Critical Jurisprudence

THE POLITICAL PHILOSOPHY OF JUSTICE

Costas Douzinas and Adam Gearey

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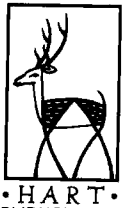

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Embarking; Passages

I

This is the logbook of a journey. It started a long time ago, just before the end of the war (Troy had not yet fallen, but Cassandra's oracle had cast a thick shadow over the city).

The first leg was good; the sea was calm, a good northern wind, the cabinets well-stocked with bread, wine and exotic herbs, the crew full of spirit. Then news of Troy's fall reached us. We also heard that Menelaus had sailed. We were not to see him again. Philoktetes' illness started soon after, the pain, the horrible pain he did not want us to know about. How can you share the pain of a friend? Can you take some of it yourself to help him bear it? Or does pain seal them into their own world?

Understanding things does not mean that we can experience them. Knowledge and life are two different worlds. Nothing was the same after that revelation. Philoktetes stayed in Lemnos. We sailed on with his bow. But, separated from its master, it had lost its power. We met the Sirens whose words were even more enticing than their melody. They sang beautifully of how they would give knowledge to every man who came to them; ripe wisdom and a quickening of the spirit. Later, we landed on Circe's island and stayed for a while. The algos (pain) for nostos (day of return) became plain hurt. Ithaca was no longer a destination or even a fantasy, just something immemorial that had to be forgotten. Lethe did not bless us. You can never return home.

Later, the Christians came. They shook things up with new stories.

Other cities fell. We heard of wars in the desert. Tragedies turned to farce. The world seemed to move far faster than our words. Perhaps the best use for books now is purely practical. Texts of philosophy can plug leaks in the hold; bonfires of sonnets keep us warm on dark nights. As for history, pages torn from Thucydides make fine paper hats for clowns.

II

Early plans for a book of this kind were made by Ronnie Warrington, Peter Goodrich and Costas Douzinas. Ronnie's untimely death made it impossible to continue. Peter and Costas also began to move in different intellectual directions. However, Ronnie and Peter's work still remains the keel and ballast of this book. They are both part of this book and indelible parts of Costas' world. Adam joined the project and brought the wisdom of (relative) youth and the

élan of style. In this long peregrination through ideas and philosophies, many people served as supporters, crew or chandlers. Shaun McVeigh, Piyel Haldar, Alexandra Bakalaki, Peter Rush, Alison Young and Les Moran have been companions throughout the long journey. Christos Lyrintzis, Maria Komninos, Nicos Douzinas, Kostis Douzinas and Nancy Rauch-Douzina have been the most generous donors of ideas and fortifications. A version of Chapter 7 was published as 'Identity, Recognition, Rights' (2002) 29/3 *Journal of Law and Society* 379–405.

III

We are most grateful to Richard Hart, Mel Hamill, Anna Greer and Rachel O'Dowd whose hard work and vision made this book.

IV

Other influences and voices that speak here: Paul Virr, Robert Cartledge, Ari Hirvonen, Panu Minkinnen, Angus MacDonald, Peter Goodrich, Anthony Farley, Melanie Williams, Maria Aristodemou, Nathan Moore, Louis Wolcher, Thanos Zaratoulidis, Peter Fitzpatrick, Maria Drakopoulou, Karin Van Marle, Johan Van der Walt, Wessel Le Roux and the many friends at Birkbeck and the CLC.

V

Mary, my lode star, thank you. Niamh, little bear, dancing light.

VI

Phaedra Douzinas' life spans the period of this adventure and has inspired some of its finishing touches. Joanna Bourke has been the closest of fellow-travelers for a long time. Her quiet wisdom, natural elegance and unceasing love have convinced me that this trip is worth finishing (if it ever will), even at the time of the tempest.

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Part 1

Introductions

1

From Restricted to General Jurisprudence

JURISPRUDENCE AND MODERNITY

EARLY MORNING PIRAEUS. The city is beginning to wake; workers hurry to the metro, squeeze into buses and the metal shutters of cafés rattle up; already the roads are full of traffic; the smell of petrol and cigarettes. But after London even this air is refreshing. A slight breeze on the quay. Look out to the sea, waiting for the ferry. The surrounding hills emerge from the shadows into the sharpest of outline in the morning sun, becoming intense. The city itself sprawls into a haze of heat. When should I go aboard? Later, azure light on the water. Islands and mountains stand out hard edged in the sun glare.

