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### **Abstract**

In response to a question concerning the use of the term 'justiceable' in Error of Disclosure what follows, I trust, will go some way towards justifying what might otherwise seem a too radical employment (though of course the radical would mark a turning towards a filiation and a root that is not simply arbitrary; leaving undetermined whether the filiation is originary and unitary, even as a differential gathering for Heidegger, or incommunicable and aporetic, absolutely other).

## In Response to a Question...

Nicholas Stobbe

In response to a question concerning the use of the term 'justiceable' in *Error of Disclosure* what follows, I trust, will go some way towards justifying what might otherwise seem a too radical employment (though of course the radical would mark a turning towards a filiation and a root that is not simply arbitrary, leaving undetermined whether the filiation is originary and unitary, even as a differential gathering for Heidegger, or incommunicable and aporetic, absolutely other).

The determination concerning 'justiceable' / 'justiciable' would be clarified only at the risk of entering into another 'unthought'. While attempting to remain faithful to the quite correct 'justiciable', I did not want to refuse to respond to the sense of the justice-able announced with this word. That is, a justice (its crisis, aporia, and necessity) which is impossible to accomplish or thetically determine but which is called for nevertheless in this necessity, and even out of this impossibility, and attested to in the judgements of Brennan, Deane and Gaudron, and Dawson JJ in *Mabo (No 2)*. There is no easy way of avoiding the sense of the 'able' in justice (who would want to? in the name of what?) without, in some sense, encountering its misprision.

The 'Justiceable': Here, for guidance, one could trace the etymological character of the suffix in question. F *justiciable*, amenable to a jurisdiction, L *justitiabilis*, liable to be tried in a

court of justice, subject to jurisdiction. 'Able', *-abilis*, adjectival suffix, the final silent 'e' dropped, from L *habilis, habeo*, to be handled, fit, suitable, make ready, to be legally qualified 1708, more generally as having sufficient power and authority or qualifications. L *habeo* — from *-ble, -bili, -bilem*, has the sense of given to, tending to, fit to, able to, from ἅπω, ἅπτω (*hapô, haptô*), to have, to hold, to have power over, to rule, to gain, to fasten, to touch, to affect, but also to perceive (grasped with the senses), to apprehend, and also to reach or to overtake. G *Habe*, defined as οὐσία, belongings, property, holdings, possessions.

The 'able' in justice-ability is indicative of what would be able to be done in law, an 'ability' encountered by the bench of the High Court in its consideration of the question of law as it devolved around a nonjusticiability in law, and which is recorded here, but which it is not able to enact or make real. Hence, this crisis of law and in law — justice — which is what law would be drawn to, touch on, and remain responsible to, but which it cannot communicate or adjudicate. Here where law is extended into justice and responsibility, but where what is 'able' or may be handled draws out an exteriority that is not the identical of justice or response, we could not say that law is in a specific sense incommensurate with justice. That is, this distance does not mean that there can be no law and justice and responsibility, but that this possibility arises with this distance. Justice is outstripped — exteriorised in its 'ability'. Yet, it is not a *quale* or anything onto-theo-logical, but a *krisis* and a response to an unassimilable distance.

This is a crisis that would not be given over to a principial essentiality, the truth of an original decision (e.g. the dis-

appointment of theology and the essential withdrawal of the sensuous from the supersensible) or a final decision or last judgement. Nor is this *krisis* indicative of a voluntarist drive, or a fundamental need (as Hegel puts it in the *Difference* essay) that would be essentially sublatale. It is, perhaps, closer to Kierkegaard's 'decision', but it is not grounded in subjectivity, or in an immanent religio-aesthetics, or the individual's poverty and indirection before God. It is, rather, and here the risk involves moving both too closely and too far with Heidegger, a crisis and a decision that takes place in the appropriation of the event (*Ereignis*), but which cannot be named or thought of as either as Being, or *Sein*, *Sein* under erasure ('X'), the more archaic *Seyn*, ἀλήθεια, *Lichtung*, or Heidegger's determination from his last decade of work of the 'untrembling heart'. *Krisis* here, rather, would mark a trembling and a caesura in what takes place (echoing Anaximander and Heraclitus differently), and signify a certain rupture in the midst of philosophy. And perhaps even philosophy as rupture — a kind of cession, then, and a frag(e)ment, hence philosophy and writing as an impossible combination. How would one respond to such a refusal and respect its alterity? This, at least, opens onto the question of a certain formal determination in writing, and why the frag(e)ment is not a paragraph (there is nothing beyond it or parallel to it), or a section, but it is perhaps a passage (that is, not a place, one fixed and purified by a border that would be more pure than the pure it in-holds, and hence the metaphysical of the border, but perhaps a certain *passage*, a (non)passage and (non)site), or a frag(e)ment (a questioning and irreducible fragment and a crisis of finitude), or what I might call now *cessions*. The frag(e)ment would be nonpresent to itself, a writing and a cession incapable of meeting its alterity itself. Which is to say, a writing ex-posed

