

Sanja Milutinovic Bojanić / Petar Bojanić

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Paragraphing: Normativity in Europe as Babylon On an Werner Gephart Intervention

*C'est un satirique, un moqueur;
Mais l'énergie avec laquelle
Il peint le Mal et sa séquelle
Prouve la beauté de son cœur*¹

One who gifts us with the image, Honoré Daumier or Werner Gephart, the *scienziato e artista*,² above all ›teaches us to laugh at ourselves‹. ›He is a sage, gentle reader‹, warns Baudelaire. But then what is so *terrible* (*terrifying*) in the painting *Babylonian Production of Normativity in Europe* (*With the Help of Pieter Bruegel*) (2016) with which *the sage* opens the exhibit *Some Colours of the Law* at King's College, London? What has happened to us, the Europeans, and what is foretold to us in this painting by one who is more European than us all – *With the Help of Pieter Bruegel*? What is Werner Gephart doing in the first place, what is his gesture, his intervention (*anschauendes Denken*)³ and his gift to us today? If Gephart's initial intention, more than twenty-five years ago, was to find and reconstruct society from various modernist paintings (to prove that ›die Gesellschaft ist im Bilde‹),⁴ indeed, to follow and develop small, modest testimonies of his



¹ At the beginning of his text about the painting of Honoré Daumier, Werner Gephart quotes these lines from Charles Baudelaire from the famous poem ›Vers pour le portrait de M. Honoré Daumier‹ (cf. Gephart: *Recht als Kultur*, p. 260). The opening stanza of the poem is ›Celui dont nous t'offrons l'image / Et dont l'art, subtil entre tous / Nous enseigne à rire de nous / Celui-là, lecteur, est un sage.‹

² In a lecture, in which he attempts to thematise his own work, Werner Gephart says ›che è il mio scopo in quanto scienziato e artista‹ (Gephart: *Senso*, p. 213).

³ Gephart translates this phrase from Goethe as ›pensare osservando‹, that is, observing thinking, meaning both thinking by observing (illustrating) and observing thought. ›For me, Goethe is one of the founders of sociology ...‹ (ibid.).

⁴ In *Bilder der Moderne*, Gephart incorporates all three of his great studies from the nineties, which, it seems to us, represent a turning point in his work. These comprise the two previously published texts, ›Bilder vom ›Großen‹ Krieg‹ and ›Bilder der Großstadt‹, as well as the at the time unpublished study on ›Sakralisierung der Natur‹, which came out as the last chapter, entitled ›Bilder der ›Natur‹ zwischen Entzauberung und Sakralisierung‹ (Gephart: *Bilder der Moderne*, pp. 189–235).

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teachers he discovered in their letters and unpublished manuscripts,⁵ he is then today *showing* us himself what happens in ourselves or what will soon happen. The construction or reconstruction Gephart names *The Babylonian Production of Normativity in Europe* ought to, above all, unveil one of the great visual fantasies (or stereotypes) of the West, and then present one of the crucial problems implied by the connection and mixing of elements and traditions (German, Anglo-Saxon, French – that is, the European tradition that is globalised and thus confirmed as universal).

It seems to us that there are three operations that Gephart presupposes in the course of his manipulation of elements and their re-installation. What entirely distinguishes Werner Gephart's project from some other similar attempts in the history of thought is the observation of the world as a set of elements and the action that *installs* these elements in an entirely new way and new location (we must always pay attention to the ›background‹⁶ in Werner's work, often found ›in front‹ or ›in front‹ of everything else!).⁷

The first such operation, undoubtedly, refers to the collage, namely the various theories and techniques of collating (*Technik der Collage*).⁸ It seems that Werner Gephart's work on the manuscripts of his teacher, Max Weber, has determined at least two protocols which then imply two tasks or two imperatives that Gephart has steadfastly clung to in his work: composition and concretisation. In addition to Weber generally not completing his books, it is obvious that the books are constructed of parts or elements⁹ and that there is no whole or work as such. What does this mean? Within the book (which is never truly a book), there are intervals and pauses that allow new composition or installation. The second protocol is a variation of the first since Gephart understands that law (*Recht*) ›as such‹ is never a compact and simple logical unit or corpus; rather, it is contextual, multidimensional and structured as a set of elements, spheres or cultures (*Recht als Kultur*).¹⁰

⁵ Thus, for example, in a letter from Marianne Weber on 13 June 1903, her husband, Max, as he is sitting next to Rembrandt's *Nachtwache*, mentions ›eine Farbenpoesie‹ and the ›Natur des Sujets‹ as *Gruppenportait* (cf. *ibid.*, p. 75).

