

The Interstitial and Creativity: Bergson and Fitzpatrick on the Emergence of Law.

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Introduction

There is something about law that makes it appear –at least to some- as the pinnacle of stability. Law, it is then often assumed, either expresses stability, or effectuates it. Many of course will accept insights from conflict sociology that suggest that every single piece of law or legislation is fought for, or, as the case may be, vehemently resisted. All legislation, claims conflict sociology, emerges out of conflict and struggle. First there is conflict and struggle. Then there is law. But conflict and struggle will not have gone away. Conflict and struggle will continue to generate law –new law, different law. That much is understood. However, much in conflict sociology tends to subscribe to the idea that at the very deep root of law one will find stability, albeit that this stability may take different forms. It could be the stability of a particular collective will to mobilize force and transform it into political power.

Law here is the product of the will of a stable collective. Although this collective will be particular –in a world of conflict and struggle, it could never be universal- it may decide to use law to express, maintain, or indeed achieve its stability. Law, standing in for the universal, may even help to achieve all this by serving as a plane on which what has been called *hegemony*, and corresponding stability, could spread. More often than not though, any such attempt at achieving hegemony will be in vain. Conflict and struggle being the ultimate bed-rock of all societies, they are then also the deepest form of stability whence law –all law- comes from. All this is well understood.

But there is another way of looking at law. Law, in this alternative perspective, is not so much the result or the source of stability, as the conduit for creativity, indeed the conduit of creativity. It is to this alternative reading of law which we will turn in this short paper. The argument is built on insights gleaned from two works in legal theory which, to say the least, are of very significant importance to anyone who might be interested in the philosophy of law. The first is Peter Fitzpatrick's *Modernity and the Grounds of Law* (2000). In his book Fitzpatrick reads law neither as stability nor as instability, but as irresolution. But there is an older insight into the indeterminacy of law. In his final major work, i.e. the one on *Les Deux Sources de la Morale et de la Religion*[1932], Henri Bergson locates law firmly and squarely in the openness of

the human condition. Although Bergson, in this book, is formally concerned with 'morality' and 'religion', his argument is certainly applicable to law. Law, according to Bergson, emerges out of openness, and law leads back to it.

Law as the Interstitial

What is the ground of law? On what does law rest? Where does law come from? These are Fitzpatrick's basic questions. A close reading of Freud's *Totem and Taboo* (1913) brings him to formulate an answer to these questions. In Freud's text, the members of the primordial horde who live under the savage rule of an all powerful authoritarian ruler eventually decide to kill the latter. Afterwards, that is, after the loss of that which constituted them, they feel remorse. In their remorse they institute the first form of law, i.e. totemic law, whereby the slain savage ruler is replaced with the totem. One could then argue that the ground of law is determinacy, i.e. the determination, of the horde, to kill the primordial ruler. Seen from this perspective law flows from determination, from something determinate within the primordial horde that made them decide something collectively. The newness which law brings is determined newness. However, one could also argue that law, in Freud's text, emerges out of indeterminacy. The indeterminacy which is referred to here is the indeterminacy within the primordial horde before the moment of decision. The horde's

decision –their determination- emerged out of this very indeterminacy. If there hadn't been indeterminacy in the horde prior to their decision, if everything had been determined, their very determination to kill the ruler, and then to institute law, would have been impossible. The horde's intention to kill, their determination to law, emerges here from openness. Law, in this perspective, flows from indeterminacy. The newness which law brings is indeterminate newness.

Now, Fitzpatrick locates law in the interstitial space between determinacy and indeterminacy. Law, he argues, is the space of 'irresolution' between on the one hand determination, and, on the other, responsiveness (2000: 16-20, 36, 68, 72-72). Law could never emerge out of utter, total determination (nothing could ever come out of *that*). But law (or anything else for that matter) could never emerge from utter, total responsiveness either. Total responsiveness, if there were such a thing, could never be able to generate anything. It would lose itself in total responsiveness. Complexity theorists would probably say that law emerges, not out of chaos, nor from the complete absence of chaos, but at the *edge of chaos*.

Law is also the interstitial space between continuity and rupture. To illustrate this: savage rule persists in (post-) totemic law, but the latter also represents a clear break with or rupture from the original savage rule of the authoritarian ruler. Law, then,

flows from the interstitial, or from 'irresolution', and flows back into it. Law, says Fitzpatrick, *is* this interstitial space. The determinacy in and of law originates in its responsiveness. And the reverse also holds: law's responsiveness originates in its determinacy. Law could never originate in absolute determination. Absolute determination could never generate anything. It could never determine anything. Nor could absolute responsiveness ever generate anything (it could never be responsive, for there would be nothing to draw responsiveness from). Only the interstitial irresolution between determination and responsiveness can.

