Surprising originalism: some critical reflections.

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First of all, I would like to thank to the Argentine Philosophy of Law Association and the Philosophy of Law Department for this encounter with Professor Solum. It is really a pleasure meeting you Professor, and having the possibility to discuss this profoundly interesting and courageaus text with my colegues and specially with its author. The adjetive I have just used is not simply politeness, I really think we are in front of a very interesting work not only because of its persuasive humorous rhetoric but mainly because it is a text that interrogates its own tradition even if it is with the intention to oxygenate, give air to it. And from a critical position that is something always to be welcomed.

1. Nevertheless what I want to argue in this brief words is that what it is surprising (for my humble point of view) is that originalism, even in this new textual linguistic outfit or clothing, doesnt still address the question of the concept of origin itself. A question and a signifier that has a long inscription not only in western philosophical and interpretative traditions (meaning Nietzsche, Freud, Philosophical Hermeneutics as Gadamer, Ricoeur or in Derrida s deconstruction and so on) but also in non western interpretative tradition such as the Talmudic, for example. In these lines of thought the origin is unreachable, either lost or doesnt exist at all as far as there is no absolute ground that soustain an unique pure original meaning. In short, it is an empty signifier, obviously in dispute. So at last what it is called "original public meaning" it is no more than the result of the force relations between discourses. In other terms, there is an internal intimate relationship between power, language and interpretation. As Bajtin puts it (a russian linguist from the early XX century): the sign is the arena of social struggle. Or as Roland Barthes use to write: power parasitizes the language itself.

Synthesizing, pretending an univocal legal text removed from social and political practices and conflicts rather than being neutral (non-political) it is a very specific ideological position: the desire to reduce law to a mere technique. A position that reproduces instrumental rationality and blocks any possibility to re-think law in relation to other alternatives rationalities. Such as the

hermeneutic one or in Bajtin words: a dialogic one. And when he says dialogic it doesnt imply symetry or an ideal communication community as Habermas suggest; on the contrary it means conflict, dispute.

2. Secondly what it is also surprising for me is that this “original public meaning doctrine” does not make any reference to the circumstance that America was not a Terra nullius. It was not an empty territory. The signifier used in this expression eclipse, silence, the preexisting original diverse meanings that circulate within the original inhabitants and its rationalities and languages. In fact, we can´t fail to acknowledge that the Terra nullius fiction was use to legitimate not only land grabbing but also genocide. So what I would like to suggest here is that in legal interpretation we have to pay very careful attention not only to what it is said but specially to what it is unsaid, silence, what is out of the frame. This is a crucial thing to grasp.

As Robert Cover use to say: Legal scholars interested in interpretation systematically ignore or suppress how law is steeped in violence and social control.

Derrida in his lecture given at the Cardozo School of Law in 1989 published as “Force of Law: the mystical foundation of authority” writes:

“a silence is walled up in the violent structure of the founding act” “Since the origin of authority, the foundation or ground, the position of the law can’t by definition rest on anything but themselves, they are themselves a violence without ground. Which is not to say that they are in themselves unjust, in the sense of “illegal.” They are neither legal nor illegal in their founding moment…. The very emergence of law, the founding and justifying moment that institutes law implies a performative force, which is always an interpretative force: this time not in the sense of law in the service of force, its docile instrument, servile and thus exterior to the dominant power, but rather in the sense of law that would maintain a more internal, more complex relation with what one calls force, power or violence”.

That is to say that the violent structure of the founding act implies also a violence at the interpretative level. In simple words: it imposes meanings and specially how to read the foundation itself.

3. In third place I wonder (and this is a question for Professor Solum) if this original public meaning doesn´t contribute to produce a less operative constitutional text as far as the complex diverse community can´t identify themself with that text any longer. We have to develop the awareness that the operativeness of legal discourse is soustained not only by the monopoly of legitimate violence (using Max Weber s words) but rather by the narratives, fictions, social representations in which the text is inscribed and read. The brilliant work of Cover is a good reference in that regard. And most of all Hayden White´s in the Historiography field. We can´t reach the meaning making process without the narratives, the intertextuality as Julia Kristeva use to traduce Bajtin s concept, narratives and intertextualities through and within the text is being read and circulates.

