

CRITICAL LEGAL THEORY

Edited by
Costas Douzinas and Colin Perrin

CRITICAL CONCEPTS IN
LAW



CRITICAL LEGAL THEORY

Critical Concepts in Law

*Edited by Costas Douzinas and
Colin Perrin*

Volume II

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Part 3

PHILOSOPHICAL

LAW: A MAP OF MISREADING

Toward a postmodern conception of law

Boaventura de Sousa Santos

Source: *Journal of Law and Society* 14:3: (1987): 279–302.

Introduction

In *Thus Spoke Zarathustra* Nietzsche announced that the spirit has undergone three metamorphoses.¹ In the first one the spirit becomes a camel; then the camel becomes a lion; and finally the lion becomes a child. While a camel, the spirit allows itself to be loaded with any values or beliefs humanity wants to load it with. But while speeding into the desert the spirit undergoes a second metamorphosis and the camel becomes a lion. The lion is the animal in revolt against the values and beliefs it was loaded with before. The lion is the spirit of negativity that substitutes 'I will' for 'thou shalt'. But because it merely acts against, the lion is a purely negative being, incapable of creating new values to replace the old ones. In order to take this further step the spirit must undergo a third metamorphosis through which the lion becomes a child. As a child the spirit is innocent and forgetting, it is a new beginning, the creation of new values. Only then will the spirit will its own will and conquer its own world.

I would like to suggest that law has also undergone three metamorphoses in the modern era. However, the sequence of the steps has been reversed. In the seventeenth and eighteenth centuries law started out as a child. The new theories of natural law and the liberal political philosophy were a magnificent new creation of values and beliefs that testified to the emergence and consolidation of bourgeois society. But as the nineteenth century wore on, the law became the lion of negativity. It was the time when law was resisting against the demands which the social question had given rise to and which were being pressed into the political agenda by emergent social and political forces. In the twentieth century, and particularly after the Second World War, the law underwent a third metamorphosis. It gave up resistance in docile submission to the whole range of values and beliefs – sometimes complementary, sometimes contradictory – that the different social and political forces imposed upon it. In sum, law became a camel, and the welfare state is the most salient feature of this process of 'camelisation' of the law.

As we approach the end of the century and start thinking *fin de siècle*, many voices rise against the camelisation of the law. Habermas has spoken of the excessive colonisation of the life-world (*Lebenswelt*) by law.² Nonet and Selznick plead for a responsive law³ and Teubner for a reflexive law.⁴ In all these theories there is a call for a new metamorphosis of the law, one that will bring it back again to its proper and natural limits, whatever they may be.

In this paper I will not be interested in the nature or even the possibility of such a metamorphosis. If it can be said that numbers – like reason – play tricks on us, it may well be that the three metamorphoses having already taken place, the magical number three will not allow for a fourth metamorphosis. Or it may be, in Nietzschean terms, that such a metamorphosis will not engender a law with a new spirit but rather a law without a spirit, that is, the end of law, be it a rhetorical end, as in O'Hagan's *The End of Law?*,⁵ or a literal end as in Foucault's denounced substitution of disciplinary power for juridical power.⁶

In this paper I am concerned rather with a preliminary task. My starting point is that the camelisation of law has brought with it the camelisation of the sociology of law and, accordingly, that before the 'decamelisation' of the law may be attempted, a full decamelisation of the sociology of law must be accomplished. What are the symptoms of the camelisation of the sociology of law? Probably better than anyone else, Richard Abel has denounced that:

... social studies of law have reached a critical point in their development. The original paradigm is exhausted. Until new ones are constructed, scholarship will be condemned to spin its wheels, adding minor refinements to accepted truths, repeating conventional arguments in unresolvable debates.⁷

Two major factors are responsible for this impasse. The first one, identified by Abel, is that:

... sociological studies have borrowed most of their research questions from the object of study – the legal system (whose problems are defined by legal officials) – and from those who studied it first – legal scholars (themselves lawyers).⁸

The second factor, recently emphasised by David Nelken, is that the law and society have been conceived in the conventional paradigm, as two separate and distinct realities or entities which are then juxtaposed in order to investigate the extent to which they correspond or do not correspond. The most important 'exemplars' of sociological research on law have been developed from this conception (the study of the relations between law in books and law in action and the study of the impact of society on law or, inversely, the study of the impact of law in society).⁹