⁶ For example, the Max Weber manuscript in collage and pastel that Gephart sometimes names *Wirtschaft und Gesellschaft oder der Torso mit Herz* and sometimes *Wirtschaft und Gesellschaft oder Webers ›Torso‹* (2002, 59 x 40 cm) functions as ›front background‹.

⁷ Cesare Ripa explains concepts in drawing, paints and colours norms, or gives faces and a body (body in motion) to norms. The representation or exhibition of some concepts and norms in his work still contains some reductions which Gephart successfully resists. One could say that Gephart adds elements in order to prevent the violence of reduction and the violence of interpretation.

⁸ Cf. Gephart: *Das Collagenwerk*, p. 116.

⁹ At the beginning of his text *Das Collagenwerk*, Gephart quotes a passage from Anthony Kronman about the nature of Weber's writing and the difficulty to reconstruct its ›organizational unity‹ (*ibid.*, p. 111).

¹⁰ In the concluding chapter of *Recht als Kultur* (pp. 289–302), Gephart explains the forms and ingredients of law the word culture ›covers‹ and ›marks‹ (*Recht als Symbol, als Norm, als Organisation, als handlungsförmiges Ritual*).

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The second operation conducted by Gephart refers to the addition of elements into a pseudo-completed composition. He adds elements where it looks like there are entirely enough elements already present. The process of addition enables the production of intervals and new empty spaces in a whole to reveal the compositional structure of this whole (to more easily parse out the elements and positions of which the ›whole‹ is made). This further allows the construction of completely new contexts in which that ›whole‹ functions as a set of various elements. Gephart invents situations of encounter for various theorists of law and society (among others). By introducing new countries and continents in which these theorists are present, along with their theories, as figures and travellers, he mixes traditions and manipulates different episodes of their biographies, harmonising conflicts among cultures and connecting what is in fact entirely impossible to connect. The technique of addition implies a theatre of difference and a standpoint that something is always missing or is not present. It indicates that things are more complicated than they seem since there are relations not yet taken into account. To add is to always surprise anew.

The third operation consists of the process of addition of oneself (the author) into the composition of presented elements. The authorship of Werner Gephart does not consist solely of deconstructing a set of elements (as in *With the Help of Pieter Bruegel*), but also in himself as subject and object into the composition. He thus thematises himself as a crucial, yet manifest element, the constructor, within this composition of elements. Gephart (the artist, jurist, sociologist, etc.) inserts himself, his experience, his travels, the Simmel or Durkheim he always carries with him on his travels, as well as his visions, as elements of what he is interpreting (or what we as readers are interpreting).

In the Somerset House-King's College, London exhibition catalogue – in reality the unfinished sketch of a catalogue – the painting *Babylonian Production of Normativity in Europe (With the Help of Pieter Bruegel)* (2016) appears twice, each time with a different text and in different photographs (one has a white passe-partout). Werner Gephart adds a few elements into the Babylon fantasy produced by Pieter Bruegel; thus, Gephart is using Bruegel's fantasy and explains in the adjacent text what he has done and why he has added what he has. Let us first consider the connection between the text about the Tower of Babel and the vision we all might have of it.

Let us all take a look, or please look, or just look (the imperative is always the most important moment in institutional action) at verse 3 of chapter 11 of the first book of the Torah (*Bereshit*). Genesis, chapter 11 describes the first instance of human building and the first great architectural endeavour. Let us recall the various visual fantasies of this great action (Bruegel's is perhaps most famous), and let us remember that this fragment is one of the most repeated and interpreted places in the history of thought, precisely because of the ever-lingering enigma of the

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destruction and failure of this great action or set of actions. Could we say that this endeavour, which follows divine action of the creation of the world, this first ever architectural impulse, fails precisely because of inadequate technology and poor material (it would appear that a terrible wind blew down and broke down the massive effort)? Does that mean that the technical readiness and equipment of a community or group determines the strength of its compactness and its duration? Or else might there be other reasons for (lack of) success?

