

Law Department

Law and the Emotions:  
Prolegomena for a Psychoanalytic  
Approach to Legal Study

COSTAS DOUZINAS

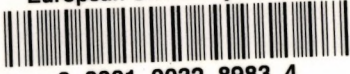
LAW No. 98/8

EUI WORKING PAPERS

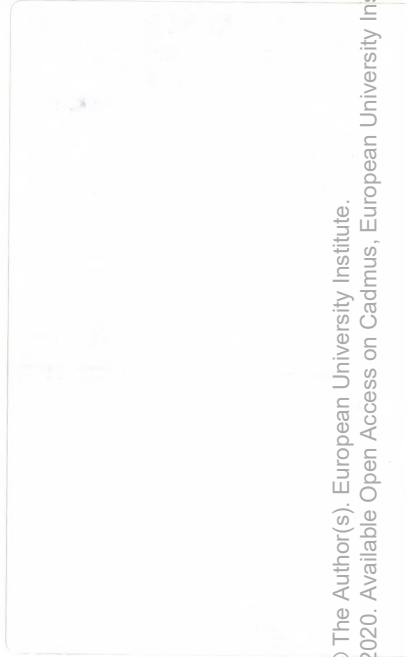


EUROPEAN UNIVERSITY INSTITUTE

European University Institute



3 0001 0032 8983 4



**EUROPEAN UNIVERSITY INSTITUTE, FLORENCE**

**DEPARTMENT OF LAW**

**WP Fa9  
EUR**



**EUI Working Paper LAW No. 98/8**

**Law and the Emotions:  
Prolegomena for a Psychoanalytic  
Approach to Legal Study**

**COSTAS DOUZINAS**

**BADIA FIESOLANA, SAN DOMENICO (FI)**

All rights reserved.  
No part of this paper may be reproduced in any form  
without permission of the author.

© 1998 Costas Douzinas  
Printed in Italy in December 1998  
European University Institute  
Badia Fiesolana  
I – 50016 San Domenico (FI)  
Italy

**LAW AND THE EMOTIONS:  
PROLEGOMENA FOR A PSYCHOANALYTIC APPROACH TO  
LEGAL STUDY**

**Costas Douzinas**

**TABLE OF CONTENTS**

- I. Freud and the genesis of Law**
- II. Lacan and the Name of the Law**
- III. Law and the Dialectics of Desire**
- IV. Psychoanalysis as Jurisprudence**
- V. Legality and Eros: Psychoanalysis as Critique**
- VI. The Inevitability of Injustice**
- VII. The refugee as symptom of the trauma of the law.**



**LAW AND THE EMOTIONS:  
PROLEGOMENA FOR A PSYCHOANALYTIC APPROACH TO  
LEGAL STUDY**

Costas Douzinas\*

Some of the best recent jurisprudence addresses the paradoxical relationship between law and the emotions.<sup>1</sup> Legal theory is hesitantly admitting the difficulties faced by lawyers caught between their commitment to the law and their personal passions. If the law expresses the power and the logic of institution, tradition and reason, our personal experiences and history with its traumas and symptoms, determine the way in which we attach ourselves to this logic. Attention to the emotional aspects of life in the law and to their hermeneutic value has been reinforced by the turn to psychoanalysis. Psychoanalysis, the recent great bonanza in social thought, is predominantly a theory of subjectivity. It claims that the subject, rather than being a pre-given substance or a fully constructed entity, is reflectively and intersubjectively constituted. The unconscious and desire both create and disrupt consciousness and subjectivity and, as a result, the understanding of human experience, action and meaning involves always 'another scene' and demands a 'deep' interpretation of the causes and effects of 'free will'. Psychoanalysis and in particular its Lacanian revision are fast becoming the latest great frontier for jurisprudence too.<sup>2</sup>

---

\* Department of Law, Birkbeck College, University of London, Malet Street, London WC1E 7HX

<sup>1</sup> Moving pictures of the emotional difficulties of the lawyer are found in some of the most interesting legal writings of the Nineties. See Patricia Williams, *The Alchemy of Rights*, Harvard University Press 1996; Sarat & Kearns (eds), *Law and the Everyday Life*, University of Michigan Press, 1993; Bentley & Tomkins (eds), *Law and the Senses*, Pluto, 1996. The emotional disfunction of the lawyer has been one of the great themes of world literature. For an interesting review see Richard Weisberg, *Poethics*, and Costas Douzinas and Ronnie Warrington, 'The Trials of Law and Literature', VI *Law and Critique*, 131 (1995).

<sup>2</sup> Recent explorations of the relationship between law and psychoanalysis include David Caudill, *Lacan and the Subject of Law: Toward a Psychoanalytic Critical Legal Theory*, Humanities Press 1997; Peter Goodrich's, *Oedipus Lex: Psychoanalysis, History, Law*,

The law has been used to the importation of theoretical schools from the adjacent fields of sociology, economics and politics. More generally, legal theory can be subdivided into two categories: internal or normative and external or explanatory theories. Internal theories adopt the point of view of the legal practitioner, of the professional and of the institution and try to theorise the processes of argumentation and justification mobilised in institutional discourse. External theories, on the other hand, treat the reasons, arguments, and justifications of the institution as signs or 'facts' to be incorporated in wider non-legal explanatory contexts. The task here is to detect the causal chains which shape or are shaped by legal practices and to correct the ideological (mis)recognitions of these forces. The psychoanalytical approach promises to put the two camps into debate and even to transcend or 'sublate' their differences. This rather extravagant claim can be made because psychoanalysis not only interprets the position of the (legal) subject, be it a judge, a lawyer or simply the bemused citizen who wants to act according to the law - in other words to follow his desire - but is also able to understand and explain the role of the legal institution. The link between the two approaches is to be found in the concept of the speaking subject. Psychoanalysis explains the constitution of the subject through its subjection to legal and linguistic -symbolic- structures. It claims to transcend all explanatory perspectives and to give them their true significance as partial attempts to grasp what is to become human within a community of other subjects. But psychoanalysis is also a 'hermeneutics of suspicion', a theory that interprets meanings through a 'double reading' of the surface of conscious speech and the depth of unconscious desire. If the former aspect shows social theory as one moment on the way to the full explanation of the speaking subject, the latter presents normative political

---

University of California Press 1995; Jean Shroeder, *The Vestal and the Fasces: Psychoanalytical and Philosophical Perspectives on the Feminine and Property*, University of California Press, 1998. See also the special issue of the *Cardozo Law Review* on 'Law and the Postmodern Mind' Vol. 16, Nos 3-4 (1995) and in particular Drucilla Cornell, 'Rethinking the Beyond of the Real', 16 *Cardozo Law Review* 3-4, 729-792 (1995). For a review of recent psychoanalytical jurisprudence, see Costas Douzinas, 'Psychoanalysis Becomes the Law: Notes on an Encounter Foretold', 1996 *Legal Studies Forum* 323.



philosophy and jurisprudence as incomplete approaches to a total understanding of the word of law.

The work of Pierre Legendre,<sup>3</sup> Peter Goodrich,<sup>4</sup> David Caudill,<sup>5</sup> Jeanne Shroeder<sup>6</sup> or of the Slovenian philosophers Slavoj Zizek<sup>7</sup> and Renata Salecl<sup>8</sup> has alerted us to the many links between law and psychoanalysis. For psychoanalysis, the law is the foundation of individuality and the cement of sociality and, as both Jacques Lacan and his heretical follower Pierre Legendre insist, individuals and societies cannot escape its empire with impunity. If the classical maxim claimed that *ubi societas ibi jus*, the psychoanalytical version reverses it: *ubi jus, ibi subjectum et societas*.

This essay argues that psychoanalytical theory, in some of its best interpretations, is a legal theory or at least a theory in which law plays a formative role. In this sense, psychoanalysis could become a privileged domain for legal theory. The conservative reflexes of the legal academy however have kept psychoanalysis, this great 'cognitive Continent' according to Althusser, to the margins of scholarship, a situation gradually changing. But there is need for caution; the centrality of numerous legal concepts and concerns in the classics of psychoanalysis has serious but largely unrecognised consequences for jurisprudence, particularly in its critical version. This essay attempts to clear the ground for the development of a psychoanalytical jurisprudence. It starts with the story of the genesis of law

---

<sup>3</sup> Pierre Legendre, *Le Crime de Corporal Lortie Fayard* 1989; *L'Amour du Censeur* Seuil 1974; 'The Other Dimension of Law', 16 *Cardozo Law Review* 3-4, 943-962 (1995); a Reader of Legendre's work in English entitled *Law and the Unconscious* was recently published (Peter Goodrich ed., Macmillan 1997).

<sup>4</sup> Peter Goodrich, *Languages of Law*, Butterworths 1993; *Oedipus Lex*, *op.cit.*; *Law in the Courts of Love*, Routledge 1996.

<sup>5</sup> *Op. cit.*

<sup>6</sup> *Op.cit.*

<sup>7</sup> Slavoj Zizek, *The Sublime Object of Ideology*, Verso 1989; *For they Know what they do: Enjoyment as a Political Factor*, Verso 1991; 'Superego by Default' 16 *Cardozo Law Review* 3-4, 925-942 (1995).

<sup>8</sup> Renata Salecl, *The Spoils of Freedom*, Routledge 1995; 'Rights in Psychoanalytic and Feminist Perspective', 16 *Cardozo Law Review* 3-4, 1121-1138 (1995).

and of the subject, as told by Freud and Lacan. It then moves to a discussion of the role of law in the constitution of desire and suggests a theory of legal erotics. Psychoanalysis explains why both law and its critique are necessary and inescapable moments of jurisprudence. This dialectical embracing of the opposites is pursued in a brief examination of the theory of justice and of the passion against injustice. A number of recent asylum cases are finally used to illustrate the original but repressed trauma or fault-line which fissures the social bond and returns when the refugee reaches the physical and metaphorical points of entry to state and law. The essay concludes that for a psychoanalytically informed critical jurisprudence to emerge, the centrality of law in the classics must be questioned from the perspective of the erotic and ethical aspects of the social bond.

## I. Freud and the genesis of Law

Psychoanalysis presents the birth of the law as a crime story. Freud's 'mythological theory of instincts'<sup>9</sup> and of law's creation starts with the murder by his sons of the primordial father who had monopolised the females of the group. Freud uses the tribal ambivalence towards totemic meals, in which the slaughtering of the animal leads to ritual mourning and lamentation followed by festive and excessive rejoicing, to argue that the totemic animal is a substitute for the primal Oedipal father. At this point, Freud wonders whether this explanation can be used to extrapolate the first form of human organisation. His eclectic hypothesis brings together Darwin's 'primal horde' theories and early anthropological evidence, gives them a psychoanalytical twist and creates a modern, 'scientific' myth of the origins of law.