Another way of looking at this is to consider law as the "mute ground" on which social combinations are made (2000: 88). The social is the realm of social combination. Social combinations are combinations whereby entities combine, that is, whereby entities are included/excluded (with inclusion depending on exclusion, and vice versa). Law, as an interstitial space, generates such combinations. Social combinations, then, are produced by law's "mute" interstitiality, rather than the other way round (i.e. social combinations producing law). The emergence of totemic law could represent the birth of human 'society'. 'Society' here includes all those who adhere to the totem, and excludes all *savages* who don't. Now, this 'society' originates in the interstitial space between determination and responsiveness. The totemic law (or 'society'), then, is born in the interstitial space between totally responsive

savage rule and the fully, totally determined horde. That is the space of law.

The birth of law, it could then be argued, is also the birth of human 'society'. The emergence of law, the emergence of human 'society' –why not call it the birth of the human condition- coincides with the emergence of the interstitial. We will explore this point in the remainder of this contribution. But allow us to repeat and stress a few more words on the interstitial first. The emergence of the human condition on the one hand constitutes a rupture with what went before, i.e. savage rule. The irresolution of law and the unstoppable diversity of social combinations which this irresolution generates in a way are a clean break from savagery. But on the other hand this emergence of the human condition –to repeat: the condition of irresolute law and resulting social combination- is also a continuation of what went before. The brutal savagery of violence is still present in all human law and social combination. In Nietzschean terms: the will to power in *human* life is still ... will to power. The human herd is still.... a herd (see e.g. Nietzsche's autobiographical *Ecce Homo*, 1908).

Law as Fabulation

Bergson had an interesting view on law and its place in an emerging human condition. Although Fitzpatrick did not analyse Bergson's work for his book on the interstitial, we believe it is

worthwhile to have a closer look at this work. Bergson saw law not so much *as* an interstitial space, but, rather, as a *filling* of interstitial space, as that which *bridges* the irresolute space between determination and responsiveness. He considered law to be the most fundamental product of the human condition, which, itself, emerged from the workings of the 'élan vital'. This 'élan vital', or life force, is the fuel of all life (not just human life) and, like Nietzsche's concept of *will to power*, it connects the rupture of the emerging human to the continuity of the non-human. In the human condition though the 'élan vital' constantly and incessantly takes human being beyond itself. Human being –Bergson agrees here with e.g. Nietzsche, whom he rarely mentions- is becoming, unrelenting becoming. That which causes, prompts and fuels becoming in human being (or in human beings), is the 'élan vital'. Human being emerged, or emerges, at the point where the 'élan vital' takes being beyond itself, beyond its 'in-itself'.

Human beings have the capacity to imagine the world around them as it could be, or as it could have been. Human beings imagine that which is not. They have the capacity to imagine that which might be, or should be. They have the capacity to imagine a world beyond its "in-itself". This capacity also includes the capacity to imagine *future*. Human beings have the capacity to imagine *themselves* as they could be. They have the capacity to imagine their own future. They can look at themselves and imagine that

which they are not, or that which they are not yet. All this is common ground with existentialist thought (to which we will return below). It pays to have a closer look at this capacity, i.e. imagination. Human beings imagine a distance between what is, and what is not (e.g. what could be, what should be, and so on). This distance lends a certain goal-orientedness to human being, and makes e.g. technology possible (Bergson, 1932: 105 ff.). The human condition, also according to Bergson, is a technological condition. But the imagined distance between what is and what is not also implies openness, indeterminacy, uncertainty, and ultimately, insecurity. This is why imagination, in the very same moment of imagining distance, will also, and simultaneously so, fill in the imagined distance with imagination (Bergson says: with *fabulation*, 1932: 111) so as to provide at least a semblance of closure, determinacy, certainty, and security. That which is thus fabulated is a technological code in the sense that it bridges that which is and that which is not (yet).