In recent years there have been some attempts away from this theoretical gulag: I will mention three of them. The first one is the research on legal pluralism in contemporary society which challenges the conventional paradigm in two ways. On the one hand, while legal officials and legal scholars assume the state monopoly of legal production, research on legal pluralism maintains the existence and circulation in society of different legal systems, the state legal system being one of them, even if the most important one. On the other hand, such a broader conception of law indicates a more complex relation between law and society, since there is not one single law but a network of laws that must be matched with society.¹⁰ The second new direction in socio-legal studies is the whole movement (and stasis) of critical legal studies in the United States of America and the United Kingdom as well as in France and Mexico or in Portugal and Italy. By transforming legal science and legal scholarship into an object of scientific research, critical legal studies carve out an autonomous field of enquiry and thus maintain "a critical distance from the self-conceptions of legal professionals", as Alan Hunt has put it.¹¹ The third attempt away from the conventional paradigm is the research on the obstacles or constraints limiting both the impact of law on society and the impact of society on law and, more generally, the research on the lack of correspondence between forms of law and social structures of which Stuart Henry's recent book on private justice is a good example.¹²

I am not going to dwell on any of these lines of research. I will only mention some of their shortcomings and the questions they leave unanswered. First, if we substitute the soft law of legal pluralism for the hard law of legal scholarship, where does pluralism end? What is law, and where is it? Secondly, in spite of their proclaimed distances in relation to conventional legal science, all these lines of research share its exclusive concern with the normative content of law. Normativity is surely the heavy reality of the law. But law is also imagination, representation, and description of reality. Where, then, is the non-normative dimension of the normative? How is it constructed? Thirdly, it is important to show that the correspondence between law and society is far more complex than previously admitted, or even that there is no correspondence. But these findings seem, then, to assume that the only possible relation between law and society is that of correspondence or lack of correspondence. This assumption leaves unanswered or even suppressed the question of whether law and society may relate other than through correspondence or lack of correspondence.

I have attempted to answer the first question elsewhere.¹³ In this paper I will try to concentrate on the second and third questions. In order to do that, allow me to take you to some exotic places, both real and symbolic. The title of this paper is taken from the title of a book by Harold Bloom, one of the most creative literary critics of our time.¹⁴ According to his theory of poetic creation, in order to be original each poem must misread the poetic tradition which comes down to it through the generations and generations of poems and poets that preceded it. Poets suffer from the anxiety of influence and poetry is always the result of the

poet's attempt to deny it. Poets overcome the anxiety of influence by misreading (or distorting) poetic reality.

I chose this title for two reasons. Firstly, because I think that law, like poems, must misread or distort reality and for similar reasons. Poems misread in order to establish their originality, while laws misread in order to establish their exclusivity. Irrespective of the plurality of normative orders we detect in society, each of them, taken separately, aspires to be exclusive, to have the monopoly of the regulation and control of social action within its legal territory. This is most patently the case with state laws, be they labour laws, criminal laws, or administrative laws. In order to operate adequately, a given labour law, for instance, must not only negate the existence of other normative orders or informal laws (such as factory codes, production of customary laws, etc.) that might interfere in its realm of application, but also revoke all the state labour laws that have previously regulated the same labour relations. This is, as we well know, a double misreading of reality. On the one hand, as legal pluralist research tells us, other normative orders do operate and are effective in the same legal territory. On the other hand, since law and society are mutually constitutive, the previous labour laws, once revoked, nevertheless leave their imprint on the labour relations they used to regulate. Though revoked, they remain present in the memories of things and people. Legal revocation is not social eradication.

This misreading of reality is not chaotic. It occurs through determinate and determinable mechanisms. Moreover, the distortion of reality which it implies does not automatically mean a distortion of truth. We have assumed too lightly in the past that truth and reality are one and the same thing. Closer attention to the pragmatics of legality may force us to conclude that such an assumption is an illusion produced by the correspondence paradigm concerning the relations between law and society. Now, here lies the second reason for the title of my paper. In my view, the relations law entertains with social reality are much similar to those between maps and spatial reality. Indeed, laws are maps; written laws are cartographic maps; customary, informal laws are mental maps. This is a strong metaphor and as such it will be taken literally, hence the subtitle of this paper might very well be: "on taking metaphors literally". In the following section I will draw extensively on the work of cartographers and I will try to show how much sociology of law may learn from cartography. I will deal with the structural features of maps and map-making as well as with the phenomenology of using maps.

Understanding maps

The main structural feature of maps is that in order to fulfill their function they inevitably distort reality. The great Argentinian writer Jorge Luis Borges has told us the story of the emperor who ordered the production of an exact map of his empire. He insisted that the map should be exact to the most minute detail. The best cartographers of the time were engaged in this important project.