- »1 And the whole earth was of one language, and of one speech.
- 2 And it came to pass, as they journeyed from the east, that they found a plain in the land of Shinar; and they dwelt there.
- 3 And they said one to another, Go to, let us make brick, and burn them thoroughly. And they had brick for stone, and slime had they for mortar.
- 4 And they said, Go to, let us build us a city and a tower, whose top *may reach* unto heaven; and let us make us a name, lest we be scattered abroad upon the face of the whole earth.
- 5 And *Adonai* came down to see the city and the tower, which the children of men builded.
- 6 And *Adonai* said, Behold, the people *is* one, and they have all one language; and this they begin to do: and now nothing will be restrained from them, which they have imagined to do.
- 7 Go to, let us go down, and there confound their language, that they may not understand one another's speech.
- 8 So *Adonai* scattered them abroad from thence upon the face of all the earth: and they left off to build the city.
- 9 Therefore is the name of it called Babel; because *Adonai* did there confound the language of all the earth: and from thence did *Adonai* scatter them abroad upon the face of all the earth.<

Is technology *the first* (above and before all others) and decisive condition of any potential joint action? Such a question assumes a few preliminary gestures that establish (found) the idea of primacy. In order to accept the idea that an established practice ought to be continuously altered and amended, that activity ought to generally be reconfigured and transformed, that it is crucial to change the way of doing, change the means and materials – that is, that change and development of activity is most important, it is necessary to show that a) there is no joint endeavour without simultaneous work on change and amendment of established technological practice (since a group is together not only because its members work together, but also because joint work is possible only if the means, materials and technology are continuously modified as well); b) only joint amendment to the work and conditions of work turns joint work into directed and permanent institutional action; and c) only institutional action, meaning activity in accordance with technological development and achievements, can be named as human action and practice, and only as such can it compete with ideal and imaginary (divine) creation (and then with other competitive actions).

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In order for a group to be able to confirm that it is communicating and that it resides in a single place together, it seems that the plan and design (›let us build us a city and a tower, whose top *may reach* unto heaven‹) as well as the incorporation and registration of a department of study or architectural bureau (›let us make us a name‹) is, in one way or another, preceded by a strong awareness of the group and its readiness (›let us‹ translating to *havah, havav* in Hebrew; Buber and Rosenzweig translate this word into German as *Auf*) to experiment, to uncover something new, to replace previous practice with something entirely different. Even though the mixing of elements (contents, materials, forms) is certainly concomitant with the mixing and overlap of words and space of residence, the (lack of) success in Babel, above all, that this narrative describes is the encounter of the group with ground and its joint manipulation of material. Let us, then, assume right away that this group first and for the time being, discovers a ›new problem‹ or ›is solving an old problem‹ in a new way (either way, we are dealing with invention and new technology). There is no institutional action without novelty, thus the novel must be renewed and repeated and then amended again. This encounter with the ground is preceded by the fact that the group is really a group of refugees relocating from somewhere, arriving at a new location already formed by a common language and one speech (that is maintained as such, held in memory, reiterated) that in turn keep the group unified over the course of their arduous journey.

