

## Derrida and Schmitt on the 'Exception'

- If the second session began with the apparently philosophical question "what is an exception", the third session adds a new guiding thread to the discussion, the thread of cruelty and of exceptional cruelty. So, Derrida, in a sense adds what appears to be another philosophical question into the mix- "what is cruelty?" in order to think the link between cruelty and exception. The tie that binds them together is the "exceptionally cruel" fact of the death penalty.

- What I'm interested in exploring is the manner in which Derrida situates the exception at BOTH ends of the abolitionist debate- (at the beginning he openly raises the possibility of whether the abolition of the death penalty may in fact be the defense mechanism or mask for a greater process that has yet to be understood, something internal to the theological, or the theological-political that, by abolishing the death penalty, nonetheless retains it in doing so). The seminar previous to this one on forgiveness, for example, tries to work out a thought of the absolute exception in relation to forgiveness- which must be irreducible to a determining judgment, outside of the law, outside of rule, calculation and so on. Any forgiveness worthy of the name is an unconditional forgiveness of the unforgivable, and hence forgiveness must be exceptional in its structure. The death penalty would, of course, be the counter-point to this notion of forgiveness, since its finality precludes any redress, any pardon, clemency etc., and because the death penalty is exceptional *within* the law itself (since Derrida suggests, unlike Foucault, that the death penalty is not one punishment like the others. It challenges the logic of the example, in a certain way).

-So, curiously, the exception finds itself on both sides of the law, as it were: as the exception *to* the law, and as the exception *within* the law, on this side of the law, in the death penalty. The exception is something like a limit concept ('concept-limite' p.89 of the French); if there is no *concept* of the exception, no law of the exception, no general criterion and so on, this is because the exception is "by definition" neither inside nor outside the law that would take it as its object. What Derrida will move towards in this seminar is the question not of a different thought or logic of the exception, but a different *relation* to the question of exceptionality as such. How?

- Earlier, while noting that the abolition of the death penalty can only be accompanied by limitations on national sovereignty (thanks to trans-national pressure) Derrida remarks that the death penalty remains, in all of the various international declarations that have been signed since 1948, the main exception to the "right to life," and that this exception is (as he says a number of times) hypocritical. In fact, it constitutes a *détente* in a sense within the traditions of right and natural law. However, he goes on to say at this point that he will leave in reserve (p.87 of the French) the question of the definition of the exception, the state of exception and so on.

- What he then proceeds to do is to multiply exceptions on both sides of the limit-concept of the death penalty, from Schmitt's theory of the partisan, to Algeria and so on, not in order to suggest some kind of dispersal of the exception, but to show the way in which the exception grounds the law itself by defining when the state of war exists, when it is legal and illegal to kill, and so on.

-It is here that he turns to Schmitt and the question of translation insofar as it helps to clarify the relation between law and exception. In fact, he will go on to articulate how the exception grounds sovereignty itself- the sovereign lives in and on the exception in a certain way. It is structured, as Schmitt argues, by a relation to the exception because the sovereign is “He who decides on the exception” (which is a translation of “Souveran ist, wer über den Ausnahmestand entscheidet”). How does this sentence describe the *relation* between sovereignty and exception? The sentence does not mean only that the sovereign locates all political power within himself in an exceptional situation (a state of war, for example) in order to protect the state, but that the sovereign is instead determined *by* the exception: the sovereign decides the exception by determining when the exception takes place: (“Car la souveraineté de l’Etat se marque justement à ce pouvoir de décider, de juger, d’arrêter, d’interpréter librement souverainement ce qui est exceptionnel, ce qu’est l’exception. La souveraineté, c’est le droit, le pouvoir habilité à décider de ce qui est l’exceptionnel de l’exception. La souveraineté est l’exception absolue, le droit de se donner le droit à l’exception et à juger, à décider arbitrairement, souverainement, de l’exceptionnalité” (p.89 in the French)).

The proper translation of the “über” is significant in Derrida’s reading because it constitutes a decision regarding the relationship between sovereignty and exception. In the first sense (the sovereign as he who decides *in* an exceptional circumstance that already exists), the sovereign emerges in a context in which the exception is “outside” his jurisdiction, where the relationship the sovereign has to the exception is distinct from his sovereignty. If, however, the sovereign is the one

who decides (on) the exception (in the second sense of the über), then the sovereign and the exception (or exceptionality) are not external to each other; i.e. the exception is not OTHER than the sovereign's emergence AS sovereign. The sovereign, in a sense, emerges co-originarily with the exception at the same time or in the same space.

-What results from this? If the exception is what, by definition, escapes all definition, then what Schmitt emphasizes is, in Derrida's words, its "pure juridical formality" ("sa formalité juridique pure" p.89.) which emerges as a result of the fact that the rule and the exception do not oppose each other; in fact, the rule exists only *by virtue* of the exception, and the sovereign is the one who decides between the law and the exception, or suspends the law in the name of the exception.

