

ARTICLES : SPECIAL ISSUE
A DEDICATION TO JACQUES DERRIDA - INTRODUCTION

Derrida, Philosopher of the Law

By Cornelia Vismann*

A. Introduction

Does Derrida's death justify a special issue of this *Journal*, preceded immediately by a special edition on human rights? Can death justify anything at all? And what does this mean for the authors of this volume; are their texts doomed to remain unjustified, if no authority steps in to legitimate our endeavour to gather texts by friends in the name of Derrida?

B. The Juridicality of Deconstruction

It is none other than the subject of this special himself who insinuates those quasi-legalistic questions. Derrida is known for his intense mode of addressing the discursive practices of founding and appealing to an authority. Hence he can truly be called a philosopher of law, in the sense that law is not only the subject, as in his essay "Force of law/Force de loi,"¹ but also the ultimate horizon of his philosophy. Not by accident do the majority of texts in this special issue focus on the "Force of Law" essay, which made Derrida popular among law-people. Beyond this direct thematization of the law, the legal, better stated as the juridical, is present throughout Derrida's writing. His idiom is fused with legal concepts, whether it is the act of promising or claiming, of confessing, signing or making a constitution. What unites those acts is their ability to bring a text into shape. And this is Derrida's discovery in the broad land of letters: no text exists without certain operations at the margin, not a legal text, not even a work of prose, which has a title and an author and thus makes a piece of writing imputable. These operations belong to the legal sphere, for example in order to apply the protections of a copyright.

* Wissenschaftliche Mitarbeiterin at the Max Planck Institute of the History of Law in Europe, Frankfurt am Main. She is the author of, *inter alia*, *Das Gesetz "DER Dekonstruktion,"* 11 RECHTSHISTORISCHES JOURNAL 250-262 (1992).

¹ Jacques Derrida, *Force of Law*, 11 CARDOZO LAW REVIEW 919-1045 (1990).

At the margins a text is being held together by legal features. As a consequence, those textual functions at the margins, such as a title and a signature, are subsumed under an expression that derives from the legal sphere. They are called “performative” features, an expression that was not accidentally suggested to John Langshaw Austin, one of Derrida’s constant references, by the legal philosopher H.L.A. Hart.² The hermeneutic tradition has underestimated the performative effects of those illocutionary forces in a text. They remained widely unobserved within a culture that had drilled its readers, also readers of laws, to search for meaning and not for how these acts function to give meaning to a text. Coming from outside the law, Derrida reminded all those whose business is the interpretation of texts of the legal underground of their activity.

However, the legality of textual margins does not suffice to explain the legal horizon in which Derrida’s thinking takes place. It explains the use and benefits of Derrida’s grammatological studies for a legal analysis, such as of the concept of authority, but not the many variations of the question of justice,³ we encounter more explicitly in Derrida’s later work, when the focus shifted from the force of signs (*gramme*) to ethics.⁴ Here language and law built a complex relationship of mutual dependency, simply because there is no right without words. The claim to have a certain right implies the right to have rights and that is, after all, to have a language, in which they can be articulated. But language is not given, human beings need education, access to the channels of justice and furthermore.⁵ This conditional circle between law and language is not a paralyzing one, however. Derrida presents it as a circulating spiral, which in its dynamic, might improve on the long run the legal standard of special rights.⁶

Deconstruction equated with justice demands a linguistic analysis of the underlying paradoxes. It presupposes that the defining force of law produces an unsaid, unrepresented surplus. For example, do the laws of hospitality produce hosts and, by the same token, though it is hardly ever said, hostages.⁷ The act of

² For further details on this point, see Cornelia Vismann, *Jurisprudence: A Transfer-Science*, 10 LAW AND CRITIQUE 279-286 (1999).

³ See Elisabeth Weber, Petra Gehring, and Drucilla Cornell in this issue.

⁴ In her contribution to this issue Petra Gehring shows convincingly that there is a constant and consecutively followed line in Derrida’s thought, despite the “shift” towards the ethical, which can be observed on the surface.

⁵ See JACQUES DERRIDA, WHO IS AFRAID OF PHILOSOPHY? RIGHT TO PHILOSOPHY I 33 (2002).

⁶ *Id.* at 37.