But where does this human capacity to imagine and fabulate come from? It is the effect of the 'élan vital' which, in human being, or in human beings, opens up being by taking it beyond its "in-itself", and which then fills it again with being (i.e. with fabulation, or with fabulations). These fabulations will of course immediately add to the "in-itself" of being. That means that they also will be available for the 'élan vital' to crack open, again and again, e.g.

when a mismatch is experienced between 'goal' and 'technology'. When that happens –and it happens incessantly- this 'cracking open' will once again generate an imagined distance beyond the "in-itself", and will once again fill it with yet further fabulation. And so on. This process is inevitable and unstoppable, since, as Bergson had argued before in his seminal *Creative Evolution* (originally published in French in 1907, translated in 1911), no product of human intelligence could ever grasp the near infinite multiplicity of human life (but all life is infinitely complex change or duration). As mere products of human intelligence, 'fabulations' could never grasp life's duration. All fabulation, then, for all its technological goal-orientedness, is bound to fall short of its basic aim, i.e. to provide closure, determinacy, certainty, and security. Fabulation is a never-ending story.

However, fabulation is the source of moral, religious and legal code. Indeed, in primitive societies, claims Bergson (1932: 162 ff), the most fundamental fabulations took the shape of animistic entities (or spirits) which filled the imagined distance between what is and what is not (yet). Spirits were fabulated as totemic idols, in religious ritual, as legal obligation to obey, and as scientific explanation. In primitive societies all these spheres were undifferentiated. The source of law, then, is to be found in this very moment of fabulation. Law, as technological code, dwells at the heart of fabulation. As fabulation, as technological code, it bridges

the imagined distance between what is, and that which is not (yet). Law promises closure, determinacy, certainty, and even security, but is, at the same time, shot through with the openness, indeterminacy, uncertainty and insecurity of the imagined distance whence it came. Law, to use Fitzpatrick's words, is an interstitial space. If law is the irresolution between determinacy and responsiveness, it is also this irresolution which generates a variety of social combinations. As a fabulated and responsive piece of technology, law's fabulated determinacy *fills in* and *results from* imagined indeterminacy. Its fabulated determinacy is then, indeed, going to be shot through with indeterminacy. That 'internal' indeterminacy (i.e. the indeterminacy within law) is the point at which the 'élan vital' will then again, and again, unsettle the determinacy of law (i.e. make it respond, in yet another bout of fabulation, to the distances thrown up by the 'élan vital').

The 'élan vital', when it strikes human being, and when it opens it up (it does so incessantly), is creative (again this is a point first explored in depth in Bergson's *Creative Evolution*). To fabulate is to be human; it is to be creative. That which is human, fabulates (creatively). That which fabulates creates what is human. The 'élan vital' creates indeterminacy in determinacy, and it creates determinacy in indeterminacy. To use Bergson's own words: it creates openness in closure, and it creates closure in openness (1932: 57-63). All this happens simultaneously. One could say, to

use Sartre's existentialist language, that the 'élan vital', in human being, creates "nothingness" (i.e. distance) in being, while it creates 'being' (in the shape of fabulation) in nothingness. But I hasten to add here that Bergson would probably have disagreed here if he had lived to read Sartre's *Being and Nothingness*, 1943. Like his modern day disciples (e.g. Gilles Deleuze) could not accommodate the idea of the void, of absolute "nothingness" out of which radical freedom and choice, according to Sartre, well up. All freedom and all choice, in Bergson's view (and Deleuze's, for that matter), is a mere effect of the infinitely complex workings of the élan vital' as it traverses matter. Freedom and choice, in other words, are mere effects of duration. There is no void. There is no nothingness (this is a point criticized by philosophers such as Alain Badiou, e.g. 2000: 89-91).

Law as Image

It could not be denied that Bergson's basic position on law ("morality and religion") is functionalist. He defines religion and morality (or code, if we extrapolate) as "une réaction défensive de la nature contre ce qu'il pourrait y avoir de déprimant pour l'individu, et de dissolvant pour la société, dans l'exercice de l'intelligence" [nature's defensive reaction against that which might be depressing for individuals, and dissolving for society, in the workings of intelligence] (1932: 211). But it is a functionalism of

sorts. To see this, we will have to have a closer look at Bergson's notion of 'intelligence'. But first we need to focus once more on the creative dimension of the 'élan vital' in human being.