The primal horde, the first form of human organisation, was a band of roving males, ruled by a violent and jealous father who kept all females for himself and drove his sons away. One day, the sons who hated their father because he blocked access to power and sexual gratification banded together and

---

<sup>9</sup> Sigmund Freud, *Why War*, in *Civilisation, Society and Religion*, 341, 359 (James Strachey ed. transl., Penguin, 1985).

killed him. But after their hatred was satisfied, a sense of remorse and guilt took over and led them to establish the two laws of totemism, which eventually founded law, morality and sociality: the prohibition of murder and the forbidding of incest. Incest expresses a fundamental desire, the mother is the desired and forbidden love object. These totemic prohibitions turned the primal horde into a fraternal clan which was later replaced by organised community. 'Society was now based on complicity in the common crime; religion was based on the sense of guilt and the remorse attaching to it; while morality was based partly on the exigencies of this society and partly on the penance demanded by the sense of guilt'.<sup>10</sup>

Freud presents his hypothesis as a 'Just-So Story',<sup>11</sup> a tale which has 'left indestructible traces upon the history of human descent'.<sup>12</sup> Law is the outcome of a heinous crime and of the need to prohibit incest, the primordial principles by means of which 'culture begins in opposition to nature'.<sup>13</sup> Two elements emerge from this story and will determine the legal proclivity of psychoanalysis. First, violence and crime lie at the beginning of humankind. Crime comes before the law and determines the nature of the law and its response. Secondly, Freud's story joins the great religious, philosophical and scientific attempts to go back to an *origo*, a time before history and memory at which human society was founded. For Freud, in the beginning of civilisation is the law. The myth and the law have a double function. Law is the progenitor and promoter of civilisation and without it humanity would not come into existence. But the law also founds psychoanalysis. The 'primal parricide' is presented as the mythical explanation and the diachronic structure of the Oedipal drama. Psychoanalysis is the science which examines law's action and its transgression.

In his later *Group Psychology and the Analysis of the Ego*, Freud abandons the mythical form of the hypothesis of origins, but keeps its main

---

<sup>10</sup> Sigmund Freud, *Totem and Taboo*, in *The Origins of Religion* (James Strachey ed. and Albert Dickson transl., Penguin 1985) 208.

<sup>11</sup> Sigmund Freud, *Group Psychology and the Analysis of the Ego in Civilisation, Society and Religion* op.cit at 154.

<sup>12</sup> *ibid.*

<sup>13</sup> Lacan, *The Ethics of Psychoanalysis*, Routledge 1992, 66-67.

characteristics which are now presented as the psychological structure of contemporary society. Social groups are naturally and unavoidably divided into leaders and led. The primal father was 'the "superman" whom Nietzsche only expected from the future' but who put into operation the principle of violent leadership at the beginning of history and still represents it.<sup>14</sup> The chief, the leader or the hypnotist are very similar to the primal father. The leader is an individual of superior strength, totally free in his actions and independent of affiliations or affection for group members. He does not love anyone but himself, and he uses his subjects to serve his needs. Being free of emotional, social or ethical ties, the narcissistic leader offers himself as an object of adoration. Group members identify with him and, through their love for the leader, the community becomes united. 'Society, Freud said, is a unanimous "mass" whose members have all put the same "object" (the "leader", or *Fuhrer*) in the place of the ego ideal and who identify with one another as a result.'<sup>15</sup>

Freud links directly his analytical theory with the creation of law in his late essays. In *Why War?*, he sets out to explain the causes of warfare in response to an invitation by Einstein.<sup>16</sup> His genealogy of the legal institution starts again with the 'primal horde'. Conflicts were resolved violently and the most powerful member killed or subjugated his opponents through brute force. All law and right, Freud insists, come from violence. The road from the might of the strongest to the legal institution passes through the victor's realisation that, if the defeated and weaker group members were to unite, they could challenge his domination. Law is therefore the replacement of individual violence by the organised violence of the community and is directed against those who resist it. The Hobbesian undertones of Freud's story are striking. Freedom is not the gift of civilisation and it was much greater, albeit unenforceable and impractical, before the law intervened. The desire for freedom is a sign of humanity's nostalgia for this original untamed personality and mental illness the result of the resentment and hatred created

---

<sup>14</sup> *op. cit.* at 156.

<sup>15</sup> Mikkel Borch-Jacobsen, *The Emotional Tie: Psychoanalysis, Mimesis and Affect*, (Douglas Brick transl.) Stanford University Press, 1992, 25

<sup>16</sup> Sigmund Freud, *Why War?* in *Civilisation Society and Religion* *op.cit.* fn. 9.

by civilisation's suppression of liberty. Law is the first and most powerful weapon in civilisation's attempt to restrain the satisfaction of instincts and desires. Freud goes on to admit that the 'first requisite of civilisation is justice -that is the assurance that a law once made will not be broken in favour of an individual.' But this the positivist justice of legality. '[It] implies nothing as to the ethical value of such law'.<sup>17</sup>

Law and legal institutions can succeed and survive over time, if they are recognised as serving communal interests and fostering emotional ties amongst group members. But such feelings are not easily created because the members of the community are unequal, men and women, parents and children, masters and slaves. These imbalances are reflected in the laws which are legislated by the powerful and the victors and promote their interests, despite their claims to the contrary. As a result, the oppressed constantly attempt to overthrow their subordination; they either ask the protection of the law and demand, impossibly, equal justice or, more often, they rebel and, if successful, inaugurate a new law which soon develops however the same pathology. Violence cannot be avoided even after the establishment of the rule of law.

Communities are held together by shared emotional ties and violence. Law's inability to resolve conflict in a community lacking communal feelings and emotional attachments leads to the extensive use of legal violence. Thus, the force which led to law's genesis is also found at the heart of its operations. A good example is the international community: it does not attract emotional ties of any kind and, as a result war becomes the main means for resolving conflict.<sup>18</sup> The antidote to violence is nurturing those 'emotional ties'. They are of two types; people may share feelings of love towards each other but this is 'more easily said than done'. Alternatively, they share important interests and concerns which can draw them closer through their identification with the love object. The object Freud has in mind is

---

<sup>17</sup> Sigmund Freud, *Civilisation and its Discontents* in *Civilisation Society and Religion* op.cit fn. 9 at 284.

<sup>18</sup> Recent controversies over Britain's position in Europe and the war in former Yugoslavia have made Freud's fears painfully topical and contemporary again.

chillingly clear. The 'innate' and 'ineradicable' inequality of men separates them into leaders and followers who 'stand in need of an authority which will make decisions for them and to which for the most part they offer an unqualified submission. This suggests that more care should be taken than hitherto to educate an upper stratum of men with independent minds...whose business it would be to give directions to the dependent masses'.<sup>19</sup> The father-chief-leader is the best substitute for violence and law's closest ally. In this transition from anthropology and myth to social psychology, law and politics acquire a menacing tone and a totalitarian potential.

## II. Lacan and the Name of the Law

Freud's jurisprudence has been criticised on various grounds. Its emphasis on *anomie*, violence and the role of the leader have been explained as expressions of the catastrophic *maelstrom* of inter-war Europe. Moreover Freud's prevarications as to the anthropological or mythological status of his political theory are usually attributed to the central conflict in psychoanalysis about its 'scientific' or hermeneutic nature. The anthropological evidence Freud used was scant and is now considered unsound. Additionally, the myth of law's genesis has been criticised for its logical flaws. If law and morality are the outcome of the murder, the sense of guilt experienced by the killer-sons cannot be explained. These inconsistencies led Lacan to turn Freud's story fully into a mythical structure and to read it, in a way similar to Levi-Strauss's explanation of the elementary structures of kinship, as an attempt to give narrative epic form to the structure of subjectivity and the operation of desire. The 'novelty of what Freud brings to the domain of ethics'<sup>20</sup> was to discover the structuring principle of the social bond. He was able to understand the reasons why the efforts of the finest minds and fieriest hearts over three millennia have failed to establish a successful moral code or an acceptable ethical practice thus leaving civilisation drowning in its discontent.

---

<sup>19</sup> *Why War?* op.cit fn 9 at 359.

<sup>20</sup> Lacan, *The Ethics of Psychoanalysis*, op.cit. fn 20 at 216.

In Lacan's reading, the murdered and cannibalised primal father is a symbol of the subject's internalisation of law, a necessary prerequisite for the development of socio-cultural identity and adult sexuality. The parricide or its consequences cannot be proven historically but its basic structure must be presupposed, if we are to understand how subjectivity and sexuality come into existence. While Freud, in common with all great system builders and in particular his hero Moses, narrates the creation of law, Lacan closer to the concerns of anthropology, linguistics and structuralism emphasises the constitutive operation of law for human identity. Freudian psychoanalysis tries to explain the law as the necessary response of socialised personality to various needs, desires and instincts. Lacanian theory explains the desires, needs and identity of the subject through her subjection to the law. From the genesis of the law to law the *demiurge*, psychoanalysis proves itself a legal theory, a discourse obsessed with the creation, internal organisation and action of the law.

Lacan's insistence on law's centrality cannot be more pronounced. His motto becomes 'In the beginning (of the subject) is the *Nomos* and the *Logos*'. No subject, no desire, no society can come into being without submission to the symbolic order, which is typically presented as a combination of law and language. The infant enters this order through the encounter with the father the lawgiver, who initially appears to possess the object of mother's desire, the phallus. The child wants the absolute love of the mother and therefore desires to become the phallus. But becoming the mother's phallus would stop the child's development into adult sexuality and law's function is to separate the child from the mother through the rivalrous identification with the father. The father -not as the biological progenitor but as the representative of the law- is now introduced in the dyadic relationship between mother and child. The law imposes the double prohibition on incest -thus stopping the union with the mother and barring the child from becoming the mother's phallus- and on parricide -thus leading the male child to identify with the father. The law, the word of the father, confronts the

omnipotence of the mother with the power of the word.<sup>21</sup> This separation from the mother and subjection to the law is Lacan's (in)famous 'symbolic castration'. The castrated boy-child<sup>22</sup> does not identify with the father who is imaginary phallus of the mother (the primal father or the father of enjoyment) but with the father who possesses the phallus through the operation of law and language (the symbolic or dead father).

In Lacan's version, therefore, the law creates the ego, it has ontological power. The symbolic castration is a question of law and legitimate possession at all levels. The mother delivers the boy to the father through a symbolic contract. The boy-child identifies with the father who has the phallus as its legal possessor, he identifies with the signifier of the phallus, the 'name of the father', or with the object as prohibited by the paternal interdiction. The phallus, this absent, non-existent master signifier is a legal title or emblem -Lacan calls it a 'sceptre'.<sup>23</sup> which the father has acquired through his own castration in order to pass it on according to the law. 'It is in the name-of-the-Father that we must recognise the support of the symbolic function which, from the dawn of history, has identified his person with figure of the law'.<sup>24</sup> The symbolic castration represents the genealogical order by prohibiting imaginary and promoting symbolic identifications. Without submission to its law, the child cannot be separated from the mother and cannot be introduced to subjectivity. But by separating the subject from

---

<sup>21</sup> Jacques Lacan, 'The subversion of the subject and the dialectic of desire in the Freudian Unconscious' in *Ecrits: A Selection* (Alan Sheridan transl.) Routledge 1977, 292-325.