⁷ See JACQUES DERRIDA AND ANNE DUFOURMATELLE, DE L’HOSPITALITE (1997).

pardoning shows the same ambivalence as a gift (*Vergebung* and *Gabe*; present and poison).⁸ And, to give a third example of a deconstructivist approach to justice, privileges are conceived as the incommensurable, forgotten rest of positive law.⁹ This statement invites, as often in Derrida's theories, a historical substantiation.¹⁰ And indeed, the linguistic-bound insight that basic rights maintain a relationship with privileges, can be backed up by legal history; as Heinz Mohnhaupt has shown recently. Basic rights derive in form and content from privileges.¹¹

Deconstruction dramatizes the exclusions, brings them to an extreme and confronts the law with that which is not justice in the realm of laws in order to give rise to the excluded. Or to put it differently: the cultivator of law breeds forgotten or suppressed forms of law with common legal features (others might call that re-entry) in order to arrive at times at a better law, at times at more justice without law. Whether the movement of ameliorisation is with or without law remains undecided, since law has an ambivalent status in the eyes of deconstruction. It is an impediment and at the same time the only possible access to justice. It is therefore a question of mentality whether Derrida is presented as a rebel or a legalistic thinker. Rebellion against and affirmation of the law have the same aim: to arrive at justice. They are not differentiable, but this is not so because of a witty (a tone one could miss in Derrida's writings)¹² camouflage, as one might think, but by principle, the principle of indeterminacy.

In contrast to the law, deconstruction never claims that it can secure this direction to the better. Deconstruction is, after all, a promise, not a doctrine. Its ju-radicality or cry for justice does not trust in grand dialectical turns. It is a theory of approximation towards that which it deconstructs. It therefore never comes to a halt. It merely points at the shaky ground of the grand notions which allegedly

⁸ See DIE ETHIK DER GABE. DENKEN NACH JACQUES DERRIDA (Michael Wetzel ed., 1993). On pardoning, see Jacques Derrida and Michael Wieviorka, *Jahrhundert der Vergebung*, 14 *LETTRE INTERNATIONALE* 14 (2000). On this subject, see also Peter Krapp's text in this issue.

⁹ See DERRIDA, *supra* note 5 at 46.

¹⁰ For a critique of the absence of deconstruction's lack of historical studies, see Friedrich Balke in this issue.

¹¹ Heinz Mohnhaupt, *Der Entwicklungsgang von den wohlverordneten, konzessionierten Rechten und Privilegien zu den dem Menschen zugehörigen Grundrechten*, *EUROPÄISCHE GRUNDRECHTE-ZEITSCHRIFT (EUGRZ)* 604-611 (2004).

¹² So, even if there is a certain playfulness in Derrida's theory, which Allan Hutchinson has pointed out in his contribution to this issue, it is not coupled with wit and irony but rather with the sincerity of a game, which one does not want to lose. Only Derrida knows that it remains undecided – because: who should play the arbiter?

secure us, such as the state as the guarantor of rights, or the borders of legal definitions in words and on maps and is in this respect up to date with the diagnosis of the present, that the power of the law of the nation state vanishes, as it is observed in terms of self deconstruction of hierarchical forms of law.¹³

The restlessness of deconstruction is due to the unlimited and relentless questioning of the juridical conditions of discourse. Derrida's speciality, by which one could infallibly identify a text by him, is thematizing this legal frame in which words are uttered. It is easy to see here, that he addresses law not as an executing force with various practices, as for example Michel Foucault does, but as the instance of formatting a discourse, not least his own discourse. So it is not astonishing to find in almost every one of his texts a reference to the situation in which they were presented. Just think of the constantly repeated quest for patience to his listeners (and think of the many speakers who never did so and challenged our patience far more than this singular polite and eloquent speaker). The references to the speech situation, which are not suppressed in the published version, let even the latter reader of the lectures never forget, that it is an oral presentation, he reads, a paper given, according to a happy English expression, which brings the impossibility of a speech to the scriptural bottom. It articulates that it is impossible to speak without a script, without a prefabricated text as well as an institutionalized frame such as an academic ritual and certain discursive features. We read in one of his texts¹⁴ how impossible it is to overcome the primordial script even if foreseen in the moment of drafting the speech. Derrida tells there that, before preparing a text for a lecture, he imagines the scene, which is awaiting him on the day of its presentation. And then he recounts that this moment of bringing a reflection to a halt is a painful moment. He feels like an animal chased around, that searches in the dark for an exit never to be found. But all exits are closed.¹⁵