Reading law books is like eating sawdust.[1] Few of us have escaped the dry taste in the mouth occasioned by the study of jurisprudence. And yet jurisprudence is the prudence, the *phronesis* of *jus* (law), law's consciousness and conscience. What does this mean? All great philosophers from Plato to Hobbes, Kant, Hegel and Weber had either studied the law or had a deep understanding of legal operations. Juristic issues have been central to philosophical concerns throughout history. Well before the creation of the various disciplines, when thinkers wanted to contemplate the organisation of their society or the relationship between authority and the citizen they turned to law. Plato's *Republic* and Aristotle's *Ethics* as much as Hegel's *Philosophy of Right* are attempts to examine the legal aspects of the social bond, to discover and promote a type of legality that attaches the body to the soul, keeps them together and links them to the broader community.

But this first meaning of wisdom (as the consiousness of law) cannot be separated from a second: jurisprudence is the conscience of law, the exploration of law's justice and of an ideal law or equity at the bar of which state law is always judged. As the wisdom of law, jurisprudence brings together *is* and *ought*, the

[1] Franz Kafka, *Letters to Friends, Family and Editors* (1977).

positive and the normative, law and justice. Plato's *Republic* is the first and most extended search for the meaning of justice in the western canon, while his *Laws* were a constitutional blueprint and a complete guide to legislation two millennia before Bentham.

Seen from the perspective of the *longue durée*, the law represents the principle of social reproduction; the passing on of what survives our brief sojourn in this world. Whenever classical philosophy occupied itself with the persistence of the social bond, it turned to law and became legal philosophy—the great source from which political philosophy and then the disciplines, sociology, psychology, anthropology, emerged in the seventeenth and nineteenth centuries respectively.

All major early modern philosophers were jurists. Thomas Hobbes was preoccupied with the common law, *Leviathan* is a clear exercise in jurisprudence. Immanuel Kant, the philosopher of modernity par excellence wrote extensively on legal issues and at the end of his life came up with a blueprint for a future world state based on international law and respect for freedom and rights. Hegel and Marx wrote superb jurisprudential texts but were also well versed in the positive law of their time. Emile Durkheim and Max Weber, the founders of sociology, wrote extensively on law and used types of legality as markers for the classification of different social systems.

But the birth of the disciplines from the womb of legal philosophy led to an impoverishment of legal study and jurisprudence. Two types of poverty accompanied modern legal theory, cognitive and moral. Through its cognitive impoverishment, legal scholarship became an entomology of rules, a guidebook to technocratic legalism, a science of what—legally—exists, and a legitimation of current policies. Edmund Burke called this obsession with reason, rights and codification metaphysical 'speculatism'.[2] Rationalism and positivism, doctrine and dogma replaced the humanistic immersion in the legal text. But rule formalism is a woefully inadequate representation of the legal enterprise even at the descriptive level. As a result, legal scholarship became academically peripheral—an examination and understanding of law unnecessary and uninteresting for the social sciences and disciplines. Legal education took the form of vocational skills training and was treated as such by both students and the rest of the academy. When legal academics complain about students' lack of interest in theoretical or other 'extracurricular' issues we have only ourselves to blame. We have set ourselves up as the purveyors of a technical knowledge that must be condensed, memorised and repeated—the death of the soul and the intellect. But as old Nietzsche said of his own studies, when the only organ addressed by the professor is the ear, it grows disproportionately large by eating away at the brain.[3]

How can we read this story of decline? The history of jurisprudence can be described as the movement from general to restricted concerns. This gradual

[2] E Burke, *Reflections on the Revolution in France*, JGA Pockock (ed), (London, Hackett, 1987) at 51, and see C Douzinas, *The End of Human Rights* (Oxford, Hart, 2000), 148–57.

[3] Nietzsche, quoted in J Derrida, *The Ear of the Other*, P Kamuf (trans), (New York, Schocken, 1985) 53.

diminution of scope and the replacement of thinking about the law of the law by a technical and professional approach have given us the standard jurisprudence textbook. Generations of jurisprudence writers have subdued their readers by obsessively repeating the question 'what is law?' and have presented legal theory as the history of the meaning(s) of the word 'law'. The 'concept' of law, the 'idea' of law, and 'law's empire' are titles of some of the most influential jurisprudence textbooks.[4] This 'ontological' enquiry indicates a certain anxiety about law's proper domain. We have to spend so much energy thinking about the essence of law because it is assumed that the law does have an essence. Once this essence is discovered, glittering like a lost coin, it will allow law to be separated from non-law. But this essence is always under threat, subject to contamination by non-law or pseudo-law—clipped coins and forgeries, which, if admitted to law's empire, may endanger its reason, coherence and systematicity.