Eventually, they produced the map and, indeed, it could not possibly be more exact, as it coincided point by point with the empire. However, to their frustration, it was not a very practical map, since it was of the same size as the empire.¹⁵

To be practical a map cannot coincide point by point with reality. However, the distortion of reality thus produced will not automatically involve the distortion of truth, if the mechanisms by which the distortion of reality is accomplished are known and can be controlled. And, indeed, that is the case. Maps distort reality through three specific mechanisms and since they are used systematically they become intrinsic or structural attributes of any map. Such mechanisms are: *scale*, *projection*, and *symbolisation*. They are autonomous mechanisms that involve different procedures and require separate decisions. But they are also interdependent. As the American cartographer Mark Monmonier put it:

... all advantages and limitations of maps derive from the degree to which maps reduce and generalise reality, compress or expand shapes and distances and portray selected phenomena with signs that communicate without necessarily resembling visible or invisible characteristics of the landscapes. The three elements of a map are interdependent. Scale influences the amount of detail that can be shown and determines whether or not a particular kind of symbol will be visually effective.¹⁶

Maps should be convenient to use. There is thus a permanent tension in maps between representation and orientation. These are contradictory claims and maps are always unstable compromises between them. Too much representation may hinder orientation, as we saw in Borges's map. Inversely, a very accurate orientation may result from a rather poor and elementary representation of reality. When you are invited to a party in a house whose location you do not know, the host will probably draw a map which will be very effective in orienting you though very inaccurate in representing the features of the environment along the way to your destination. One more example: some of you may have seen medieval *portolans*, those maps of ports and coasts well-renowned in the Middle Ages which, though very poor as far as representation of the globe goes, were very effective in orienting navigators at sea.¹⁷ There are maps that solve the tension between representation and orientation in favour of representation. These I would call, borrowing from French cartography, image maps. Other maps solve the tension in favour of orientation. These are instrumental maps.¹⁸

I would like to suggest that this dialectic of representation and orientation applies to law as much as it applies to maps. In the analysis of the relations between law and society we should substitute the complex paradigm of scale/projection/symbolisation for the simple paradigm of correspondence/non-correspondence. In the following I will linger on maps a little while to analyse in more detail each one of the procedures through which maps distort reality. In the process I hope to interest you in the fascinating world of maps. As Josef Konwitz has said, "It is

a supreme irony that maps, though they are one of the most common cultural metaphors, are still far from occupying the place they deserve in the history of mentalities."¹⁹

The first major mechanism of representation/distortion of reality in maps is scale. Scale, as Monmonier has defined it, "is the ratio of distance on the map to the corresponding distance on the ground".²⁰ Scale involves, then, a decision on more or less detail. "Since large-scale maps represent less land on a given size sheet of paper than do small-scale maps, large-scale maps can present more detail."²¹ Since maps are "a miniaturised version" of reality,²² map-making involves the filtering of details, "the selection of both meaningful details and relevant features".²³ As Muehrcke put it, "what makes a map so useful is its genius of omission. It is reality uncluttered, pared down to its essence, stripped of all but the essentials."²⁴ One easily understands that the decision on scale conditions the decision on the use of the map, and vice-versa. "Small-scale maps are not intended to permit accurate measurements of the width of roads, streams, etc., but rather to show with reasonable accuracy the relative positions of these and other features."²⁵

Geography, which shares with cartography the concern for spaces and spatial relations, has also contributed important insights on scales, both scales of analysis and scales of action. As to the former, there are phenomena that can only be represented on a small scale, such as climate, while others, like erosion, for instance, can only be represented on a large scale.²⁶ This means that the differences in scales are not simply quantitative but they are also qualitative differences. A given phenomenon can only be represented on a given scale. To change the scale implies change of the phenomenon. Each scale reveals a phenomenon and distorts or hides others. As in nuclear physics, the scale creates the phenomenon. Some of the fallacious correlations in geography derive from the superimposition of phenomena created and analysed on different scales. The scale is "a coherent forgetting" that must be carried out coherently.²⁷

Mediating between intention and action, scale applies also to social action. Urban planners as well as military chiefs, administrators, business executives, legislators, judges, and lawyers define strategies on a small scale and decide day-to-day tactics on a large scale. Power represents social and physical reality on a scale chosen for its capacity to create those phenomena that maximise the conditions for the reproduction of power. The distortion and concealment of reality is thus a presupposition of the exercise of power.