The conditions of giving a paper – that of limited time, so that not everything can be said and the irreversibility of the order of speech and script – are impossible conditions, conditions of the impossible. There is no other escape than staying within and just naming these conditions which construct and obstruct the speech. The texts by the thinker of the primordial script, an *arché-écriture*, prior to any spoken word, are therefore consequently written speeches, which reflect the

¹³ Gunther Teubner, *The King's Many Bodies: The Self-Deconstruction of Law's Hierarchy*, 31 LAW & SOCIETY REVIEW 763-787 (1997).

¹⁴ Jacques Derrida, *Mochlos, L'œil de l'Université*, in DU DROIT A LA PHILOSOPHIE (1990) (German translation: MOCHLOS ODER DAS AUGEN DER UNIVERSITÄT (2004)).

¹⁵ Derrida, *id.* at 64.

prerequisites of speaking. They involve the speaker in the preworld itself, the founding scene, where the conditions of speaking are set-up, where words are conditioned. With these matters there can be no question that we find ourselves here in the midst of the world of law, the place from which the *Rechtsförmigkeit* (juridicality) of Derrida's philosophy derives. It is a concern with the juridical conditions of language, conditions of the impossible at the bottom of all our utterings.

C. Deconstruction as a Philosophy of Roman Law

Derrida is fond of foundations. As an expert of inaugural scenes he is not, however, a founder himself. He is the meticulous observer and describer of these scenes and through this effort he comes closest to the impossibilities that surround his reflections as untraceable exits in the dark. Hence, Derrida was once himself in the position of founding. The *Collège International de Philosophie (CIPH)* can be traced, among other initiators, back to him. The founding was accompanied by an impressive number of texts concerning the legal implications of such an institution. They are gathered in a volume under the title *Du droit à la philosophie*,¹⁶ which is now part by part being translated into German and English.¹⁷ These texts reside in the preferred domain of pre-paring. They draft a foundation that has no other *raison d'être* but the reflection on foundations, the act of laying ground as well as pure research (studies in laying foundations and that which laid the foundation of knowledge), unconditioned, without being integrated in any rational programs; in brief: an independent, sovereign institution.

Can there be such a thing as a sovereign institution, an institute of sovereignty? In a strict Derridian sense an institution is what meets all the conditions set up by law and as a concept of law sovereignty depends on successful representations. Since it is subjected to the regime of signs, Derrida concludes that sovereignty in such a dependent condition is none.¹⁸ It is a materialization and as such doomed to be a betrayal on the ideal. It has to count on its effects, at least it is orientated towards certain ends. It has, at the least, to administer time so that an institution becomes an institution of durability. Deconstruction does not overthrow the concept of sovereignty but recodes it by searching for a *topos*, a concept, even an institution that transcends these conditions.

¹⁶ Derrida, *id.*

¹⁷ DERRIDA, *supra* note 5; JACQUES DERRIDA, *THE EYES OF THE UNIVERSITY, RIGHT TO PHILOSOPHY II* (2004) (German translation: *PRIVILEG. VOM RECHT AUF PHILOSOPHIE I* (2003); *MOCHLOS ODER DAS AUGEN DER UNIVERSITÄT. VOM RECHT AUF PHILOSOPHIE II* (2004)).

¹⁸ For an analysis of Derrida's notion of sovereignty in his latest book (*Schurken*), see Friedrich Balke in this issue.

It searches for sovereignty without representation – an unconditioned sovereignty. One can certainly not think of that as a protestant power of anti-representation, which replaces the notion of sovereignty by the work of governing. The negation would remain within the same logic. The prefix “un” in the concept of an unconditioned sovereignty indicates an asymmetrical negation and as such sets free all kinds of oppositions. It suspends itself from legal bindings in general. Therefore “unconditional” is not the same as the legal concept of *Bedingungsfeindlichkeit* (adversity to conditionality) common in certain contracts or a testimony. It is more likely to hear it expressed as “unconditional surrender.” Although this has been a condition set up by the victorious allies in 1945, the speech act of capitulation itself is without conditions. The unconditioned speech act coincides with the unconditionality in the matter. An unconditioned sovereignty would therefore be one that capitulates, capitulates from the conditions of representation. But more likely one has to hear “unconditioned” with Kantian ears. Kant explains pure reason by the notion of the *Das Unbedingte* (unconditioned), which he paraphrases as the totality of all conditions and calls this *universitas*.¹⁹