We have to understand that we need to discuss the core question of interpretation not only in a legal dimension but mosty in an epistemological level. And this is not just fancy theories, The readers -meaning the communities with its complex diverse differences- have a profound active role in that interpretative process. They are not pasive at all, and they shouldn ´t be. We have the responsability to generate, to increase the mecanisms to enable the expansion of that possibility. That doesn t imply a blank check. As Gadamer says something comes with the text, it is what he calls the "text´s world" or the "text´s thing". But something comes also with the reader, the interpreter: cultural context, traditions, prejudices, preconceptions (what hermeneutics name as preunderstanding). So there is a tension between what the reader brings to the interpretating process and this text´s thing. Tension that is resolve through somesort of agreement, what Gadamer calls "fusion of horizons" "Horizontverschmelzung". After the reading process we are never the same but neither the text.

Understanding happens when our present understanding or horizon is moved to a new understanding or horizon by an encounter

In this regard, the same thing happens when we want to read the past, we are always interpretating from somewhere, in this case from the contemporary complex present time and context. We can´t recreate the past itself as an object; on the contrary it is always mediated by perspectives, by language, by the simbolic dimension through we look and reconfigurate history. In this case that "suppose original XVIII century public meaning".

In "Truth and Method" Gadamer´s main work, he writes (let me quote it in spanish):

"Quiero decir con esto en primer lugar que no podemos sustraernos al devenir histórico, apartarnos de él, de modo que el pasado sea para nosotros un objeto… Estamos siempre situados en la historia….Quiero decir que nuestra consciencia está determinada por un devenir histórico real, de tal modo que no tiene la libertad de situarse frente al pasado".

4. Furthermore, what we should take into account as well is the tremendous discursive force that the scenes, the images and the simbolisms have in law and in legal interpretation And that ocurres because as Pierre Legendre and also Enrique Marí in our country say, the simbolic appeals straight to our unconscious, to a pulsional libidinal register. In that path I think we have also to pay attention to the signifiers use in legal texts. Conceptualizing legal interpretation only in terms of the signified constitute – in my opinion- a parcial, narrow approach. The elaboration through the signifiers offers a more profound route as long as it enables to reconstruct the sintomatic names chained to the signifiers used.

5. Fourthly, what I would like also to remark is that the Concept of "the public" used by this new originalism doesnt consider what Hannah Arendt already draw the attention to: that between the public and the private domain crossing both, it is the social realm.

With this I want to express that we need to re-think law through new topologies, like the Moebius strip, for example. The Moebius strip or band is an

unorientable surface where you can´t distinguish nor inside nor outside. How is this related to law? Well, that ´s precisely the way I think we should understand the relationship between legal discourse and social reality. Legal discourse operates in a very performative way in the social reality building process as well as social reality operates, crosses law and its complex construction process.

6. Finally, I dont want to bore with more philosophical concepts but I truly believe that we have to place, relocate the question of legal interpretation within the tension between this three interpretative traditions: Critique of Ideology (Habermas as the main contemporary reference), Philosophical Hermeneutics (mainly Gadamer) and Deconstruction (obviously with Derrida ´s signature).

The discussion between Habermas and Gadamer is well known and use in legal theory but let me suggest that we should also look to the Gadamer and Derrida debate. The encounter between them took place in April 1981. Gadamer main contribution there was entitled “Text and Interpretation”. Derrida responded with three questions entitled “The good will of power”. Gadamer answered with a text titled “Despite everything, the power of the good will”. According to Derrida, Hermeneutic interpretation is based on the mistaken assumption that thought, as representation, precedes and governs communication. Derivative of this believe – as Swartz and Cilliers explain- are the equally mistaken presupositions of the simplicity of the origin, the logical sequence of all tracing, homogeneus analysis and the adherence to the authority of the category of communication.

Gadamer believe, however. that Derrida tacity agrees to some “good will to understanding” since he directs his questions directly to Gadamer, thus assuming that Gadamer is willing to understand him.

In closing, Confronting the real difficulties involved in dealing with difference, working with pluralitiy and limits at the same time in the meaning making process, asuming the complexity, paradoxical, fictional, simbolic feature of legal discourse; and also desarticulating the hierchical shape of law itself, are perhaps our most difficult, hardest but urgent tasks and challenges as a legal community

Borrowing a Cover phrase “As long as death and pain are part of our political world, it is essential that they be at the center of the law”.