<sup>22</sup> For Lacan access to the symbolic order is much easier for the girl-child who, in not having the penis, accepts with less difficulty the interdiction on becoming the mother's imaginary phallus. In this sense, men who harbour the ridiculous hope that the physical organ is identical with the symbolic position are failed women.

<sup>23</sup> 'If this exchange must be described as androcentric...it is, M. Levi-Strauss tells us, because of the occurrence of political power that make themselves felt in it, power that falls to men (sic) to exercise. It is therefore because it is also the sceptre that the fallus prevails - in other words because it belongs to the symbolic order.' Lacan in unpublished Seminar X quoted by Mikkel Borch-Jacobsen, *Lacan: The Absolute Master* (Douglas Brick transl.) Stanford University Press, 1991, 213.

<sup>24</sup> Lacan, *Ecrits*, at 67.



the love object and introducing him to lack, the law is also the creator of desire.

When we turn from the law to *logos*, from the father to the linguistic rewriting of the Oedipus drama, legal metaphors proliferate again. Language both in its structure and action is homologous with the law. 'Noone is supposed to be ignorant of the law; this somewhat humorous formula taken from our Code of Justice nevertheless expresses the truth in which our experience is grounded...No man is actually ignorant of it, since the law of man has been the law of language since the first words of recognition.'<sup>25</sup> Again when glossing Levi-Strauss's structural interpretation of kinship and exchange, Lacan insists on the primacy of the law-language order:

The marriage tie is governed by an order of preference whose law concerning the kinship names is, like language imperative for the group in its forms, but unconscious in its structure...The primordial Law is therefore that which in regulating marriage ties superimposes the kingdom of culture on that of nature abandoned to the law of mating...This law, then, is revealed clearly enough as identical with an order of language.<sup>26</sup>

And if the order of *logos* as language is identical with the order of law, *logos* as speech or discourse acts like law. In Lacan's oracular aphorism

It is somewhere other than the Reality that it concerns that truth derives its guarantee: it is from Speech. Just as it is from Speech that Truth receives the mark that establishes it in a fictional structure. The first words spoken (*le dit premier*) stands as a decree, a law, an aphorism, an oracle; they confer their obscure authority upon the real other.<sup>27</sup>

Reality, Speech, decree, the other. In this obscure formulation we can trace all the essentials of the rule of law according to Lacan. Law does not just

---

<sup>25</sup> id. at 61

<sup>26</sup> id. at 66

<sup>27</sup> id. at 305-6

constitute the subject but has wider redemptive qualities. Hegel's dialectics of desire can be traced in Lacan's legal formulations. Under the influence of the dialectic, Lacan turns the 'discontents of civilisation' into desiring subjects who fight for the impossible love object unto death. In this dialectic of desire and death, law becomes a partial cure for the traumas of society, in a fashion not dissimilar to that applied in clinical analysis to individuals.

### III. Law and the Dialectics of Desire

The influence of Hegel's *Phenomenology of Spirit* and of Kojève's reading of Hegelian theory<sup>28</sup> on Lacan's 'return to Freud' is well-documented.<sup>29</sup> Lacan uses the Hegelian dialectic extensively to show how the Other and reflexivity help in the constitution of self. But while the turns and tribulations the Hegelian self goes through are central to the achievement of self-consciousness, Lacan's reformulation presents the subject as split and decentred. In Kojève's reading, Hegel aims to reconstruct the transcendental presuppositions and the necessary historical stages which have led to the present condition of subjectivity and of historical and philosophical consciousness. While Descartes and Kant had emphasised the solitary consciousness, Hegel claims that the ego as self-consciousness is constituted through desire. Simple consciousness discovers, through sense-perception and speech, being and the external world standing outside of the subject and independent of her knowledge. But for the ego to rise, this passive contemplation of the world must be complemented with desire. Desire belongs to a subject, it is exclusively and radically subjective, it is my desire which makes me aware of myself and of my difference from the object, the not-I. Thus desire reveals and creates self-consciousness.

---

<sup>28</sup> Alexandre Kojève, *Introduction to the Reading of Hegel*, (Allan Bloom ed., James Nichols transl.) Cornell University Press 1969.

<sup>29</sup> See amongst many Vincent Descombes, *Modern French Philosophies* (L. Scott-Fox and J.M. Harding transl.) Cambridge University Press 1980, Chapter 1; Borsch-Jacobson, *Lacan* op.cit., fn. 23, Introduction; Michael Taylor, *Altarity*, Chicago University Press, 1987, Chapters 1 and 5; Slavoj Žižek, *The Sublime Object of Ideology* passim.

But desire is active, it tries to assimilate and transform its object in its being, it negates its independence and givenness. The desire for food, for example, negates the being of the foodstuff as it devours it to satiate hunger. Desire reveals a fundamental lack in the subject, an emptiness in the self that must be filled through the overcoming of the external object. But this devouring desire does not differentiate humans from animals. The fully human desire is not addressed towards an object or a being, but towards a non object, towards another desire. When self desires a thing, it does not do so for its own sake but in order to make another self recognise his right to that thing and therefore recognise his existence and superiority. But as a multiplicity of desires desire to be so recognised, their action for recognition becomes a war of all against all. This universal fight for recognition must stop before the annihilation of all desires. For that to happen, Hegel assumes that one of the combatants must be prepared to fight to the end and risk his life; at that point, the other accepts his superiority and surrenders. He who risks his life for prestige becomes the Master, the other his slave. The slave has subordinated his desire for recognition to that for survival. The Master's superiority will be realised hitherto in the slave's work, which transforms nature in the service of the Master. If history is seen as a unified totality, class division and the structure of subjectivity are attributed, logically if not empirically, to the struggle between desiring selves and its inevitable corollary, the creation of masters and slaves. History will end, for Hegel, when master and slave are dialectically overcome, sublated in a final synthesis 'that is the whole Man, the Citizen of the universal and homogeneous State', Hegel's Prussian state or the future utopia of his followers.<sup>30</sup> But for the non-Marxist Parisian intellectuals of the inter-war period, this promised reconciliation was no longer historically credible and the emphasis was placed on the agonistic aspect of intersubjectivity and desire.

For Kojève, the other's recognition is essential for the creation of subjectivity, but this dependence reveals a fundamental lack at the heart of self. Both types of desire, for the other and for objects, can be mediated only through another's desire. Desire as the desire for the other's desire, the desire

---

<sup>30</sup> Kojève op. cit. fn. 28, at 44.

to be recognised in one's individuality, is therefore deeply narcissistic. If desire recognises itself in another desire, it finds in its object the essence of all desire, emptiness and lack. The mirror reveals desire's object to be nothingness, non-being. Death, Hegel's 'absolute master', is the 'truth' of desire and history is competitive and violent.<sup>31</sup>

This analysis contains the mainsprings of the Lacanian theory of desire. Lacan is quite categorical about desire's turn towards the void of death. Desire as the demand for recognition is a persistent and insatiable erotic request to be desired as a subject. The non-object of desire is the pure negativity of a subject who desires herself and cannot be satisfied by objects, because they are what the subject is not. The object of desire is a failed object, what the subject is not and what desire lacks. Desire as the desire of desire is not desire to be an object, not even the object of the other's desire, it bears witness to a constitutive lack. It is a pure desire of that emptiness that designates in the other another desire. But if desire desires itself as desire or as subject, it wants not to be an object, it wants not to be, it is a desire for death. Desire has no object other than the non-object of death, freedom has no ground other than the flight towards death.

In Lacan's interpretation, the Oedipal scene is an attempt to shield the subject from the reality of his abysmal desire. The rivalry with the father becomes 'the narrow footbridge thanks to which the subject does not feel invaded, directly swallowed up by the yawning chasm that opens itself to him as pure and simple confrontation with the anguish of death...indeed we know of that shield of intervention, or substitution that the father [forms] between the subject and the absolute Master - that is death'.<sup>32</sup> It is preferable to identify symbolically and rivalously with the Other who bars enjoyment than be handed over to the abyss of its radical absence. Thus the non object of desire becomes the target of repression. Non being cannot be represented, it is beyond presence and representation. But this desire of

---

<sup>31</sup> On Hegel's attitude to death, the 'absolute master' see Costas Douzinas and Ronnie Warrington, 'Antigone's *Dike*' in *Justice Miscarried*, Edinburgh University Press, 1994, Chapter 2.

<sup>32</sup> Lacan in unpublished Seminar VI, quoted by Borch-Jacobsen, *Lacan* op.cit. fn. 23, at 94.

nothing organises itself in imaginary scenarios, in which it imagines and pictures itself in objects (Lacan's *petit objet a*). Imaginary identifications with objects and ideals are failing attempts to deny death. They both misrecognise desire and defend the self from the spectre of its morbid desire. And as the object of desire cannot be present, it is represented through inadequate, failing representations and identifications and gives rise to images and imaginary constructions raised on the ground of repressed desire.

The discontent of civilisation is the result of these imaginary identifications which lead to intense competition for the love object. Lacan's partial solution to the irresolvable problem of intersubjective hostility is different from that of Hegel or Freud. Law is brought in again. A contract that lies behind speech allows the social bond to operate. 'This rivalrous, competitive base at the object's foundations is precisely what is surmounted in speech, insofar as it interests a third party. Speech is always a pact, an agreement; people understand each other, they agree -this is yours, that is mine, this is one thing, that is another.'<sup>33</sup> To speak to another is to deny death, to delay and defer desire, to avoid addressing the absolute Other or Master. Speaking leads to a truce, rivalry is abandoned in order to participate in discourse and share our imaginary scenarios or symbolic representations with the other. But speech is a lie, a denying negating deferring discourse which places the love-object, death and its desire, (temporarily) in abeyance. But this lie is also the whole truth. If, in Lacan's famous formulation, the subject is a signifier for the another signifier, we reveal ourselves in speech in which we address an other. The act of speaking, the enunciation of discourse, is ontologically of greater importance than its contents.

Let us set out from the conception of the Other as the locus of the signifier. Any statement of authority has no other guarantee than its very enunciation, and it is pointless for it to seek it in another signifier, which could not appear outside this locus in any way. Which is what I mean when I say that no

---

<sup>33</sup> Jacques Lacan, *Seminar III: The Psychoses*, Routledge 1994, 50.

metalanguage can be spoken, or, more aphoristically, that there is no Other of the Other.<sup>34</sup>

But why do people down arms and enter into debate? We must assume the existence of an initial pact, a hypothetical social contract which supports subjectivity and sociality. This contract is minimal in subject matter but far reaching in consequences. The original pact cannot be questioned or justified, it must be assumed to be true, a fiction repeated in every act of speech. Its object is simply the agreement to speak, to exchange speech rather than blows and to conduct the rituals and the struggle for recognition through discourse rather than through mortal battle. All speech, speaking itself before any content of the utterance or intention to communicate enacts the terms of this contract. Its terms establish my speech as the locus of my truth and the addressee of my speech, as the guarantor of its truth.