When the refugees finally find themselves in a plain and rest from an uncertain journey before verse 5, thereupon unfolds a detailed control of documents (personal ID, building license, community approval certification, geodesic approval, inspection of architectural design, site inspection, company [name] registration into transcendental registry, etc.). The group has one single goal and in two moves conducts at least six distinct operations (the author of this chapter is dividing and putting them together at random, although the nature of narrative and counting makes them seem temporally sequential). The first three are simultaneous: (1) speech and complete mutual comprehension (›they said to one another‹), (2) mutual encouragement through speech, using the imperative (›let us‹), mobilisation and readiness of the actors to hold (self) awareness as being members of a larger whole, and (3) the invention of a new kind of building. The second three simultaneous actions, in addition to mutual encouragement and the imperative to move, include (4) maintaining focus, taking care of one another, and moving together jointly (›let us‹); (5) establishing collective intentionality and creating a grandiose joint building design; and (6) the founding of an institution (documentation, company), named and thus recognised as an independent actor. Of course, it is entirely clear that this group (its attribute is the use of the pronoun ›us‹ and the imperative ›let us‹) is comprised of individuals of different genders and ages (a plurality of I's), none of whom are in some way distinguished. There is no special member, leader, chief of this group who stands above others in any way or repeats the imperatives

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more than the rest. And the only goal of this group is that it remains a group (lest we be scattered abroad upon the face of the whole earth), having its identity, its own λ . In order for the group of refugees to hold together, for the belonging and trust in the group be ensured, lest it be scattered, meaning for it to be what it is, it is necessary that they, all together and in a disciplined way, conduct the listed activities (in a disciplined way means to learn together, produce science or a segment of science – a discipline¹¹ – with joint work). Only if they conduct these actions together (plural) does the group remain a group (singular), and they do not become scattered (plural).

The questions of whether the appearance of the institution, the institution of Europe (Gephart would say and let us make us a name) as such, is preceded by certain acts or actions or certain cooperative manipulations, games, equilibriums or, indeed, whether the institution as a normative group and normative agent (Christine Korsgaard) is preceded by certain group models and social facts, gatherings, associations are sophist questions, even if philosophy is of necessity composed of the (again very disciplined) practice of pondering such questions and corresponding answers. There remain still other dilemmas: does the cooperation precede the institution or is it simultaneous to it? Is the institution composed of constitutive or regulative rules and are those in fact different? Is the institution a game, and if so, what kind? Are the principles of justice separate for the institution, meaning that they should not be confused and mixed with the principles that suit individuals and their actions in special cases (as Rawls would have it in his *A Theory of Justice* from 1971)? Further, in what way does a group become *incorporated* and what kind of documentary and *policy* actions mean that an institution endures and successfully delays its inevitable end and decay (why is there an end, and why is it inevitable)? All these dilemmas already exist in the testimony of the grand action in Babylon, where a group, coming from somewhere, is already constituted since it speaks the same language and travels together, thus relocating.

New science or new learning (*discipline*), just like new learning about a group and joint work, at which this ancient grouping arrives, however, concerns time and successful duration and perseverance. If there is no common language at the beginning, no trust or transparent communication, the group cannot survive long enough to work together. Even if it works together and works in an entirely new way together, without a great plan (about Europe), without its company name, it will not endure. Consider now that this group has indeed discovered the ingenious invention of lasting and that it has indeed persisted. It is completely uncertain whether its destiny is successful or unsuccessful: The history of great visual fan-

¹¹ Werner Gephart writes about discipline and its significance (*Geist der Disziplin*) in his text on the Great War, insisting on the importance of Weber's definition of discipline (cf. Gephart: *Bilder der Moderne*, p. 95).

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tasies about these few lines from the *Bereshit* shows us that this work, this plan, this institution lasted for centuries before it was interrupted. It is not straightforward to conclude that we, now, as a large group that has come from elsewhere and has occupied the world, have *de facto* the same task and are in the midst of a great endeavour to institutionalise as Europe, lest we be scattered and perish.

Verses 8 and 9 describe how the intention of the group, the construction, tends to become bigger and bigger, to become a European city (leaving aside the potential variations here offered by Hebrew). That is, the location where the group with perfect language arrived from somewhere else, and where it relocated and undertook this joint endeavour, has actually become a place of prattle, jabber and babble (hence the word Babylon). In building a city (Europe), the group intends to mark this action with its name (Europe), thus preserving itself in one place with the act of naming. On the other hand, an action of some higher, dominant force (The Lord) annuls the institutionalised act of the group with its own intervention and its new label (Therefore is the name of it called Babel). It turns out that the sudden, brutal cessation of the web of actions of this group, the goal of which was joint endurance and self-preservation, meant that the overall initial unity was damaged once and for all (And the whole earth was of one language, and of one speech). Why and how is this possible?