The second mechanism of representation/distortion of reality is projection. To be useful maps must be easily carried about and stored. Flat maps can be rolled and folded. It is by means of projection that the curved surfaces of the earth are transformed into planes. The most convenient transformation cannot yield flat maps without distorting shapes and distance relationships. I am not going to bother you with the specifics of projections, the different types of projection and the distribution and degrees of distortion characteristic of each of them.²⁸ I will only make a few general remarks that are relevant to my argument. The first

remark is that projections do not distort reality at random. Each type of projection creates a field of representation within which forms and degrees of distortion are unequally but determinably distributed. For instance, some projections distort the equatorial regions more than the polar regions, while others do the opposite. Moreover, the different projections distort the different features of the space differently. Some projections (called the conformal projections) preserve areas but distort angles and shapes and directions, while other projections (called equivalent projections) do the inverse. We cannot get the same degree of accuracy in the representation of all the different features and whatever we do to increase the accuracy in the representation of one given feature will increase the distortion in the representation of some other feature. It is very much like the uncertainty principle of Heisenberg in quantum physics, according to which we cannot measure the velocity and the position of the particles simultaneously and with the same degree of precision and whatever we do to increase accuracy in determining the position will distort the measurement of velocity.

Every map projection is thus a compromise. The decision on which kind of distortion to prefer is conditioned by precise technical factors but it is also based on the ideology of the cartographer and on the specific use intended for the map. For instance, during the cold war the western mass media used to show the Soviet Union on a world map designed according to the cylindrical projection of Mercator. Since this kind of projection exaggerates the areas in high and median latitudes in detriment of those in inter-tropical latitudes, such a map would inflate the size of the Soviet Union, thus dramatising the extent of the communist threat.²⁹

The second remark on projection is that each map, each historical period or each cultural tradition of map-making has a centre, a fixed point, a physic or symbolic space in a privileged position around which the diversity, the direction, and the meaning of other spaces is organised. For instance, medieval maps used to put a religious site at the centre – Jerusalem in the European maps, Mecca in the Arab maps.³⁰ The same happens with mental maps, that is, with the cognitive visual images we have of the world around us. As Muehrcke said, “most of our mental maps would emphasise our own neighbourhood, with its environments assuming less significance.”³¹

Symbolisation is the third mechanism of map representation/distortion of reality. It refers to the representation of selected features and details of reality in graphic symbols. Without signs the map will be as unusable as Borges’s map. Such is the case of the Bellman’s map in Lewis Carroll’s *Hunting of the Snark*.³² You may remember the verses:

... One could see he was wise,
the moment one looked in his face!

He had brought a large map representing the sea,
without the least vestige of land: And the crew were much pleased
when they found it to be. A map they could all understand.

“What’s the good of Mercator’s North Poles and Equators,
Tropics, Zones and Meridian Lines?”

So the Bellman would cry: and the crew would reply.

“They are merely conventional signs!”

“Other maps are such shapes, with their islands and capes!

But we’ve got our brave Captain to thank”

(So the crew would protest)

“that he’s brought *us* the best –

A perfect and absolute blank!”³³

Cartographic language is a fascinating theme and semiotics has provided its research with new analytical tools. The sign systems have evolved over time and still today different systems may be chosen according to the specific cultural context of the map-maker or according the purposes of the maps. In a recent book on this topic, J. S. Keates, drawing from semiotics, distinguishes between iconic signs and conventional signs.³⁴ Iconic signs are naturalistic signs that establish a relation of likeness with the reality represented (for instance, a bunch of trees to designate a forest) while conventional signs are far more arbitrary. “Convention holds that certain types of symbols are appropriate for certain types of phenomena” – for instance, linear symbols for roads and boundaries and graduated circles for cities and towns.³⁵ If we look at the historical record it will show that the sign systems used in maps were initially more naturalistic and gradually became more conventional.³⁶ But even today, according to many circumstances, maps may be more figurative or more abstract; they may rely on emotive/expressive signs or on referential/cognitive signs; they may be more readable or more visible.³⁷

You may be surprised with this digression on maps. Clifford Geertz said that law was a way of imagining the real.³⁸ My argument is that there are many unresolved problems in the sociological study of the law that may be solved by comparing law with other ways of imagining the real. Maps are one such way. There are, in fact, striking similarities between laws and maps – both concerning their structural features and their use patterns. Obviously, laws are maps only in the metaphorical sense. But, as rhetoric also teaches us, the repeated use of a metaphor over a long period of time may gradually transform the metaphorical description into a literal description.³⁹ Today laws are maps in a metaphorical sense. Tomorrow they may be maps in a literal sense.

A symbolic cartography of law

I will now present the outline of what I would call a symbolic cartography of law. I will try to show that the national (and the international) territory consists of several social spaces which, though autonomous, interrelate in different ways. Within each social space and across spaces different kinds of juridical capital