This Other, which is distinguished as the locus of Speech, imposes itself no less as witness to the Truth...But it is clear that Speech begins only with the passage from 'pretence' to the order of the signifier, and that the signifier requires another locus -the locus of the Other, the Other witness, the witness Other than any of the partners- for the Speech that it supports to be capable of lying, that is to say, of presenting itself as Truth.<sup>35</sup>

The 'truth' of my speech, the only truth I have, is also the denial of my desire and therefore a lie. The law turns a lie into the truth of subjectivity and sociality by supporting a veritable and powerful legal fiction, according to which desire is not directed at death but at replacements and substitutes which become the matter of discourse and representation.

The function of this original contract is therefore strictly mythical. Its object is non-being; it diverts the desire of nothing into speech but its enactment and repetition is the absolute precondition of sociality. In classical political philosophy, the pact reveals an assumed original individual freedom, which must be restricted by the Sovereign to guarantees

---

<sup>34</sup> Lacan, *Ecrits*, 310-1.

<sup>35</sup> *ibid.* at 305.

peaceful social intercourse. The psychoanalytic pact guarantees the subject: it makes the other testify to the subject's 'truth' and turns speech into the domain where this truth will be delivered. As long as we accept the authority of this fiction sociality survives. Only the 'truth' of speech can allow us to enter a peaceful intercourse with the other and that truth is based on a contract, a law, a convention which replaces competition for the imaginary object of desire.

The implications of this theory for jurisprudence are momentous. Law is the social face of the inter-subjective contract of speech. It is not the law that needs legitimacy; legitimacy is the product of a primordial legality. The most important aspect of the legal institution is to guarantee the contract of speech, to offer a symbolic source or origin -the Sovereign, the Legislator, the Law- which announces that law and speech have authority and must be obeyed.

Every legitimate power always rests, as does any kind of power, on the symbol. And the police, like all powers, also rests on the symbol. In troubled times, as you have found, you would let yourselves be arrested like sheep if some guy has said *Police* to you and shown you a card, otherwise you would have started beating him up as soon as he laid a hand on you.<sup>36</sup>

We should add parenthetically that the police are colloquially called the Law and that statements by the police and judges are the 'word' of law. In this sense, that the law is and speaks is more important than what it is or says. It is the police or the judge speaking Law, in their magnificent or terrifying emblems clothes and images, that reveal the subject's desire. The interpreter, confronted with an object -the legal materials- or another subject -the litigant- asserts his identity and wholeness through the enunciation of legal speech prior to its semantic component. The content of speech, the actual interpretation of the law, expresses the secondary or desire to ascribe definite legal meaning to the object and thus turn its mastery into a guarantee that the subject's lack has been overcome. The judge must be seen to declare

---

<sup>36</sup> Lacan, *The Seminar of Jacques Lacan*, Vol. 1, (John Forester transl.) Norton, 1988, 201.

rather than make the law, to be the mouthpiece of the institution, because his declaration serves a double function: the pronouncement of the word, law's signifier, carries law's power; but this declaration expresses also the legal intention to seize the object, to give it meaning and thus make it witness the unity and completeness of the law and its subjects.

If in the 'contract of speech' we agree that there is truth, that there is an alternative to the vicious game of imaginary violence and the impasse of the dialectic, the legal contract turns this 'truth' into the justice of the law. Justice, the imaginary scenario attached to the law, is a misrecognition of the real object of desire. What matters is that law exists and is given. Its justice is secondary and its impossible claims, if taken literally, would undermine the main function of law which is to guarantee that there is Truth and Justice rather than that any particular verifiable type of truth or of the good.

#### IV. Psychoanalysis as Jurisprudence

Lacan did not address institutional law in any detail. As long as law promotes the mainsprings of subjectivity and guarantees the contract of speech, it is not of great concern for the analyst. The next step in the juridification of psychoanalysis was taken by the French legal historian and philosopher Pierre Legendre, who turned the ontological power of the Lacanian 'law-speech' into a complete juridical anthropology.<sup>37</sup> For

---

<sup>37</sup> The work of Pierre Legendre is quite unprecedented in legal historiography. In his many publications (see fn. 4) he has opened a new field of legal writing or legal poetics in which the love of the text (of law) and of medieval and patristic sources is accompanied with a highly literary and allusive -almost baroque- style. His genealogy of modern law and of its malady of technocratic rationalism, links the 'revolution of the interpreters' in the 12th century with the incorporation of the key themes of canon law into civil law and challenges many of the assumptions of traditional historiography. Similarly, Legendre's historico-theoretical insight that the law captures the soul and by attaching body to spirit creates the subject opens a large vista for jurisprudence and this writer has been considerably influenced by his captivating and seductive theory and prose. But a critical jurisprudence must question the conservative repercussions of his juridical anthropology, as presented for an English readership in his Cardozo Law Review essay *op.cit.* fn. 3. In these respects, Legendre joins the climate of the reactionary Catholic response to modernity. The critique of this aspect is indispensable



Legendre, the legal system 'institutes life',<sup>38</sup> it forms the 'atomic bond' which binds the 'primary material of man: biology, the social, the unconscious.'<sup>39</sup> The legal institution is functionally homologous to the law of the father or, in an other version, it interprets and applies the original interdiction. In the same way that the father introduces the subject into separation, lack and negativity, language and the institution 'separate the subject from the fantasm of being whole.'<sup>40</sup> But this separation needs a guarantor, a 'sacred' inaccessible place which stages the origin or the cause of the subject's being. In pre-modern societies this role was played by totems, religions or mythical references to the just foundations of law. In modernity it is 'the state [which] is the sacred place of the Totem, wherever it takes hold, whatever its constitutional form may be, the religious or mythical space of the discourse called upon to guarantee the foundations without which the law would remain unthinkable'.<sup>41</sup>

The law stages the totem or the interdiction around the father, more specifically around 'the image of the substance of the Father, which is equivalent to the totemic principle in European civilisation'.<sup>42</sup> The 'juridical montages' of this image, God or Pope, Emperor or King, state or legislator, 'giv[e] consistency to the founding discourse by representing the Other as a concept, in order to spread the effects of the Interdiction, that is to say, the juridically organised effects'.<sup>43</sup> Again when Legendre turns to the mythical contract of speech, he interprets it in a legalistic way. The void that guarantees the social order -what Legendre calls the Reference- must be

---

for the development of a critical psychoanalytical jurisprudence which will profit greatly from an engagement with Legendre's work. Cf. Peter Goodrich, 'Translating Legendre', op.cit. fn 3; Anton Schutz, 'Sons of Writ, Sons of Wrath' op.cit. fn 3 and Peter Goodrich, 'Introduction: Psychoanalysis and Law' in Goodrich ed.: *Law and the Unconscious: A Legendre Reader*, Macmillan 1997. For a more critical approach see Alain Pottage, 'The Paternity of Law' in Douzinas et al eds, *Politics, Postmodernity, Critical Legal Studies*, Routledge 1994.

<sup>38</sup> Legendre, 'The Other dimension of Law', op.cit. fn 3 at 943.

<sup>39</sup> *ibid.* at 954.

<sup>40</sup> *ibid.* at 952.

<sup>41</sup> *id.*

<sup>42</sup> *ibid.* at 959.

<sup>43</sup> *ibid.* at 960.

transmitted and validated legally, through patrilinear genealogy, juridical emblems and the reason of the law. This is the all important but neglected 'other dimension' of law: 'a body of discourses which, within any society, construct the founding image which is the subjects' marching banner...These are valorised institutionally; not according to their express content (which is a function of the declared intention of the author), but through the fact of being symbolically accorded a place within society as representations of the reference.'<sup>44</sup> As Pottage pithily observes, 'truth is, therefore, produced by juridical reason as communicator of this non-juridical dimension of law, and manoeuvred through a function of paternity'.<sup>45</sup>

For Legendre, contemporary jurisprudence has forgotten this central task of institution to guarantee the genealogical binding or filiation of the subject and has abandoned the anthropological function of law. In his diatribes against the 'idiocy' of contemporary lawyers, Legendre takes this sombre picture to a logical and highly problematic extreme. Courts which have legally recognised the new gender of sex change transsexuals and are prepared to have a child adopted by his hitherto mother who, after surgical intervention, became a man, suffer from a peculiar case of catastrophic institutional amnesia.<sup>46</sup> They have abandoned 'thinking about the structure of the Interdiction...and given up on introducing the subject to the institution of the limit.'<sup>47</sup> The law, lured by the 'propaganda of science' and 'our democratic ideals'<sup>48</sup> abandons its role and, by attacking the 'montages of Interdiction', becomes an accomplice to the destruction of the symbolic order which hitherto 'supported the life of the species'.

If for Legendre the analyst, jurisprudence misunderstands law's formative role, for Legendre the lawyer, Lacanian psychoanalysis underestimates the anthropological function of the legal institution. It ignores or neglects the

---

44 Legendre quoted in Alain Pottage, *op.cit.* at 165.

45 *id.*

46 Legendre refers to a Canadian case and one in the European Court of Human Rights.

47 Legendre, at 956.

48 *ibid.* at 957.

'dimension of institutionality',<sup>49</sup> 'the power [of law] to say what constitutes the relation of signification between a word and a thing'.<sup>50</sup> In this sense, the social is a 'discourse, an assemblage of words, a textual order, organised to speak to any subject'.<sup>51</sup> The law can be conceived as 'staging the institution of splitting [and] juridical practices as interpreting the original law of the Father'.<sup>52</sup> This nomocentric approach to subjectivity and sociality has considerable consequences. Law in all its facets becomes excessively valorised and politics are seen as either lawful and legalistic or as antinomian and transgressive.

But Legendre's strictures against Lacan are not fully justified. Lacan bemoans the contemporary weakening of the laws traditionally used to displace the violence of imaginary identifications with equal vigour. The disenchantment with civilisation has been unleashed by a spiral of failing filiations and the progressive abandonment of speech in favour of sexual rivalry and violent competition. 'We know in fact what ravages a falsified filiation can produce, going as far as the dissociation of the subject's personality'.<sup>53</sup> Lacan, the man of the law, repeatedly diagnoses and castigates the various afflictions of legal civilisation: aborted genealogies, infelicitous filiations and incomplete Oedipal identification are important failures in our societies, but they are not alone. They are accompanied by the weakening of every legal support of subjectivity and sociality, by a long list of broken laws and frustrated pacts. Borch-Jacobsen usefully catalogues,

the insolvency and 'narcissistic bastardising' of the father figure, the growing indistinguishability of the paternal function from the 'specular double,' the 'tangential movement toward incest' in our societies and so on. In short, it is the competitive, rivalrous world, revealed as the great traditional ordering principles retreat, a world of doubles all the more identical for asserting their

---

49 *ibid.* at 960.

50 *ibid.* at 946.

51 *ibid.* at 949.

52 *ibid.* at 951.