A group of people that for whatever reason relocates, a group of refugees certainly, plans to create a *counter-institution* (an *ad*-institution): to set up something new, contemporaneous and parallel with the institution of the cosmos and world given by some other, higher force, (in this case *Yahweh*, *Elohim* or *Adonai*). *Counter* is not *against* because it originally meant parallel or *adjacent* or towards (in the direction of something, advancing toward the institution). The first normative moment, then, in the weakest possible sense of the word (norm before norm itself, hence possibly called *Kulturnorm*, following Max Ernst Mayer who in 1903 made a distinction between cultural and legal norms)¹² or an institutional moment *par excellence*, can be found in 11:4 when the group decides to have itself (to have identity): »And they said [the members of the group], Go to, let us build us a city and a tower, whose top *may reach* unto heaven; and let us make us a name, lest we be scattered abroad upon the face of the whole earth.« It would appear that this new institution (in)tends towards the already existing institution (high up in the sky), towards the sky, from whence (in verse 5) »the *Adonai* came down« (towards the group down below). There is also the danger of contest between two institutions,

¹² The term *Kulturnormen* was coined by one Max Ernst Mayer in a 1903 book (cf. Mayer: *Rechtsnormen und Kulturnormen*). This pupil of Jhering is mentioned also by Hasso Hofmann (cf. Hofmann: *Recht und Kultur*, p. 40). For us, the interesting chapter is the one in which Hofmann analyzes the history »des Begriffspaars Recht und Kultur« and the emancipation of the term »culture« (ibid., pp. 34 and after) in law and philosophy, which begins with Wilhelm Arnold's book *Cultur und Rechtsleben*, published in 1865.

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as well as of idolatry. These are standard interpretations of the future failure of the group and its grandiose construction. If we make use of this nearly forgotten distinction between cultural and legal norms,¹⁵ it seems that this institutional gesture performed by our group could belong to both culture (since it is a group that becomes a group, develops, is nurtured) and normativity (an act that then obligates all members of the group to remain together in one place). In order for the group to have its identity (name), in order to be big (as big as possible, »whose top *may reach* unto heaven«), it is not necessary that it be essentially different from other groups or an already established instance (such as our group). As a group, soon enough a corporation, company, alliance of states, it is in competition (sizing up, calculation) with other groups and cultures (as it is part of a large market, opulence), but not necessarily in conflict or opposition and thus at war with them. A group does not exclude other groups or cultures of groupings, nor does the group as *counter-institution* have to be destroyed, as it happened to that group of masons many centuries ago.

Still, why was then this group or institution or *counter-institution* destroyed? Verses 5–7 describe the descent of the higher force and his control (in the masculine), his testimony and assessment as well as a description of the ambitious party of extraordinary powers, which is not to be hindered in its unusual intention and action (such a description is at once a challenge to this higher force to show that it is in every way more powerful than the group). Verse 7 is the *chef d'œuvre* of the author of this story: the higher force, always presenting itself in the first person plural (power being always presented as plurality in one, the royal »we«, the sovereign, Leviathan), mobilises its plurality with the same words with which the group constituted itself (»let us«), intending to take away from the group the condition-less condition of the institution or institutionalisation: language (»Go to, let us go down, and there confound their language, that they may not understand one another's speech«).

The result of the intervention of this higher force (a genocidal act, given that there is a clear intention to destroy the »groupness« of a group, that is, the connection among its members or what makes the group a group: language, building structure, living space, etc.) is that the individuals are once again dispersed and play the way Pieter Bruegel the Elder painted them in *Children's Games*: each individual for itself or in minimal groups.