The 'élan vital' is necessarily creative in that it creates distance between what is and what is not (yet), whilst it simultaneously creates fabulations (of which law, or technological code more generally, is the fundamental form) that fill the distance. In doing that, it creatively takes human being, time and time again, beyond itself. In most cases though, this creativity is only quasi-creativity. That which is fabulated only constitutes a re-combination of social assemblages or combinations within the space of an already existing code. In other words: that which is fabulated merely represents a mere reshuffling of an existing deck of social cards (or arrangements). In most cases fabulation does not generate fundamentally new arrangements. It very rarely leads to the creation of fundamentally new codes, that is, fundamentally new *forms of life*. In other words, fabulation in most cases only rearranges combinations in the *extensive* sphere -i.e. in the sphere of the actual- not in the *intensive* sphere, i.e. the sphere of the potential, or virtual (1932: 247-253). Typical here are processes of attempted universalization, whereby efforts are made to universalize particular codes, e.g. in the fabulated belief that the fully human resides in the universal. Such attempts are doomed to fail, since, of course, all social combinations rest upon exclusion,

including those that aim for universal inclusion –indeed *particularly* those that aim for universal inclusion. Authors such as Zygmunt Bauman would later expand on this in the claim that “order is not universalizable” (1993: 8-15; 212).

However, creation of the really new is, in human being, certainly possible. Real creativity is creativity that takes place in the intensive sphere, in the sphere of pure, no-yet-actualized potential. There, intensities may recombine, thus generating new forms of life which are built around new codes. This process of recombination is first a virtual process. The newly emerging form of life emerges first virtually, before it then actualizes in the extensive sphere, i.e. in the sphere of the actual. Bergson’s focus on the role of the virtual in the creation, by the ‘*élan vital*’, of the new, was later adopted by Gilles Deleuze and Félix Guattari in their double volume on *Anti-Oedipe* (1972) and *Mille Plateaux* (1980). In his book on *Foucault* (1988: 36-37) Deleuze would call the virtual moment of emergent forms of life “diagrammes”. Once formed (*rhizomatically*, one might add) these diagrammes then traverse the actual (matter, bodies, fabulations, institutions, language, and so on), where they will clash with the codes that are embedded in the already existing, and where they will undergo, in this very clash, an unavoidable amount of transformation and modification. Ultimately though they may generate, in the actual, combinations and re-combinations in which some of the new may then shine through (Jamie Murray has

recently published two very fine papers on the topic of Deleuzean emergence; see Murray 2006 and 2007).

The crucial question now is: who, or what, creates? One way of answering that question would be to simply say: the 'élan vital' does. As said above: the duration of life is full; infinitely complex and interconnected, and changing incessantly, but full. There is no void in life. Life knows no "nothingness". There is then no reason to assume a role for subjectivity in creation. Subjectivity, Bergsonians and Deleuzeans might argue, is a mere effect of the creativity of, or in, intensive life itself. Subjectivity is itself a mere effect of the 'élan vital'.

But there is another way of looking at this question. In his book on *L'Imagination* [1936] Jean-Paul Sartre critically analyzes theories and models of imagination, including Bergson's. Strangely, he did not study the latter's book on *Les Deux Sources* though, which had been published only a few years before (we will later see that his argument may therefore have been slightly unfair to Bergson). Sartre uses Husserl's notion of *intentionality* to oppose any conception of imagination as the mere *intensive* combination, or re-combination, within *duration*, of a particular kind of objects (i.e. images). On the contrary, Sartre claims, "L'image est un acte et non une chose. L'image est conscience *de* quelque chose" (1936: 162]. In other words: the image is an *act* by something that is intentionally linked, through consciousness, to a particular object.

That 'something' is the subject. Whether or not the subject is a mere effect of the life force or 'élan vital' is irrelevant. The issue is to recognize that images are *actions*. Actions are intentional. They are what intentional singularities do. The image *is* intentional action by intentional singularities (call them subject, the self, etc). Whether they are mere effects of the 'élan vital' or not, intentional singularities exist. They act. They do things, intentionally. And they have an impact. They are important, indeed crucial, to the understanding of the emergence of law. If it wasn't for the actions of intentional singularities, the new (or law, or code more generally) would never get to be imagined in the first place. Human being is *singular*. Yes, one may hold the idea, with Deleuze and Guattari, that the subject, or the self, is rhizomatically multiple, and rhizomatically intertwined with its actual outside and with the much deeper reservoir of *intensive* potential. But the "nothingness" inside it (Sartre, 1943, of course), that is, the distance within it between its "in-itself" and its "for-itself" (Sartre, 2003: 637), has a *singular* shape. Like its multiplicity, its internal nothingness is *singular*; ever-changing and transforming, yes, but *singular* nevertheless.