Jurisprudence thus sets itself the task of uncovering and pronouncing the truth about law. It approaches the task by following two major approaches, the internal and external. Internal theories adopt the point of view of the judge or lawyer and try to theorise the process of argumentation and reasoning used in institutional discourse. This method often deteriorates into an extended set of footnotes to judicial pronouncements, a practice useful for a certain type of pedagogy but intellectually suspect, and, as tasteless as Kafka's sawdust. External theories, on the other hand, typically the sociology of law and Marxist approaches, treat reasons, arguments and justifications as 'facts' to be incorporated in wider non-legal explanatory contexts. The task here is to identify the causal chains that shape or are shaped by legal practices. External theories could be used as a corrective to the excessive formalism of jurisprudence. They can provide the background and methodology for empirical socio-legal research, which explores the economic and social effects of legal operations and domination. They are interested in behavioural patterns and the motivations rather than the intentions of people; they focus on social structures, on the causes and unintended consequences of action rather than individual agency. But the law is preoccupied with individual choice, will and liability while structural and institutional concerns are secondary. As a result sociological and socio-legal scholarship has remained marginal. Normative jurisprudence has become the standard fare of the law-school curriculum and external theories have been demoted to an occasional supplement for the politically aware, or re-positioned as sociology and criminology courses for those who are bored with the law curriculum or drawn to the romance of scholarship rather than to the cold utilitarianism of legal practice.

Within normative jurisprudence, legal positivism has been the dominant and typically modernist internal approach. Positivism is both the cause and effect of the moral poverty of the jurisprudence of the twentieth century. Positivism

[4] HLA Hart, *The Concept of Law* (Oxford, Clarendon, 1979); D Lloyd, *The Idea of Law* (London, Penguin, 1978); R Dworkin, *Law's Empire* (Oxford, Hart, 1998).

based the legitimacy of law on formal reason and on the consequent decline of ethical considerations. Using the strict distinction between fact and value, positivists excluded or minimised the influence of moral values and principles in law. The effort was motivated by cognitive-epistemological and political considerations. Hans Kelsen and Herbert Hart, the two towering influences of continental and Anglo-American positivism, turned the study of law into a 'science'. A 'science' of law could only be founded on observable, objective phenomena, not on subjective and relative values. Kelsen called his approach a 'pure theory of law', a discourse of truth about norms.[5] The object of study was defined as the logical hierarchy of norms, presented as a coherent, closed and formal system, a legal grammar guaranteed internally through the logical interconnection of norms and externally through the rigorous rejection of all non-systemic normative matter, such as content, context or history. All correct legal statements in legislation and adjudication follow a process of subsumption of inferior to superior norms. No possibility of conflict between the higher and the lower norm exists. At the basis of the pyramid a presupposed *Grundnorm* sets the system into motion but is an abstract imperative, an empty norm with no substantive value.

Herbert Hart, the most prominent English positivist, constructed his theory in a more pragmatic fashion. Hart calls his *Concept of Law* both an essay in descriptive sociology and an analytical jurisprudence. Distinguished both from coercion and from morality, law should be approached as a coherent and self-referential system of rules. As rules refer to other rules, their systemic interdependence determines the existence, validity and values of any particular rule. Hart shifts the question from 'what is law?' to 'what is a modern legal system?' and finds the answer in the combination of primary rules of obligation, such as those of crime or tort, and secondary rules or rule-governed mechanisms which enable primary rules to be enacted, changed and applied. Behind all, a master rule, the rule of recognition, determines whether a particular rule is legal and whether a legal system exists. But when Hart turns from his virulently systemic order to the actual interpretation and application of the rules, a small crack appears in the edifice. In most cases, legal terms and rules have a paradigmatic core of settled meaning, which makes interpretation non-controversial. Occasionally, however, certain terms have a linguistic or motivated indeterminacy—a 'penumbra of doubt'—as to their meaning. In such instances, the interpreting judge and the rule-applying administrator must exercise a degree of discretion. Discretion re-introduces moral, political or policy-based value-choices. But this was the dreaded supplement, the Trojan horse of moralistic naturalism, that positivism had tried to keep at bay.