53 Lacan, *Ecrits*, 66-7.

autonomy, all the more racked by guilt for declaring their emancipation from every law.<sup>54</sup>

The answer to these failures of law must be legal. The task of psychoanalysis is to underpin the law, to bear witness to the 'truth' of the speaking subject, to strengthen the position of the father, to create a new social contract, which will oppose its fictitious truth to the lie of the imaginary and will 'install (or reinstall) a rule of the game in the absence of any rule, at a time when truth, precisely, is no longer "believable"'.<sup>55</sup>

The operation of the law through the symbolic castration and the introduction into language (the name of the father) is therefore a universal function which associates the father with the figure of the law...And when the Legislator (he who claims to lay down the Law) presents himself to fill the gap, he does so as an impostor. But there is nothing false about the Law itself or about him who assumes its authority.<sup>56</sup>

The law is eternal, unconditional and unaccountable. Its operation and authority are the prerequisites of life but it has not been legislated. The father is regarded as the 'original representative of this authority of the law'<sup>57</sup> but he is absent, he can only be the failing image of the law-giver. Rousseau claims in *The Social Contract* that the Legislator must assert divine inspiration in order to make his laws legitimate. But his fraud is soon seen through and as a result the legitimacy of the laws is perpetually doubted and their validity challenged. This is the reason why many Greek city-states invited foreigners to draft their Constitutions who, on completing the task, left the city thus helping maintain the mystique of origins. For Lacan, the Legislator is the most foreigner of foreigners, the absolute Other. But he is not the origin of the law but the product of the law's operation on the psyche. In this sense, the Legislator is an impostor but this makes it even more

---

<sup>54</sup> Borsch-Jacobson, *Lacan: The Absolute Master*, op.cit. fn. 23, at 129.

<sup>55</sup> Lacan, *Ecrits*, 130.

<sup>56</sup> *ibid.* at 311.

<sup>57</sup> *id.*

imperative that his authority be asserted and the false truth of his law proclaimed.

We cannot doubt this law or challenge its effectivity without falling into madness. Nothing much can be said about its provenance as it lies at the basis of all experience. The law is, it prohibits, it separates and individuates. We all are the children of the law, of a natural and absolute legality upon which humanity rests. If Legendre differs from Lacan is not in the ferocity of his denunciation of the afflictions of modern civilisation. When Legendre reads the two laws as structurally homologous, he is repeating what Lacan emphasised throughout his work. It is only when he literalises the law of the Father and turns it into a juridical function, when he charges the legal institution with the work of the totem or assigns the institution of psychic foundation on concrete legal practices that he diverges from the master and turns the law into the most imperial of discourses. For Lacan, the function of analysis is to repeat, re-enact and strengthen the absent original contract. The analytical scene and transference become the court which witnesses and validates the truth of the subject. It is in this sense, I believe, that Lacan, the impostor legislator pronounces the infamous words: 'I, truth, speak'.<sup>58</sup> Legendre, on the other hand, places the function of the guarantee of truth on juridical institutions. While Lacan brings psychoanalysis to law, Legendre returns law to psychoanalysis and turns it into the most orthodox of legal theories.

## V. Legality and Eros: Psychoanalysis as Critique

These psychoanalytic legal themes are not far removed from the axiomatic foundations of the science of law and of dominant jurisprudence. We cannot evade or avoid the law, its functioning is the absolute prerequisite of subjectivity and its structures organise the lineaments of sociality. The persistent inability of critics of all persuasions to dent the emblems of

---

<sup>58</sup> Jacques Lacan, *Television* (Dennis Hollier, Rosalind Krauss and Annette Michelson transl.), Norton, 1990, 3.

legality and to weaken law's legitimacy is related to its inescapable necessity and its logically presumed -almost mythical- nature. We, the children of law, can no longer kill the Father because the parricide has already happened and led to the birth of law. This is a bleak picture for the critics of the legal order. Their refutations can be seen as delusionary invective and their conjectures as utopian antinomianism. And yet critique has always followed orthodox triumphalism like its inescapable shadow or like a parasite that feeds off the success of its host. This persistence marks -to use Legendre's term- still another side or dimension of the law, law's deep imbrication with desire and passion. Gadamer says that 'being that can be understood is language' and adds that language carries in it 'the infinity of the unsaid'.<sup>59</sup> Psychoanalysis attends to this 'unsaid', to repressed meanings and past voices, emotional affects and libidinal investments which disturb the empire of consciousness and of law. If the psychoanalytic story of law can be seen as the myth which, like Plato's cave, underpins jurisprudence and gives it an air of invincibility, the dialectics of desire are its underground stations from which the resources of resistance are drawn. For Lacan and Legendre, we cannot avoid the symbolic order and law this side of madness; but equally the eros attaching to legality points to the inescapability of critique.

To understand law's implication with desire, we must return to the original scene: the law calls the subject into being by severing and barring the maternal object. This separation happened before the creation of the ego and of the scene of representation; it cannot enter consciousness and remains repressed and forgotten. But at the same time, the forbidden Other gives rise to desire and its barred ecstasy, Lacan's *jouissance*, it becomes the foundation and *telos* of the subject. This Other Thing or Real, comes before the reality of everyday life and before our attempts to adjust the pleasure principle to the exigencies of the phenomenal world. The Real stands at the beginning of the signifying chain, it forms its traumatic core but it is also external to it. It is the structuring principle, the *nihil* from which language and the Other originate, but it is also barred 'inaccessible, obscure, opaque', it both creates *ex nihilo* and challenges the sovereignty of being.<sup>60</sup>

---

<sup>59</sup> Georg Gadamer, *Truth and Method*, Sheed & Ward, 1975, 425.

<sup>60</sup> Lacan, *The Ethics of Psychoanalysis*, op.cit. fn. 13, at 209.

*Jouissance* must be prohibited and repressed, but its return and repetition as symptom creates memory and the memorable retrospectively and gives to things their historical dimension. The function of the drive and of *jouissance* as its (impossible) satisfaction, is to remember and to historicise, to sustain the past through the trauma of the present, to create time in the interplay of destruction and pleasure.

This constitutive and catastrophic object has generated one of the most persistent campaigns in history to beat it back ban it and, failing that, to tame and imprison it as its full force seems to threaten the survival of individual and community. The superego is one such attempt to ban or restrict access to desire and enjoyment. The superego is the introjection, the importation into the soul and the turning against the ego of the original aggressiveness and destructiveness, a manifestation and derivation of the death drive. The tension between the ego and the superego leads to guilt, the need and desire for punishment because the superego has all the characteristics of the sadist: it has no obvious motive for punishing the ego but never ceases tormenting it. Indeed the more the ego follows the injunctions of superego's accretion, conscience, the greater the torture becomes. It is the people 'who have carried saintliness furthest who reproach themselves with the worst sinfulness.'<sup>61</sup> The development of conscience turns the renunciation of libidinal and destructive drives, originally imposed by external authority and the fear of loss of love, into a much more tyrannical internal authority and a permanent unhappiness, an insatiable all-devouring law which becomes all the more severe and punishing, the more it leads the ego to renounce its instincts.

But if the superego is a cruel creator of pain and suffering, it is also the generator of an insatiable desire which marries pain with pleasure. It comes, as Freud put it, alloyed with *eros* and connects the voice of conscience to the necessity of our desire. In the Freudian myth, the remorse and the sense of guilt of the parricidal brothers was the result of their ambivalent feelings towards their father; they both hated and loved him, admired and wanted him destroyed. After their hatred was satisfied in the murder, their love

---

<sup>61</sup> Freud, *Civilisation and its Discontents*, op. cit. fn. 9, at 318.

came forward and founded the law by giving it the father's power and endowing it with the feelings of love and admiration that accompanied him. *Eros* played an important role in the origin of law and in the fatal inevitability of guilt. The superego stands therefore both for the gratification our submission to the law brings and for the pain of its inherent and brutal amorality. The cruelty of conscience is homologous to that of the law: the more you feed it the more it wants. We have been subjected to a law which we know only in its transgression and the attendant sense of guilt, we are bound before any particular obligation, we are asked to obey before we know the contents of the command. But at the same time, this is the law of our *eros* which, in its cruel and impossible demands, becomes, like Sade's executioner, an instrument of pleasure. Morally, we want to transgress a law that can never be atoned.

Lacan again finesses Freud's analysis. The myth of the primordial parricide both strengthens desire and gives it form and direction. The removal of the father does not admit the sons to unadulterated pleasure. The obstacle is removed but its replacement, the law, makes pleasure harder to get. But as sin feeds on conscience and transgression is the parasite of the law, so too desire needs the law. Our union and *eros* for the mother, subjected us totally to the Other. Entry to the symbolic order and submission to the law brings to an end this alienating total subjection and controls the desire of the all powerful Other (or mother).

It is this whim that introduces the phantom of Omnipotence, not of the subject, but of the Other in which the demand is installed...and with this phantom the need for it to be checked by the Law...[desire] reverses the unconditional nature of the demand for love, in which the subject remains in subjection to the Other, and raises it to the power of absolute condition.<sup>62</sup>

Thus entry to the law not only checks the absolute power and whim of the Other; it also allows the subject to enter the realm of pleasure. Our *eros* subjects us to the law before we know its demands, but conversely our love confronts us as a necessity, as a fate pleasurable and painful, structured by

---

<sup>62</sup> Lacan, *Ecrits*, at 265.



the law. There is a close link between law and desire. The law both represses and creates desire. And while the law is closely linked with the prohibition of primary *jouissance* through the symbolic castration which is necessary for the subject's admission to pleasure, the superego turns enjoyment into an injunction and duty, which in Zizek's pithy phrase 'is the most effective way to block access to enjoyment'.<sup>63</sup>

The law of desire becomes known in its effects, it structures the ego in its traumatic relationship with desire and the superego. We do not repress desire because we have conscience, we have conscience because we repress desire. We cannot know the law of desire in advance, but we follow the desire of law in its fatal consequences. The unconscious drives the self to act, to an unwilld unintentional action. Lacan's Real is our modern *moira*, our libidinal destiny, the imperative of our *eros* which we cannot avoid and we cannot avoid betraying.<sup>64</sup> Freud's ethical injunction is therefore to accept responsibility for the necessity of the law of our desire; psychoanalytic ethics introduces a new responsibility for our desire, a love for a truth inscribed in our destinies which we can never fully know.

The law and the contract are therefore natural and constitutive but also replete with erotic investment. Paul in his epistle to the Romans had already anticipated this great erotics of law.

If it had not been for the law, I should not have known sin. I should not have known what is to covet if the law had not said, "You shall not covet." But sin, finding opportunity in the commandment, wrought in me all kinds of covetousness...Apart from law sin lies dead. I was once alive apart from the law, but when the commandment came, sin reviled and I died; the very commandment which promised life proved to be death for me. (Romans 7:7)

Law and desire, the prohibition and its transgression are intertwined in a deep dialectic. The law captures the subject through the barring of the love

---

<sup>63</sup> Slavoj Zizek, *For They Know Not What They Do*, Verso, 1991 at 237.