One may of course choose to ignore Sartre's phenomenological point. But in a way Bergson himself, in his *Les Deux Sources*, already felt that he had to be more specific on the issue of subjectivity. He never uses the word though. Instead he uses "intelligence" and "genius" (1932: 56-85). The 'élan vital', in

human being, generates images of newness through "intelligence" and "genius", and those –although Bergson remains silent on this issue- *must* then be singular. 'Intelligence' is about conceptual contemplation and assemblage, and thus it (i.e. intelligence) usually deals with extensive materials (matter, social arrangements, language, concepts, ideas, and so on). But 'intelligence' also integrates "l'infra-intellectuel" (habit, routine, nature an-sich, and so on) and "le supra-intellectuel" ("aspiration, intuition, and emotion") which are "indéfiniment résolubles en idées" (1932: 85). Genius is the soul ("l'âme") that manages or conducts such integration through a movement which, in abandoning all existing code, *mystically* (Bergson's word) explores human being's "très grand corps inorganique", that is, "le lieu de nos actions éventuelles et théoriquement possibles" (1932: 275). The notion of the *Body without Organs* may come to mind here to Deleuzeans. The soul of genius, in other words, is the soul that opens up to, withdraws into, and subsequently explores, the non-organic, non-organized, un-coded zone of pure intensive potential (the "theoretically possible"). The only way for such a soul to be able to do *that*, and to creatively allow the new to emerge (Sartre would say: to creatively imagine the new), then, is to actively and indeed intentionally withdraw from all existing code. There is a paradox involved here: it takes singularities who intentionally withdraw from the extensive –and therefore also from their very singularity- for real creativity to

emerge. In other words, wherever and whenever singularities will not intentionally withdraw from the codes embedded in the extensive actual in order to *mystically* explore yet-unrealised potential in the sphere of the intensive, new forms of life, new law, or simply newness will not emerge. Only combinations and re-combinations in the sphere of the extensive actual, and within the bounds of codes embedded in the already existing, will then be possible.

Law, or code, more generally, in a Bergsonian view, emerges first as image. With Sartre's phenomenology (or existentialism) added to it, it emerges as action (as fabulated image, to be precise) in and through the operations of singularities whereby virtual assemblages of intensities are 'allowed' (they are 'allowed' this by intentional singularities or 'selves' that decide to withdraw from all actualized code) to traverse the sphere of the extensive when they actualize. A pure Bergsonian (and Deleuzean) view here would hold that this act of 'allowing' is fully part and parcel of the workings of duration, and of the 'élan vital' itself. In a Sartrean-inspired view this 'allowing' refers to a decision made by a singular self built around a void (the location of radical freedom and choice) struck, in human being, by the workings of the 'élan vital'. In this view, whichever combinations of intensities take place in the virtual, for their emerging code to actualize in the extensive, the operation of intentional singularities is crucial. This operation is imagination. It is

human imagination, to use a pleonasm. 'Genius' is the name which Bergson gave to the capacity to imagine the really new, that is (in Bergson's view): the capacity to withdraw from all extensive code and to directly tap into the sphere of the intensive which is the sphere of duration, of the 'élan vital' itself.

Law, then, begins its life as *image*. One may take all this quite literally. The code of newly emerging forms of life –or law, if you wish- tends to actualize first *as image*, or *in image*, before it does so conceptually, that is, in the extensive world of language. It would take us too far to develop this point here though (please refer to Lippens 2009, 2011a and 2011b for elaborations on this).

Conclusion

Many criminologists have had a longstanding interest in processes of criminalization. Criminologists (or sociologists, for that matter) would be able to analyse and even explain the origins and genesis of such pieces of legislation. It was not our intention to rehearse the many sociological models and perspectives that have been devised to get to grips with processes of criminalization. However, one might perhaps be forgiven for thinking that the common thread in many of those models and perspectives is that law is the result of the struggle and conflict within and between sets of social assemblages or combinations.

The point we have been trying to make here is that one could also look at the question of criminalization from a more philosophical point of view. In this essay we focussed on writings by Henri Bergson [1932] and Peter Fitzpatrick (2000) on the emergence of law. It became clear to us that law is not just a matter of combining and re-combining extensive social arrangements (although of course we now hasten to add that it is *that* also). Law is, in a way, more fundamental than social combinations or assemblages. At a more fundamental level law seems to be a technological code that begins its life as fabulated image. As fabulated image though, it is shot through with the openness and indeterminacy of its interstitial origins. That means that *another* law, *another* code, *another* form of life, are always possible, even beyond the mere re-arrangement of extensive assemblages and combinations. It only takes a while, and *mystical* singularities (Bergson's word again), for newness to emerge.

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