]n many contexts, the state might be the best protection for certain forces and dangers (131)." This is surely right. As Roberto Unger and others have shown, institutions (including institutions such as the State or an international system of governance) do not have fixed social consequences but may be used for many different purposes.[10] Derrida is right to stress the semantic openness of the categories through which the international world is now perceived. But it is uncertain if this underwrites the (Kantian?) view that we live in transition from one type of relative fixedness to another, and even less certain that it is possible to distinguish "opportunistic" (102) semantic policies from those that are not. If politics is about the projection of meaning-contents to disputed words in an (agonistic) environment where institutional alternatives can only be contextually assessed, everyone is always an "opportunist".

Derrida views the clash of Muslim fundamentalism and the United States as a clash between two political theologies in fashion that forces Europe into the position of the gentle civiliser: a position in which Europe has, for both Habermas and Derrida, so far failed. For Habermas, too, the clash is between two closed systems between

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[9] Baudrillard suggests that an event can be an event only outside discourse and that it ceases to be one when captured by discourse, *supra* note 3, 21-5, 35. As discourse gives meaning, an "event" (in the heavy, Heideggerian sense also employed by Badiou) can only be meaningless. Derrida does not go that far. The event may be represented in discourse, even if it may be only revealed in deconstruction, through a glimpse at the "trace" it has left on the conceptual surface.

[10] Roberto Unger, *False Necessity. Anti-Necessitarian Social Theory in the Service of Radical Democracy* (Cambridge University Press, 1987).

which no dialogue presently seems possible. Both invoke Europe's role as a mediator, insisting on the need for the dialogue to open by addressing the world's social and economic injustices, and both argue towards the cosmopolitan vision of world citizenship. [11] To get there, Habermas invokes the notion of tolerance, but Derrida rejects it.

Derrida is critical of tolerance as an offshoot of a religious, authoritarian worldview: "tolerance is first of all a form of charity… the good face of sovereignty, which says to the other from its elevated position, I am letting you be…" (127). Derrida invokes the (Kantian) notion of hospitality, a *pure* hospitality that is not based on invitation, that opens itself "to someone who is neither expected not invited. To whomever arrives as an absolutely foreign visitor, as a new arrival, nonidentifiable and unforeseeable, in short, wholly other" (128-9). Such hospitality has something of political theology about it: it cannot be realised on this earth. For every act would always already positivize it, re-inscribe hospitality under certain conditions (an invitation, a membership, a victimisation, etc.). The interesting question is the relationship between the way Derrida arrives at the transcendental through the idea of "pure and unconditional hospitality" and his legal reformism that seems otherwise without direction (for neither sovereignty nor globalization provided it, unconditionally). The temptation is to see Derrida advocating - as he almost did in his famous essay on legal theory[12] - an ethically founded view of law whose focus was always on the (indeterminable) moment of decision at which crystallise both the justice of the institution whose decision it is, and the decision-maker's accountability to those the decision concerns.

Habermas refuses the turn to the transcendental. "Tolerance" may indeed possess the paternalistic overtones for which Derrida rejects it. But this is precisely why tolerance must be situated in a dialogic framework of rules and procedures. "Within a democratic community whose citizens reciprocally grant one another equal rights, no room is left for an authority allowed to *one-sidedly* determine the boundaries of what is to be tolerated" (41). To work acceptably, toleration requires a system of rights embedded in a constitution, understood as a self-correcting learning process.

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[11] Europe's role as the "vanishing mediator" or the translator between the US and the East, itself transforming in the course of such mediation, is interestingly discussed in Étienne Balibar, *L'Europe, l'Amerique, la guerre* (Découverte, 2003), 35-61.

[12] Jacques Derrida, 'Force of Law: The Mystical Foundation of Authority', in Drucilla Cornell, Michael Rosenfeld, David Gray Carlson, *Deconstruction and the Possibility of Justice* (Routledge, 1992), esp. 3-29.

Neither Habermas nor Derrida fully play the interviewer's game. Both embark on trajectories of thought that do not always address the questions Borradori poses to them. The questions work more as spring-boards for general reflection. Apart from the question of tolerance vs. hospitality, there is little direct engagement between them. The styles of argument of the two philosophers differ, as was to be expected, and it is quite fascinating to follow their different economies of expression in articulating parallel interpretations of September 11 and of what a desirable future might look like. Both see the main danger coming not from "terrorists" but from the West's response. Both appeal to law and multilateralism against American hegemony. Each sketches his utopia less in terms of positive principles than as an open-ended future. As the editor points out, despite the often stark juxtaposition between the supporters of Critical Theory and Deconstruction in the academy, the main protagonists of those two strands of thought appear to be much closer in political intuition than one might assume. Or perhaps this is only because they are both distinctly *European* thinkers whose shared identity as such is revealed immediately as they are made to face the awesome face of American hegemony - a conjecture whose implications for any study of philosophy as a social force would be interesting to pursue.