<sup>64</sup> See generally John Rajchman, *Truth and Eros*, Routledge, 1991, 87-142.

object but at the same time fans the flames of desire. The linguistic and juridical chains established by the nothing of the original contract and transmitted through speech (Lacan) or the emblems of legality (Legendre) are the objects of an elaborate legal erotics. The law works through interdiction and fascination, by means of a dogmatics and an aesthetics or poetics which open the (legal) subject to the other scene of a repressed desire that always returns in legal enunciations. The interpretation of the law, by judge or lawyer, the re-enactment of the 'contract of speech'<sup>65</sup> can never be performed fully, because speaking reveals the subject of the unconscious at the same time that it conceals it in the claim that the 'law speaks', that no trauma or lack haunts it and that the 'right answer' can be discovered in the interstices of the *corpus juris*. Peter Goodrich has documented historically the displacement and investment of this desire in texts of law and has inaugurated a genealogy of legal critique as the work of desire.<sup>66</sup> Goodrich searches for the symptoms of the trauma and its repression in the slips of the legal text, the figures of speech, the inadvertent mistakes and oversights, the *incurias* that reveal the subject of desire in the midst of the dead letters of law.<sup>67</sup> In this approach, interpretation is not just the epistemological desire for understanding, knowledge or completeness but, with Marx, the desire for transformation and, with Freud, the desire for a cure. If for Legendre, the masters of law are the representatives of the paternal principle of filiation, for Goodrich the lawyer is a creature of desire, she is devoured with passion. By examining the interstices of this complex amalgam of law and desire, we can understand jurisprudence and critique as the two necessary moments of legal operations and we can start developing a legal erotics for the age of genealogical and moral uncertainty.

---

<sup>65</sup> See above part II.

<sup>66</sup> The work of Peter Goodrich must be distinguished from the rest of psychoanalytical jurisprudence because of his insistence on the erotics of law and text. It is the first and unparalleled so far attempt to develop the critical aspects of psychoanalysis for jurisprudence.

<sup>67</sup> For a now classical statement of this position see Peter Goodrich, '*Jani Anglorum*: signs, symptoms, slips and interpretation in law' in Douzinas et al eds, *Politics, Postmodernity, Critical Legal Studies*, Routledge, 1994, 107.

## VI. The Inevitability of Injustice

At this point, it is instructive to turn to one of the most important themes of legal philosophy, justice, and examine the way in which psychoanalysis helps understand the relationship between law and desire and between jurisprudence and critique. Justice has been the most discussed topic in Western philosophy, from Plato and the Sophists to Rawls and critical legal theory. In jurisprudential terms, justice is a synonym for the various forms of the Good, defined successively as virtue, utility or the law. But a central tenet of psychoanalytic jurisprudence is that the social bond passes through our traumatic relation with the Other and is determined not by principles or simple pleasures and pains but by our uncanny dependence on *jouissance*. According to Lacan, Freud's great discovery was to understand that the Good is neither an arrangement of virtues and values in the right order of reason, the *orthos logos*, nor the absolute formal law of the Kantians. Neither substance nor form, neither logos nor *lex*, neither inside nor outside, individual or universal, the Good is the (M)other, the forbidden object of desire, and no other Good exists. All other goods and resources are distributed, arranged and used according to the demands of this supreme but unattainable Good. Civilisation and culture start with law and morality, but this is a morality of unfulfilled and unfulfillable desire and the ego is created in the struggle to satisfy this insatiable and impossible desire that keeps returning.

Legal and moral attempts to define the supreme Good or achieve justice fail because the lack, the gap opened in the subject by the primal separation, the 'symbolic castration', can never be filled. But if no Good exists, the ethical thought seeking it is condemned to a perennially failed contemplation of the relationship between law and desire and the quest for the Good is unwittingly transformed into the problem of access, distribution and enjoyment of goods. The concept of the Good was always duplicitous, ethical and pleasurable, its ambiguity best captured in the double meaning of the classical *praxis*. *Praxis* means ethical action and practical life in co-operation with others (*synergeia*); but *praxis* is also the production of *erga*, of products and goods. Theories of justice are contemplations on the Good;

their operation, however, has always been concerned with goods, the products of labour and depositories of value which satisfy needs and increase pleasure. In this sense, ethics has always been a hedonism and its history culminates in Bentham and utilitarianism.

For psychoanalysis, ethical theory proper can only begin when the inquiry into the nature of the Good recognises that the 'law is closely tied to the very structure of desire' and that justice bridges normal pleasures and intense *jouissance*.<sup>68</sup> This link explains the persistent injustice of theories of justice. Western conceptions of justice inevitably turn out to be economic theories, they turn the question of the Good into that of the division of goods. But the possession of goods deprives others of their enjoyment and, control over goods leads to control over people. Goods meet needs; they also engender power relations and intense pleasure because their ownership makes others suffer loss and lack. Our relation to goods is therefore arranged in such a way as to account for the fact that others can hurt us by depriving us of our pleasurable objects. Everytime the ego chooses to do Good, something beyond justice appears, an erotically tinted fear and hatred 'something completely enigmatic [which] returns to us again and again from our own action - like the ever-growing threat within us of a powerful demand whose consequences are unknown'.<sup>69</sup> The Good brings together an economy of satisfaction and the fear of privation in the hands of an imaginary and threatening other, who acts as the depriving agent and bars access to *jouissance*.

In this perspective both utilitarianism and deontological theories, despite their surface differences, are equally misconceived. Utilitarianism correctly emphasises the role of pleasure-seeking emotions and attempts to control, exploit and make them productive. But it does not go far enough in acknowledging the privative and destructive element of all theories of the Good. It cannot understand that the law which structures pleasures and pains -desire- is also an uncontrollable and threatening force because it points to an intense enjoyment that lies beyond pleasure. The obscene inner law of the

---

<sup>68</sup> Lacan, *Ethics*, fn. 13, at 76

<sup>69</sup> *ibid.* 234

superego, the self-tormenting law of conscience, links transgression with *jouissance* and turns desire into law. utilitarianism

The law of Kantianism is even more frightening.<sup>70</sup> Kant separated the law from considerations of passion and emotion and from empirical or historical experiences. A moral action does not promote the common or individual good, but is motivated out of pure respect for the law irrespective of rewards or sanctions, calculations and consequences. Moral law does not ally itself with the pleasure principle; it obligates people to apply it freely without fear or passion. Its maxim is found in us and becomes the foundation of freedom, but it acts like a law of nature, 'as if' it came from within, 'as if' obedience to it is motivated by external fear and internal inclination. But this 'natural' law has no pathology or content and must not be led by impure feelings and inclinations. The only feeling Kant acknowledges is the intense pain produced by obedience to law's demands. Freed from all empirical content, this law can only be pure form, that of universal legislation. Form holds the place of the missing content and the vacated Good.

The wiping out of all content of Kant's categorical imperative reminds Lacan's symbolic castration, in which the incestuous maternal object stops being the supreme Good and is replaced by the 'paternal law' of the symbolic order. This pure loss changes the status of all objects that are mobilised to fill the void created. But these objects operate against a background of radical loss and will always fail to reconstruct wholeness. Similarly, the emptying of all content from the categorical imperative and the renunciation of enjoyment create a new kind of object of desire, Lacan's *objet petit a*, and a new surplus enjoyment.<sup>71</sup> Kant's law is experienced as non-economical by the subject; it has no interest in his well-being but, at the same time, it opens a new vista of enjoyment. For the ethics of duty, self must suffer and the greater the purity of respect for the law the greater the pain that obedience induces, a pain tinged however with obscene pleasure. The categorical imperative is not unlike Sade's law of pleasure inducing pain and

---

<sup>70</sup> See generally Jacques Lacan, 'Kant with Sade', *October* 1, 1989, 55-75 and *The Ethics of Psychoanalysis* op.cit. 167-242.

<sup>71</sup> See Žižek, *For They Know Not what They Do*, op.cit, at 231-4.

Freud's superego. Freud compares the categorical imperative, which works in a 'a compulsive fashion and rejects any conscious motives' with the taboos of primitive tribes.<sup>72</sup> Lacan agrees; a civilisation based on abstract duty releases the structural law of desire and leads to discontent, destruction and death. 'There is a sepulchral mound at the limit of the politics of the good, of the general good, of the good of the community' writes Lacan. 'All life after all is rottenness'.<sup>73</sup> An ethics that does not recognise this basic fact is likely to nourish disenchantment and strengthen the catastrophic tendency of desire while pretending to serve the wider good.

Legal or formal justice leads to similar problems. Freud repeatedly insists, against the complacent naiveté of jurisprudence, that 'law was originally brute violence and that even to-day it cannot survive without the support of violence'.<sup>74</sup> Violence cannot be avoided. Force stands at the origin of law and is the outcome of law's inherent inability to resolve conflict in a community that lacks communal feelings. In the analytical schema, the law helps restrict violence and the urges that militate against civilisation, at the cost of incorporating the forces it replaces. Law is an expression of the powerful and can make no ethical claim other than the formal equal subjection of all to the same rule. Finally, the law, in its attempt to limit desire and aggression which are 'quite a natural thing, to have a good biological basis and in practice to be scarcely avoidable',<sup>75</sup> acts unnaturally and its success is inextricably bound with persistent failure. By exchanging pre-social fragile happiness for a civilised but pleasureless security, law contributes to the process of disenchantment. 'The price we pay for our advance of civilisation is a loss of happiness through the heightening of the sense of guilt'.<sup>76</sup> Whatever the type of social organisation, psychoanalysis insists that there is a residue, a 'nonlinked thing'<sup>77</sup> or faultline in every

---

<sup>72</sup> Freud, *Totem and Taboo*, 50.

<sup>73</sup> Lacan *Ethics*, at 233, 232.

<sup>74</sup> Freud, *Why War* at 355.

<sup>75</sup> *ibid.* at 360

<sup>76</sup> Freud, *Civilisation and its Discontents*, op. cit. fn. 9, at 327.

<sup>77</sup> JF Lyotard, 'A I' Insy (Unbeknownst) in Miami Theory Collective ed. *Community at Loose Ends*, Minnesota University Press, 42-8 at 46.

community and law, beyond their control to which they remain hostage. It is analogous to an 'unconscious affect', encountered in the 'sharp and vague feeling that the civilians are not civilised and that something is ill-disposed towards civility' which 'betrays the recurrence of the shameful sickness within what passes for health and betrays the "presence" of the unmanageable'.<sup>78</sup>

## VII. The refugee as symptom of the trauma of the law.

One of the clearest instances of this 'shameful sickness', experienced as the unsettling symptom of a deep malaise, is associated with the arrival of refugees at the frontiers of the nation-state. Refugees represent the original separation between the nation-state and other nations or between citizens and foreigners, as if the modern state and its law came into existence, like the human subject, through a radical split. But this split, which turns the aliens into the necessary presupposition of citizens' rights, must be denied and the strongest denial is found in the universalism of human rights.