¹⁵ In the words of Max Ernst Mayer, »Normen (oder Rechtsnormen) sind Regeln ... sie sind also Imperative, entweder positive (Gebote) oder negative (Verbote).« *Rechtsnormen* should be harmonised with *Kulturnormen* (»daß die Rechtsnormen übereinstimmen mit den Kulturnormen«). Mayer's definition is as follows: »Den Ausdruck »Kulturnormen« gebrauche ich als einen Sammelnamen für die Gesamtheit derjenigen Gebote und Verbote, die als religiöse, moralische, konventionelle, als Forderungen des Verkehrs und des Berufs an das Individuum herantreten.«

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Here are five trivial assumptions. Was this group – this very cooperative and mobile group, where all worked with each other, jointly endeavouring to execute a grand project – destroyed because it was still not sufficiently institutionalised? (For example, was there, perhaps, a sudden appearance of corruption and negligence that prevented an efficient realisation of the project, making it late?) Was it destroyed because it was a *counter-institution*, which would mean that the institutional action of the higher force did not care for (and forcibly dealt with) the emergence of any competing institution (one of the orthodox or standard interpretation of this event)? Was it destroyed because the group was relocating, changing its dwelling, and began, as refugees on a territory not native to them, the building of an ill-advised and illegal structure, without license and proper documentation? Was it destroyed because this new institution was itself unjust (poor working conditions with many worker fatalities, too many benefits for the indolent)? (Both Rawls and Scanlon speak of an ›unjust institution‹, where individuals advertise or protest against the institution, against inequality and hierarchy, seeking balance and equality.) Or was the group perhaps destroyed because the amount of its negative social acts, because its cruelty and lack of engaging acts were fatal?

All these questions, dilemmas, paradoxes stand before Werner Gephart when he has to make a quick description of Europe in the form of Babylon. He first adds a few new elements. Primarily come the main European institutions, the main buildings, skilfully fit into Bruegel's dilapidated walls. Thus, European institutions or Europe becomes part of this grandiose ruin. Then there are two instances in the upper left, one being the hot-air balloon, flying the British flag, as if fleeing, but certainly separating in protest or from dissatisfaction with the great European ruined structure; the other a group of people, disengaged, and no longer part of collective, which is also Gephart's way of confirming that there is surely something outside the monstrous European institution. Then there is the lower right, the figure of Max Weber, that is, the instance that ›critically observes the scene‹, as Gephart writes. Both Max Weber (probably the instance of the social and legal theorists as ›forming form of the society‹ [Simmel] or perhaps the reader, or indeed the author himself, Werner Gephart) and the Brexit balloon are, however, a consequence or remnant of the great normative chaos emanating from the heart of the tower in great concentric waves resembling a large target and spreading towards the periphery of this structure. At the centre, we find the symbol ›§‹. Thus, the paragraph, §, or ›paragraphing‹, is at the centre, a chaotic plurality of miniscule paragraphs, stuck to the walls of the tower's façade. Why ›§‹? What is Werner Gephart's intention?

It seems that in the course of the coordination of joint work and rules of work of various groups, thus the coordination of different characteristics of individual parts of one single group, certain irregularities and abnormalities appeared. The paragraph ›§‹ represents the norm, or normative capacity, and Werner Gephart

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thinks that in Europe the problem has appeared in that place. It further leads to uncertainty and decay of the compactness of this large group. This is why Europe ought to be represented, according to him, as the Tower of Babel in ruins; but as ruins that still survive (as ruins), even with insufficient chance of true reconstruction and renewal. Visually, Gephart inserts many paragraphs, »§« into the great body of the European structure, which means he inserts many disharmonised and dispersed norms, actually not in cohesion and order (these are intervals without connection). This scattering and excess of norms, according to Gephart, precedes misunderstandings in language as well as separation and dispersion of members of the great European family. This visual intervention Gephart explains in the accompanying text: »(...) the non-transparent production of a multitude of legal rules that overlay national legal cultures. (...) an abstract scheme of the non-production process is inserted«. Variations of the words production and non-production are certainly more difficult to understand than the visual interventions. It thus seems to us that this interpretative action by Werner Gephart belongs to the family of very successful attempts to resolve the secret destruction of the Tower of Babel (the great joint work of all). His effort, paradoxically, leaves hope that the time of building, the time of institutional design and of correction (of paragraphing) are still ahead and that the enemies of Europe will have to wait a while longer for the final failure of the European project. Max Weber, or our sage in the right corner of this painting who »critically observes the scene«, is the true guarantee that this is still possible.

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