The unconditioned as *universitas*: this equation invites Derrida to reserve the unconditioned sovereignty of all for the one institution named university.²⁰ It has sovereignty by capitulating. Withdrawing from certain ends, the utilisation of knowledge, nests though the danger that the university suffices itself. Against this dangerous process of self-immunization²¹ Derrida sets up the obligation of the university to acknowledge certain obligations such as education. Sovereignty becomes then a negotiation between the unconditioned and the conditioned.²² The negotiation is itself the legally bounded part of sovereignty, of which the opposite is leisure, for the opposite of *negotium* simply is *otium*. Deconstruction of sovereignty therefore does not confront with the option: either power of representation or capitulation. Rather it allows the possibility for the university, to make sovereign use of both, action and “pointless” thinking of our fundamentals. The latter part of the university is not subjected to any conditions such as the regime of time. It indulges in the luxury of infinite time. Endless sessions of faculty meetings is not meant, but the work or labor of thinking. Derrida himself demands that privilege of time, as his quest for patience indicates.

¹⁹ IMMANUEL KANT, KRITIK DER REINEN VERNUNFT 2. Abt., 1. Buch, 2. Abschnitt, B 379.

²⁰ JACQUES DERRIDA, DIE UNBEDINGTE UNIVERSITÄT 17 (2001).

²¹ See *id.* at 45.

²² *Id.* at 63, 76.

It is not only with respect to the institutional founding of the *CIPH* that the question who is the sovereign has relevance. Throughout his writings Derrida's hope weighs on philosophy. So he grants the right to found an institution unconditioned, though that is an impossible act, for philosophy. "... [P]hilosophy would have the right to speak of right and not reverse."²³ Although up to the grammatical form, the conditional seems unavoidable in the field of founding; philosophy and only philosophy is trusted to do away with legal conditions. It is not the philosophy, as it is presented at the faculties of today. It is, we learn in the same passage, the philosophical, that which comes before the grand oppositions, such as *physis* and *nomos*, which mark the western mode of thinking.

Before the grand oppositions there is a space open for demarcations, which the Greek called *chôra*.²⁴ Despite the Grecian nature of this notion, to which Derrida dedicated a whole essay,²⁵ he does not refer to the ground before the grounding, that is in brief to the Greek gods before Roman foundations in rural ground or *ager publicus*. Instead, Derrida treats *chôra* as a space for projection, a theoretical space in order to undo the distinctions. That the leading distinctions of western thinking, such as of the oral and script, have a history themselves, is not within the range of deconstruction. Rather, to ask for a history prior to an *arché-écriture* falls under the suspect of idealistic longings.

Deconstruction begins with its work, when the philosophical has become a superior system. Therefore the philosopher Theophrast who obeys the law, only earns what Derrida's name also holds within it: his derision.²⁶ Theophrast was going to lead a philosophy school, but he was prohibited from doing so, until the citizens of Athens voted for his admission. His philosopher-colleague, Derrida, comments: "A vote for the return of the philosophers! Must philosophy wait to be given votes publicly? Does it need majorities (democratic or not)?"²⁷ With these rhetorical exclamations, the French founder of a philosophy school waives even those democratic legal achievements he usually treats with grand respect, instead favouring the unconditioned superiority of the philosophical philosophy. This is – good or not – Platonic tradition, in which Theophrast plays not the least important role. The pupil of Leukipp and of Plato is infamous for "Platonizing" the centuries

²³ DERRIDA, *supra* note 5 at 27.

²⁴ See Dirk Baeckers article in this volume.

²⁵ Jacques Derrida, *Chôra*, in *ÜBER DEN NAMEN* 123-170 (2002).

²⁶ See Peter Goodrich's article in this volume.