In premodern Europe, the philosophical cosmopolitanism of the Stoics, the legal cosmopolitanism of the Roman *jus gentium* and later, the Christian spiritual universalism of *caritas* and *civitas peregrina* had weakened the Greek differentiation between Hellene and barbarian or Greek and Jew, who were all united in Christ. This spiritual universalism acquired its modern secular meaning with the enactment of the French Declaration of the Rights of the Man and the Citizen.

Article 1 the Declaration states that 'men are born and remain free and equal of right' a statement repeated in the Universal Declaration of Human Rights some 150 years later. According to these statements, men share a common human nature which is parcelled out equally to all. But the rights which follow and materialise this basically Christian principle can only be guaranteed by a political association, the nation state. Accordingly, article 2

---

<sup>78</sup> id. at 44,43.

states that 'the aim of any political association is to preserve the natural and inalienable rights of man' and article 3 adds that 'the principle of all sovereignty lies essentially with the nation; no group, no individual may have any authority that does not expressly proceed from it'. Finally, article 4 completes the creation of the new democratic state by stating that 'the law is the expression of the general will; all citizens have the right to work towards its creation.' While all men are declared free and equal, only the nation-state which can grant authority and protect right. Citizenship, membership of the nation, makes people human by protecting their inalienable (human) rights. The citizens, presented in a Rousseauian fashion, participate in the creation of the general will by becoming legislators. And as nation-states are defined through territorial boundaries, other people and nations are automatically excluded from the rights of the citizen and the office of legislator. The same basic split can be found in the philosophy of Kant, the greatest theorist of autonomy and rights and, in the legitimisation stories of the democratic state.

The separation between man and citizen characterises modern politics and law. The modern nation-state comes into existence through the exclusion of other people and nations. The modern subject reaches her humanity by acquiring political rights of citizenship, which guarantee her admission to the universal human nature by excluding from that status others without such rights. The citizen, has rights and duties to the extent that he belongs to the common will and to the state. The alien is not a citizen. He does not have rights because he is not part of the state and he is a lesser human being because he is not a citizen. One is a man to greater or lesser degree because one is a citizen to a greater or lesser degree. The alien is the gap between man and citizen. Between human nature and political community lies the moving refugee. To have citizens we must have aliens, to have a home or a home country others must not have one, they must be in movement or in transit, or even better in perpetual flotation, in orbit, like those medieval mentally ill who were made to travel the rivers of Europe on board the ships of fools. The modern subject is the citizen and citizenship guarantees the minimum requirements necessary for being a man, a human being. We become human through citizenship and subjectivity is based on the gap, the difference between universal man and state citizen. It is predicated on



exclusion, the absence of foreigners, whose existence is evidence of the universality of human nature but whose exclusion is absolutely crucial for the creation of concrete personhood, in other words citizenship.

What is at stake when the law comes to treat the refugee? It was argued above, that for psychoanalysis the self is split, that the subject comes to existence by being separated from the mother and by being introduced to lack, to an otherness which marks a deep trauma but also founds subjectivity and desire. This constitutive and catastrophic trauma is rejected and prohibited but it does not go, it lurks in us unbeknown and returns in violent and repetitive symptoms, the cause of which is forgotten because they never entered consciousness. Freud calls the dread created by this return uncanny. This abject uncanny has been compared to a stranger, who being already inside the psyche or the state, threatens their boundaries.

Faced with this inscrutable fear and desire, the subject erects symbolic and imaginary scenaria of wholeness. Something analogous happens with the nation-state and its law. The original separation and exclusion introduces a lack at the heart of the polity, which cannot be fully represented or managed and always comes back, in xenophobia and racism, in hatred and discrimination and remains intractable to politics, which keep inventing myths and celebrating a fictitious unity. Whatever the type of social organisation, there is always a residue, a faultline, analogous to the individual unconscious affect or symptom, beyond the control of community and law to which they remain hostage.

There is a great paradox therefore in asking the law to protect the refugee. The law divides inside from outside and is then asked to heal the scar. Aliens are the other of subjectivity, the symptom of the subject and the refuge of the state, what the state needs in order to declare its sovereignty and dignity. This analysis applies to all aliens. What makes it specific to refugees is that their arrival at the borders is experienced as the symptom of the trauma, as the return of the repressed, the sign of the lack in the heart of the citizen. The exclusion of foreigners is, by analogy, as much constitutive of national identity as it is of human subjectivity. In asking to be recognised, refugees bring back the exclusion and repression at law's foundation and, demand of

us to accept the difficulty we have to live with the other in us, to live as an other. The law treats the refugee as a returning symptom and uses a number of strategies of disavowal and denial in an attempt to shelter subject and community from the recognition of its constitutive trauma.

Let us examine three strategies used by the courts to shield themselves from confronting the uncanny, familiar and threatening foreigner. First, the denial of the trauma by making the symptom -the refugee- an object of cognition or interpretation. Second, the denial of the trauma through the effacement of the face of the other and, finally, the assertion of the wholeness and unity of the nation and its law or the denial of castration.

The case of *R. v. The Secretary of State for the Home Department, ex parte Sivakumaran*,<sup>79</sup> involved a number of Tamil asylum seekers fleeing an offensive by the Sinhalese government and the Indian army against the Tamil areas of Sri Lanka. Their applications had been denied by the Home Office and the House of Lords was asked to determine the circumstances when a 'well-founded fear of persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion' exists, the necessary precondition under international and British law for establishing an asylum claim. The Court of Appeal had held that the test for finding a 'well-founded fear' should be largely subjective. It would be satisfied by showing that the refugee had (a) actual fear and (b) good reason for this fear. Unless an applicant's fear could be dismissed as 'paranoid', 'fear is clearly an entirely subjective state and should be judged accordingly'.<sup>80</sup> The House of Lords reversed. According to the Lords, a genuine fear of persecution could not suffice. The fears should have an 'objective basis' which could be 'objectively determined'.<sup>81</sup> Justified fear should be based on 'true', 'objective facts' which, as such, could be ascertained by an objective observer like the Home Secretary or the immigration officers. The authorities were entitled to decide not only 'on the basis of the facts known to the applicant, or believed by him to be true' but

---

<sup>79</sup> [1988] 1 All ER 193, HL.

<sup>80</sup> id. at 195.

<sup>81</sup> at 196.

also on 'unknown facts which would help assess whether 'subjective fear was objectively justified'.<sup>82</sup> The Home Secretary had taken into account various reports from relevant sources (the refugee unit of the Home Office, press articles, information supplied by the Foreign Office) and had concluded that while army activities 'amounted to civil war' and 'occurred principally in areas inhabited by Tamils', they did not 'constitute evidence of persecution of Tamils as such...nor any group of Tamils'.<sup>83</sup> He was therefore justified in dismissing the fear of persecution and rejecting the asylum application, because on the basis of the 'objective' facts known to him the applicants had been or was likely to be subjected to persecution.

In this encounter with the refugee, the role of the judge or the administrator has gradually changed. He starts as the recipient of the refugee's request but, in stating the facts, he now claims to be on the same plane as the refugee, able to understand his predicament. In other words, the past pain of the refugee and his fear of future torture have been translated into an interpretable, understandable reality which, like all reality, is potentially shareable by judge and victim. But if interpretation is the possibility of constructing interpersonal realities in language, pain, death and their fear bring interpretations to an end. In the idiom of cognition, fear is either reasonable and can be understood by the judge but cannot lead to the granting of asylum, or is irrational and therefore non-existent as non-reason is the very thing the law does not recognise. In the first instance, it is the excess of knowledge and reason on the part of the judge that disqualifies the fear, in the second it is the excess of fear that disqualifies itself. But this translation of fear into knowledge assumes that the judge can occupy the place of the refugee and share the pain. Fear, pain and death however are radically singular and timely; they resist and at the limit destroy language and its ability to construct shared worlds. The refugee suffers fear and violence, first in the hands of the torturer and, secondly in the administrative/judicial claim that intimate fear and pain can be translated into shareable knowledge. For the law, this translation of unique feelings into calculable realities is necessary. It restores its ability to pass sentence,

---

<sup>82</sup> at 202.

<sup>83</sup> at 199.

an ability temporarily disturbed by the encounter with reason's other (feeling, pain, death) and cognition's other (the refugee). But at the same time this translation objectifies the other. It negates the temporal and situated character of fear and turns its timeliness into another, allochronic time, a time disqualified when compared with the temporal stasis of truth and the timelessness of the law.

The second strategy denies the trauma by effacing the face of the refugee. Our case involved four applicants who were refused asylum by the immigration authorities and wanted to challenge that decision.<sup>84</sup> Under the Immigration Act 1971, illegal entrants, those without visa and those refused refugee status at a port of entry should leave the country and appeal against the refusal from abroad. The Act's remarkable assumption that people fleeing persecution will not experience some difficulty in obtaining visas paves the way for the courts' subsequent actions. The refugees argued that under the U. N. Handbook of Refugee-Determination Procedures, they had a right to appeal against the refusal of asylum and that their removal would frustrate that right. The House of Lords responded by stating that the Handbook had 'no binding force in either municipal or international law'. The applicants were illegal entrants and to allow them to stay, while other visitors denied leave to enter could only appeal after leaving, would be 'plainly untenable'.<sup>85</sup> 'Where the result of a flawed decision may imperil life or liberty a *special responsibility lies on the court in the examination of the decision-making process*'.<sup>86</sup> The dignity of the process should be protected at all costs. Here the traumatic other is used to underpin the superiority of the law (and) of belonging. The fairness, worth and justice of the law is proved and its attractiveness 'as a haven' justified even when - especially when? - it turns the refugee away and sends him back to his fate.

This second strategy is associated with the fact that the refugee moves. He crosses borders and territories, he has left home and does not have a home, he may even not want one other than a temporary refuge. But home and

---

<sup>84</sup> *Budgaycay v Secretary of State for the Home Department*, [1987] 1 All ER 940, HL.

<sup>85</sup> *id.* at 947.

<sup>86</sup> *id.* at 951.

dwelling, the safety of community and tradition is what shelters self and community from the 'unspeakable other'. This other is always elsewhere, not where I am, where consciousness is and speaks. 'Where it was you will be' is the way Freud defines the primary trauma. He defies the propriety and property of self, he denies home, hearth and national territory by having no shelter and anchor. The refugee is roaming, nomadic delirious and threatening. By sending him away, we hope that we will evade the trauma and avoid the face. A face in fear or pain comes, in its singularity, to haunt its neighbours as much as its persecutors. The trauma must be denied, it must be sent away to its place which is also a non place, the unconscious. To come to the law the refugee comes to the port of entry, the physical and metaphorical door of the law. But to face the law the refugee must leave both the country and its law. The coming foreshadows the going, the law is present and makes its presence felt only to the absent. The refugee is brought to the law by being removed, the exclusion at the foundation of the law is both repeated and repressed. Our community and the law will not come face to face with our injustice.