to another memory and a memory of the Other, a writing, exposure, or denudation and a sign bereft of the body, which is not to say that it has no body but that this body is differential and heterogeneous. (The frag(e)ment, lacking a self-sustaining presence, would mark the trace of an exposure to this interruption. A frag(e)ment and an interruption, then, whose temporality is no guide to a nonpresent presence, or a future of this presence, or a history reformed in the concrete and real [the real, it is intimated, has a future, though one before which the present of the real is never sufficient], but the intempestivity of an inter-ruption and a *krisis*. What if presence were no longer a *Sein* but a *krisis* and a decision? What if ethics were not a *proté philosophia* but a decision and a necessity [without ground]? Hence ethics and judgement as ex/pression of a finitude without end. And hence a writing without reserve; that is, one that is abandoned to exposure, and encounters the absence of its site at its dis/posal.)

*Handlung*: What do we handle? What kind of being are we? The question is taken up in an exemplary manner by Heidegger who argues that we are beings marked by questioning; that is, we take up the question and pose it insofar as we are the exposed ones. More particularly, for a reading of the 'able' in question, Heidegger examines the relation of praxis to *Handlung* in the 1942-3 *Parmenides* lectures and points out how the human, as this one who possesses language (τὸ ζῶον λόγον ἔχον) also possesses hands (what this living animal has or possesses, *echein*, is *logos*, language or discourse, but this having which it holds, and which is its holding, will also signify writing). Here, the question of what one does and is capable of doing or handling is intimately connected with *logos* and measure, and hence with

right and rule. It is such a relation between right or law (*ius*) and both de-termination and practice that I have attempted to respond to, where justice and the question of its handling were not simply opposed but drawn into a *krisis*. (A further question would have to consider, very carefully, the historical transformation of the relation of law to *logos* and *mythos*, with particular attention to justice and *dikê*, and the relation of equality and good law, or *eunomia* (Solon), and proto-democratic law *isonomia* (Kleisthenes)).

The hand, following Heidegger's exposition — not forgetting that this itself is already a work of hand, a work drawn out in images and signs which the hand already signs, and signs in its being-exposed (Dasein is not simply the there-being, *dasein*, but is there [*dort*] and here [*hier*] in its being there), and hence the departure of an immemorable exposure —, makes its presencing evident in the production and disclosedness of signs or writing. This account of the withdrawing hand made evident in its erasure with the word recalls, for me, the rotating *στήλαι* of Greek antiquity, those rotating stone posts engraved with the laws of the city-state in a public and open place for everyone to turn with their hands and read. In any case, the double relation of withdrawing-unconcealing, trace and identity, at least as this is suggestive for the reading I am proposing, would point to an impossibility (e.g., signed by Brennan *et al* of the High Court) of justice signing its name; or, rather, a possibility that justice could point to or indicate its *aporia* (here, perhaps, indicative of a certain justiciability and justice-ability), and hence a *skandalon* for law. Further, this too would raise the question whether law (-*leg*, *legein*, gathered together, -*lex*, *legere*, the legible of writing) were not the trace of an impossible limit of justice, no less than

the trace of *skandalon* and *aporia*. (Would justice call on the *aporia* of law? Are we capable of handling this detour? Signing it? Would justice name an incomparability and impossibility of this distance? But law signs, and law signs it multiply, in different hands, with the hands of difference, incapable of handling (signing) this nonidentical justice. As if [the question of] justic(e)(i)ability marked a repetition and a difference of what is without relation, absolutely other, ungraspable and unknowable, which is not to say unthinkable, and yet not the all-turning heart of an absolute One.)