- Derrida, in the passage I just referred to, twice reiterates that what is at stake in Schmitt is a "pure decision"- a decision worthy of the name would need to decide on the exception, absolutely, singularly. The idea of a pure decision, a decision "as such" or the exception "as such" might remind us of the bidding up on sovereignty that we explored last year, in Derrida's reading of Heidegger's translation of "Walten" as something beyond or above sovereignty, as the gesture towards a pre-political, or non-theological sovereignty. If there we saw Heidegger possibly repeat or re-double, in a certain way, the structure of the theological-political in the gesture towards translating "Walten" as something "prior to" its set-up, its erection into a "system" as Derrida refers to it here, it is this earlier seminar that helps clarify *why* this doubling is inevitable (i.e. its not just Heidegger's "mistake" or "error"). It is because decision and exception cannot be thought separately from each other: there is decision, "pure

decision” only in relation to an exception which happens “at the same time” or “in the same space” (“à la fois”): “À plusieurs reprises, Schmitt utilise cette expression très forte et qui définit à la fois l’exception et la souveraineté: le droit *se suspend* lui-même, le droit a le droit ou donc le droit de *se suspendre* lui-même (c’est la structure du droit de grâce: loi au-dessus des lois, droit au-dessus du droit)” (p.92 in the French). What will become important, for Derrida, I think, is the possibility of thinking otherwise this “à la fois,” of thinking otherwise this relation between decision and exception, of calling into question their co-emergence. I’ll return to this possibility, but first I want to lay out a couple of points about Derrida’s discussion of Schmitt’s definition of the sovereign.

- So- how does the exception constitute the ground of sovereignty itself? Derrida notes in passing that Schmitt does not define sovereignty itself, but *the sovereign*. If the sovereign is he who decides the exception, who cuts between law and what is outside the law, this means the sovereign’s decision must have a relation to something outside of the legal or juridical order. The sovereign, in order to be sovereign, cannot have anything that precedes it, or that supercedes it, nor can any instituting force be exercised prior to it. In a sense, it borrows the reference to a “transcendence” that Derrida mentions in relation to his four major figures at the beginning of the seminar, if only to insist that this transcendence strictly speaking *does not exist*, it does not precede the decision that produces law. The sovereign is therefore first of all a relation to itself- to a space “before the law,” that remains a part of the juridical order “after the law.” What is the nature of this “space”, and what relation does sovereign decision have to it?

-Sovereignty grounds itself on an exception because the sovereign decides when the law can be suspended in the name of the law. A law that suspends itself, or interrupts itself, points towards the ground of the law as something that is not itself "lawful." Derrida's translation of Schmitt suggests this: "L'autorité démontre que pour créer le droit, elle n'a pas besoin d'en avoir le droit" (die Autorität beweist, dass, sie, um Recht zu schaffen, nicht Recht zu haben braucht) (p.92 in the French). To produce law, one does not need to have it- law does not precede itself; or one could put it this way: the origin of law is not legal, the origin of reason not natural etc., a statement that challenges Beccaria's Enlightenment notion of natural law. So, what the exception situates, and the way it defines the sovereign, is in relation to the ground of law as a "performative" of a certain kind, a *force of law* separate from the law itself: "Et la force irrécusable de cette logique, c'est qu la source du droit, du *dire le droit* ou du *faire le droit*, cette source performative, ce pouvoir performatif d'avant le performatif qui implique de la convention, ce pouvoir d'avant la convention, ne peut pas être juridique, ce'est celui d'une décision qui, en elle-même, ne relève pas du droit et doit rester sinon illégale, du moins a-légale" (p.92 in the French). The reason I say a "performative of a certain kind" is because this is strictly speaking not a performative, because for a performative to be "felicitous" in Austin's sense, it must make reference to a legal/ juridical order that authorizes it, as for example, in a marriage ceremony. Here, however, that legal order is precisely what is brought into being. This force of law separate from law itself is a performative outside of the juridical that sets the juridical into place, brings it about. It is not illegal, since this already presumes that law is in place, but a-legal- the force of law

without law. It is this structure that underpins the death penalty, since it constitutes not only the exception to the “right to life” that is part of the tradition of natural law, but also the suspension of the law (putting to death) in the name of the law. The reason that the death penalty is an exception is not only that it is unlike other punishments, but because it is the “example” of the suspension of the law *within* the juridical order; it is also therefore in a certain way a-legal, a mark of the “decision” that separates law from the force of law.

-So the sovereignty of the sovereign, in a certain sense, cannot ground itself, just as the death penalty cannot account for its a-legality, because its ground is both inside and outside of its institution. If this a-legal space (the performative without performative) founds law itself, the question remains what relationship the a-legal constituting moment has to the juridical. And since (if I may use this term), this quasi-“mystical” ground of law gives rise to something *within* the law that is not itself *legal* (namely, the death penalty), then it is a question not of a divine vs. terrestrial sovereignty, but of a conflict over the sovereign’s relation to this a-legal space of a performative without performative. This is perhaps why Derrida earlier insisted that he had chosen his four figures not only because they are condemned to death, but because they also represent the figures, are “examples” in a certain way, of *another*, or *other* theological-political. That is, they represent the possibility of another relation to the “transcendence” or ground of law that the death penalty responds to. So, what I’m suggesting is that part of what these various figures represent is Derrida’s attempt to stage a conflict over the question of a relation to the exception as such. That is, what Derrida seems to be suggesting here is that what

is taking place in the debate over the death penalty is not simply a challenge to the “theological-political” from the standpoint of a sovereignty that is secularized or groundless. What is taking place, rather, is a mutation internal to the theological-political (which would INCLUDE what is usually understood as “secular sovereignty”) that re-imagines its relation to the quasi-performative space of the exception that grounds the law. This is perhaps why the possibility of the disappearance of the death penalty remains ambiguous in some ways, for Derrida. Since the death penalty remains the most tangible vestige of the perdurance of the theological-political, its abolition could very well be a cover-up, so to speak, the last attempt to eliminate a relation to the exception that reminds the juridical of the “performative” space outside the law (for lack of a better term) that conditions its institution. What this suggests is at stake, then, is an attempt to reconceive the relation between law, the juridical, and the space of exception. Can the exception be realized within the law in a way other than the death penalty? I end with this question.