²⁷ DERRIDA, *supra* note 5 at 25.

before the 4th.²⁸ He confounded the oral tradition of the Pythagoreans, to which Leukipp also belongs, with the written philosophy of Plato. Derrida's exchange with philosophy begins here, with the impossible speech, which Plato never ceased to lament on in his written dialogues and which ignores the tradition of the vowel alphabet and its implications for a culture in which philosophy was not yet separable, let alone superior to other techniques with letters, mathematics and music and law alike.²⁹

Derrida, the thinker of the "pre," does not make a step before this Platonic ground (most likely because he is afraid of the "false" steps Heidegger once made in presocratic space)³⁰ and thus affirms the monstrous phonologocentrism, against which deconstruction accedes. Within this phono-logic, law can only mean written law, as it gained shape in Ancient Rome and therefore Derrida's grammatology serves to analyze the *ius scriptum*, that is in brief: the making of the authority of law. It cannot give an account though on the "pre" of the distinction between *ratio* and *oratio* (equally between *otium* and *negotium*) – distinctions of which, Pythagoreans and the lawgivers in this tradition such as Zaleukos und Charondas, did not even dream.

²⁸ CHRISTOPH RIEDWEG, PYTHAGORAS, LEBEN, LEHRE, NACHWIRKUNG 156 (2002).

²⁹ Friedrich Kittler, *Vom Appell des Buches and Mousa or Litteratura*, manuscripts with the author.

³⁰ For an account of the complicated relationship with Heidegger, who is one of the few who never benefited from Derrida's politics of friendship, see Derrida's rather harsh dissociations from Heidegger. DERRIDA, *supra* note 5. Here, I would like to translate passages from a recent letter written by my father, Dieter Vismann:

"Derrida states in 1972 that nothing that he tries would have been possible without the opening (Eröffnung) of Heideggerian questions (see, JACQUES DERRIDA, POSITIONEN 18 (1986)). He is of course not an epigone of Heidegger. Derrida wants to analyze the ambivalences in Heidegger's project of overcoming metaphysics. This project had a constructive aim: to demarcate metaphysics in its positive possibilities, and that also means in its limits (see, MARTIN HEIDEGGER, SEIN UND ZEIT § 6 (7th ed. 1953)). This constructive drive can also be found in Derrida, which is yet not accompanied by the same pathos, *dem Walten des Seinsgeschickes*. Compared with that pathos Derrida's deconstruction has the air of demythologizing Heidegger. [...] According to Heidegger should the destruction of ontology finally give access to the primordial springs, 'den ursprünglichen Quellen [...], in denen die ersten und fortan leitenden Bestimmungen des Seins gewonnen wurden' (HEIDEGGER, *id.*) This is the attempt to objectify the ontological way of thinking and to arrive beyond the tradition's obstructions of *Sein* at the *eigentliche* (true) essence of *Sein*. [...] Derrida sees here a metaphysical dualism in that opposition of *ursprünglich/abgeleitet* and *eigentlich/uneigentlich*, that slipped Heidegger's attention in his search for a *neue Ursprünglichkeit*. [...] Derrida is searching more explicit than Heidegger for a primordial difference, which differs beyond *Sein* und *Seiendes* and lays the traces for this difference. This difference, that cannot be drawn together in the word *Eigentlichkeit* or *Nähe*, is Derrida's focus..."

Manuscript with the author.

Not to look for that which the Roman grounding, as the supermodel for all groundings, obstructs, is the limit of a philosophy in the tradition of Plato, a limit that lays above all ground for a deconstructivistic discourse on rights.³¹ By drawing a line beyond which one cannot step, it is rendered possible to ask: how to deconstruct the founding scene in its conditionality. It generates, if not to say: authorizes discourses that transcend the conditions of the given law, such as activist human rights discourses, at present. The prize however for that insight is that it turns it back towards an unconditioned Greek past, a present, by the way, of its own to western thinking.

To remain in the sphere of preparation for that which is yet to come, has the curious effect that things happen as they are announced. Institutions are founded while they are drafted. This is the whole secret of performative actions. Deconstruction counters this effect by the speech act of effacing or undoing legal actions. Even more, and quite dialectically, the absence of an authority generates the founding of a discourse on the very same matter, as not the least this special issue of *German Law Journal* proves. Here, deconstruction challenges the impossible: that things happen without words, unconditioned.

³¹ For the delimiting effects of limits, see the introduction to Drucilla Cornell's contribution to this issue.