Justice, accordingly (and these would remain provisional considerations, at least already drawn into a trace and exposure of writing), would be handed down in the law, turning not into its distance (how would it turn into its distance or meet it? as if in turning into its distance it could encounter itself without delay) but would respond to this distance by turning away from it, responding to this de-tour with a delay (both a force, a turning, and a gathering). What would be called for here, then, would mark the face of the absolutely asymmetrical Other, this Other who precedes me and who is absolutely without precedent (but not including here the positivity of Levinas' Platonic Good [*ἀγαθόν*], and following Caputo's critique of an ethical first philosophy). Justice here would open in its response to the absolute singularity of the Other and to this distance — re-laying (*legô*) in the de-tour a responsibility/respons-ability (*re-spondere*, to promise in return, *spondeo*, promise, engage, *σπένδω*, to make a truce or treaty, to offer a libation) to this crisis which calls on it.

The question of Heidegger's retrieval of a founding moment in an originary and disclosive relation with Being is nevertheless



less easily concluded. On the one hand, this response would appeal to a repetition (*Wiederholung*) and a differential beginning. On the other hand (if these two responses could so easily be displayed), the appeal is conservative. The hand, and handlingness, is an act of mediation from an unfolding origin out of which the ontological difference comes into manifestation — i.e., it becomes manifest, becomes in its manifesting, and marks beings in their exposure as manifestation. But perhaps what needs to be recalled here is already announced with the manifest — *manus* (hand) + *festus* (struck), the manifest, the apparent, is struck (*fendo*), such that the visible, what is seen or read, appears not simply as a result or as an object of an action of the hand, but is a strike, a blow, a force and a violence (*φέρω*, to bring forth, present, to bear, endure, achieve). Certainly what is experiencable here in regard to the blow or strike echoes Heidegger's description of language as a strike (*Schlag*), and with it a certain account of mediacy. But the poet who mediates and communicates this beginning and origination (hence Hölderlin as the poet of the German (origin)nation), and who speaks the origin originally in its beginning essentially by fateful necessity or destiny, handing it down as it were, must include the sense that this origin, even as disclosive withdrawing, even in the still untrembling heart of the essence of *ἀλήθεια* or truth, is communicable, even if not communicated. In drawing the hand the hand makes visible, makes able according to an originary order — but what if law and justice could not meet this incommunicable immediacy? what if law and justice communicate without a communication with the immediate? as though law and justice were now to communicate in an indirection?

Here, perhaps, in a penultimate comment, I would return to the paragraph commencing with “At the limit of law.” —Law, here, at its limit (Terra Australis, Gondwanaland), discloses its error. It overtakes its limit (viz. English common law) without having encountered what preceded it (the Other, the nonphenomenological trace of the Other after Levinas). Another encounter awaits it (this is its limit, a limit which however it does not contain), an encounter with the absolutely Other which would not call on us entering this distance, occupying it, but in turning away from, turning as it were in/to the de-tour of an other response. Hence, a return of law to be made in its re-sponse to the event of its dis-closure, a return marked according to the turn of its de-lay. But this return would not have led it to its originary site, it would not mark an originary return communicated in its immediacy, its return to itself, but to a turn and a self that takes place as a *krisis*, an abandonment, and a dispersion, hence the reference two fragments later to a taking place. Taking place here signals a double response to a pre-Socratic sense of a troubled or strife torn justice (Anaximander, but also Antigone) and existence (Heraclitus), and Heidegger’s reflection on the event of appropriation, this event or happening of a nonpresent Being that properises through an accord — to the heart, in the direction of the heart, *cordis*, though isn’t the heart a problematic ground? doesn’t the heart make us tremble? would not the heart mark an interruption of the classical philosophical ground? — an appropriation and expropriation, a displacement marked through the figure of the (non)site.