The final strategy denies the violence of exclusion by asserting the justice and unity of law. The case, *M v. Home Office*,<sup>87</sup> is one of the most famous refugee cases. Its most important element is that the refugee, under the initial M. (for murder one is tempted to add), is only a prop in the proceedings, absent, silent, probably dead. M. was a Zairian refugee who sought asylum in this country claiming that he had been extensively tortured as a result of anti-government and trade union activities. the Home secretary based on his 'objective reports' turned down his application and ordered his removal to Zaire. As a result of a last minute application for judicial review, a judge ordered a stay of the deportation until further medical reports were obtained. In a series of events never fully explained the Home Secretary, Kenneth Baker decided to disobey the Court order because he thought that in constitutional law a mandatory order against the Crown was beyond the jurisdiction of the Court. M was released from the British Embassy in Kinshasa and was never heard of again. The issue before the courts in

---

<sup>87</sup> [1992] 2 WLR 73, CA; [1993] 3 AER 537, HL

subsequent application for judicial review was whether the Home Secretary had acted in contempt of court in disobeying the court order.

In this case more than any other law's desire comes to the fore. Faced with the absent silent other, the law speaks in its most grandiose language. Death is the most uncanny of fears and the strongest desire of the unconscious. The probable death of the refugee mirrors this combination of *eros and thanatos*. The courts deny the traumatic object facing them by offering one of the most elaborate defences of the spiritual unity of the Crown and of the eternal validity of the common law. The action of the Minister, if found in contempt, would be a challenge 'against the fundamental supremacy of law'.<sup>88</sup> But the Home Secretary as a Minister of the Crown and an integral part of the unwritten constitution cannot have offended the supremacy of the law or the dignity of its administration. The Crown, this most fictitious of entities, is the fount of Justice, an image of eternal unity, of affective bonds and immemorial trust. It cannot be in contempt of its own creation and attribute.

Law's strategy is clear: the more threatening the exclusion and the fear, the stronger does the court deny them by proclaiming the wholeness and the integrity of the political community by offering a paean to the supremacy of the law, the residual trust between Government and the courts, and the unity of Crown and political body, the nation it represents. The trauma is denied through the erection of the fantasy scenario of a complete law and a unified polity. The desire is to deny castration, to forget the violence and exclusion present at its foundation and re-enacted when the refugee is sent to his death, to present the body politic and the corpus juris as immune from otherness and fear.

Confronting the refugee raises the possibility that we are refugees too. This means that I am asked not just to accept the other but to accept that I am another, to extend the notion of the itinerant foreigner to the foreignness that lies deep in me and the political community. The refugee is within us. When we are fighting him, we are fighting our unconscious, this improper

---

<sup>88</sup> [1992] 2 WLR 73, at 98.

place in the midst of our own and proper. The only way for combating this violence, according to Freud, is to nurture 'emotional ties' of love and identification. People should be encouraged to share important values and concerns and thus draw closer through their identification with the shared object, be it a leader, a party or the community of justice. Justice makes people identify with the totality. 'I can be happy to be one of We, if We are just, because then We will treat Me as well as reasonably possible; and We will be happy to have Me as one of Us, because We know that I being just, will see things from Our point of view, and will not exclude wider considerations from my assessment of the situation.' In the just society there is no 'stasis, no dissension...no conflict.'<sup>89</sup>

But no such society exists. The City of God must wait. Justice is not fully of this world; the social will always lack an ultimate foundation, structure or unity. The feeling of injustice, on the other hand, is the way through which people construct this sense of lack, incompleteness or disorder, the name given to the symptoms of social exclusion, domination or oppression. Justice is what society lacks and desires; it has no other definition or rather justice is the definition of the indefinable, the unconscious of the law, a trace that signifies a past trauma or a future union, always deferred and different. Theories of justice are a 'fantasy', the fantastical screen or frame philosophers, poets and lawyers have erected to shield ourselves and to explain away the unknown desire of the other and of the impossible community. They answer the symptoms by negating their cause, they are failing attempts to forget and exorcise the terrifying trauma at the heart of the social. But the radical dissymmetry, the abyss of the other's desire and of injustice will always leave behind a remainder for which neither the law nor fantasy can fully account. Thus, while a huge amount of intellectual labour has been put into creating theories of justice, such theories are always bound to fail because justice forgets, it must forget injustice. This is the reason why the law always creates its critics and why critique always feeds off the law.

---

<sup>89</sup> J. R. Lucas, *On Justice*, Clarendon, 1980, 18-9.

We can provisionally conclude that while psychoanalysis is a powerful hermeneutic tool for understanding the persistence of critique and the emotional life of law, we must re-interpret Lacan's Other ethically in order to address the inadequacies of the institution and the traumas of the social bond. Freud's story of law starts with violence and Lacan's story of the subject begins in separation and lack instituted by the law. But the persistent sense of injustice and its attendant and unceasing critique indicate that there is a thing which predates the law, an eros more primordial than the thanatos the law institutes as the object of desire. Feminist psychoanalysis calls this law before the law the 'primal union with the Mother' (Irigaray)<sup>90</sup> or the 'archaic mother' or 'abject' (Kristeva).<sup>91</sup> In the ethical terms of Levinas, the trauma of the subject is created through its exposure to Otherness, in which the origin of law and language are 'constantly submerged by pre-original substance'.<sup>92</sup> In a paradoxical sense psychoanalytical jurisprudence can be criticised for not being sufficiently erotic, for being unable fully to understand the nature of the 'emotional ties' it places at the centre of the social and legal bond. The ethical and critical myth of law reinterprets the primal parricide and emphasises its erotic aspect. The brothers felt a sense of guilt before law and morality had arisen, because an ethical turning to the Other comes before the law and becomes its ground.<sup>93</sup> In this interpretation, the murder and the eucharistic meal of the dead symbolises not just the narcissistic Oedipal identification with the Father, but the original incorporation of alterity - as Death or the Other - at the heart of subjectivity. It is precisely because the law presupposes ethics, that moral guilt could be felt in the absence of the law. This ethical obligation to what in self and society is beyond the ego and the social body, this love for the

---

<sup>90</sup> Luce Irigaray, *Speculum for another Woman; An Ethics of Sexual Difference*, (Carolyn Burke and Gillian Gill transl.) Athlone 1993; *I love to you* (Alison Martin transl.), Routledge 1996.

<sup>91</sup> Julia Kristeva, *The Abject; Powers of Horror*, (Leon Roudiez transl.), Columbia University Press, 1982; Part II, 'Women, Psychoanalysis Politics' in *The Kristeva Reader* (Toril Moi ed.), Blackwell 1986, 137-320.

<sup>92</sup> Emmanuel Levinas, *Humanisme de l'Autre Homme*, Montpellier, 1972, 68.

<sup>93</sup> For an elaboration on these themes see Douzinas and Warrington, 'A Jurisprudence of Alterity', 3 *Social and Legal Studies* 405, 1994 and *Justice Miscarried*, Edinburgh University Press, 1994, Chapters 2 and 4.



dead or unknowable Other, is what will always infuse the passion for justice in the emotional life of the lawyer.





# EUI WORKING PAPERS

EUI Working Papers are published and distributed by the  
European University Institute, Florence

Copies can be obtained free of charge  
– depending on the availability of stocks – from:

The Publications Officer  
European University Institute  
Badia Fiesolana  
I-50016 San Domenico di Fiesole (FI)  
Italy

**Please use order form overleaf**

# Publications of the European University Institute

To                    The Publications Officer  
                         European University Institute  
                         Badia Fiesolana  
                         I-50016 San Domenico di Fiesole (FI) – Italy  
                         Telefax No: +39/55/4685 636  
                         e-mail: [publish@datacomm.iue.it](mailto:publish@datacomm.iue.it)  
                         <http://www.iue.it>

From                Name .....

                         Address.....

                         .....

                         .....

                         .....

                         .....

- Please send me a complete list of EUI Working Papers
- Please send me a complete list of EUI book publications
- Please send me the EUI brochure Academic Year 1999/2000

Please send me the following EUI Working Paper(s):

No, Author        .....

*Title:*                .....

No, Author        .....

*Title:*                .....

No, Author        .....

*Title:*                .....

No, Author        .....

*Title:*                .....

Date                .....

Signature         .....

# Working Papers in Law

Published since 1996

**LAW No 96/1**

Silvana SCIARRA  
Verso una costituzionalizzazione dei diritti  
sociali fondamentali nell'Unione europea

**LAW No. 96/2**

Christian JOERGES  
The Market Without the State? States  
Without a Market? Two Essays on the  
Law of the European Economy \*

**LAW No. 96/3**

Massimo LA TORRE  
Significato, azioni, giudizi di valore

**LAW No. 96/4**

Marie-Bénédicté DEMBOUR  
Harmonization and the Construction of  
Europe: Variations away from a Musical  
Theme

**LAW No. 96/5**

Karl-Heinz LADEUR  
Proceduralization and its Use in Post-  
Modern Legal Theory

**LAW No. 96/6**

Silvana SCIARRA  
How 'Global' is Labour Law? The  
Perspective of Social Rights in the  
European Union \*

**LAW No. 96/7**

Marie-Jeanne CAMPANA  
Le droit français des entreprises en  
difficulté

**LAW No. 96/8**

Marita KÖRNER  
The Impact of Community Law on  
German Labour Law - The Example of  
Transfer of Undertakings

\*\*\*

**LAW No. 97/1**

Massimo LA TORRE  
Law and Power. Preface to a Non-  
prescriptivist Theory of Law

**LAW No. 97/2**

Paul L. DAVIES  
The Relationship Between the European  
Court of Justice and the British Courts  
over the Interpretation of Directive  
77/187/EC

**LAW No. 97/3**

Antoine JEAMMAUD/  
Martine LE FRIANT  
La directive 77/187 CEE, la Cour de  
Justice et le droit français

**LAW No. 97/4**

Yota KRAVARITOU  
An Introduction and a Bibliography on  
Feminist Jurisprudence

**LAW No. 97/5**

Yota KRAVARITOU  
Du Droit et de l'Amour dans l'Union  
européenne

\*\*\*

**LAW No. 98/1**

Massimo LA TORRE  
Theories of Legal Argumentation and  
Concepts of Law.  
An Approximation

**LAW No. 98/2**

Massimo LA TORRE  
Two Essays on Liberalism and Utopia

**LAW No. 98/3**

Massimo LA TORRE  
Meaning, Actions, Value Judgements -  
A Moderate Non-Cognitivist Approach

**LAW No. 98/4**

Christian JOERGES  
The Science of Private Law and the  
Nation State

\*\*\*

Die Wissenschaft vom Privatrecht und der  
Nationalstaat

**LAW No. 98/5**

Andrea BARENGHI  
Note sull'arbitramento della parte

\*out of print



**LAW No. 98/6**

Francis SNYDER

EMU Revisited: Are we Making a  
Constitution? What Constitution Are we  
Making?

**LAW No. 98/7**

Christoph U. SCHMID

From Pont d' Avignon to Ponte Vecchio.  
The Resolution of Constitutional  
Conflicts Between the European Union  
and the Member States Through  
Principles of Public International Law

**LAW No. 98/8**

Costas DOUZINAS

Law and the Emotions: Prolegomena for a  
Psychoanalytic Approach to Legal Study

\*out of print