The political dimension of the attempt to exclude morality from the legal domain should be sought in the modern experience of relativism and pluralism. The fear of nihilism is also important. In the positivist world-view, law is the

[5] H Kelsen, *The Pure Theory of Law* (Berkeley, University of California Press, 1934).

answer to the irreconcilability of values, the most perfect embodiment of human reason. Its operation should not be contaminated by extrinsic, non-legal considerations, lest it loses its legitimatory ability. These claims can be found throughout the law curriculum. Let us list some. Private law turns social conflict into technical disputes, the resolution of which are entrusted to public experts and technicians of rules and procedures. Public law imposes constitutional limits and normative restrictions upon the organisation and exercise of state power. Rules de-personalise power and structure the exercise of discretion by excluding subjective values—they restrict choice in the application of law by administrators and judges. Indeed, the rule of law is presented as the law of rules, the main achievement of which is to rid the law of ethical considerations. We encounter this attitude in the distrust of administrative discretion and of judicial creativity; in the antipathy towards administrative tribunals, legal pluralism and non-judicial methods of dispute resolution; in the insistence on the declaratory role of statutory interpretation and the 'strictness' of precedent; finally, in the emphasis on the 'literal' rule of interpretation which allegedly allows the exclusion of subjective preferences and ideologies.

But the banning of morality from legal operations did not protect the common law from its many shortcomings. On the contrary, the many miscarriages of justice revealed since the Eighties, law's persistent racism and sexism, its aloofness from social reality and its highly unrepresentative personnel indicated that the proclaimed absence of morality lies at the heart of the problem. At this crucial point, jurisprudence turned its attention to hermeneutics, semiotics and literary theory as an aid to the failing enterprise of positivism. The hermeneutic turn was motivated by the urgent need to correct the descriptively inadequate and morally impoverished theory of law. The new hermeneutical jurisprudence insisted that the law is not just a system of rules—that additionally, it contains a huge depository of values and principles and a rich thesaurus of meanings. We may disagree as to the meaning of any particular statute or precedent, we may even accept that judicial reasoning and justification can legitimately lead in conflicting directions, but as a minimum, the law is about the interpretation of its own texts. Law is written to be applied in the future; interpretation is the life of the law. We must abandon, therefore, the *Grundnorm* and the rule of recognition for the meaning of meaning. We must replace or supplement the technical rules of legal reasoning with the protocols of interpretation or with the study of rhetorical tropes and hermeneutical protocols. We must approach the texts of law through the law of text.[6]

The literary and hermeneutical turn gave legal theory a long-lost sense of excitement. Another consequence was to make morality integral to law's operation again and, in particular, to judicial interpretation. The jurisprudence of meaning responded to a highly topical demand and ethics became part and

[6] C Douzinas, R Warrington, S McVeigh, *Postmodern Jurisrpudence: The Law of Text in the Texts of Law* (London, Routledge, 1991).

justification of the newly discovered interpretative character of the legal enterprise. But there is a catch. To take Ronald Dworkin's popular hermeneutical theory, the operation of law is presented as necessarily embodying and following moral values and principles. The law is no longer just about rules in the manner of Hart and certainly it is not the outcome of the untrammeled will of an omnipotent legislator as John Austin, the nineteenth century founder of legal positivism, had argued. Law's empire includes principles and policies; the application of law involves creative acts of interpretation. Judges are asked to construct the notorious 'right answer' to legal problems by developing political and moral theories that would present the law in its best possible light and create an image of the 'community as integrity'. Legal texts must be read as a single and coherent scheme, animated by the principles of 'justice and fairness and procedural process in the right relation'.[7] A similar position can be found in the work of James Boyd White, the most prominent representative of the law and literature movement. Justice must be approached as translation between the values of a community and their incorporation into legal texts.[8]

Morality and moral philosophy are thus correctly acknowledged as an inescapable element of judicial hermeneutics. But the effect of hermeneutical jurisprudence is to justify and celebrate a practice that has long been divorced from the quest for justice by presenting the law as the perfect narrative of a community at peace with itself. Morality is no longer a set of subjective and relative values, as the positivists claim, nor is it a critical standard against which acts of legal power can be judged. If a right legal answer exists and can be found through the use of moral philosophy, even in hard cases, judges are never left to their own devices and judicial choice can be exorcised. The nightmare of positivism has been turned into the noble dream of the hermeneuticians.[9] Hart had reluctantly accepted the dreaded supplement of judicial discretion at the cost of endangering the rational completeness and coherence of the law. Dworkin's hermeneutics presents judicial interpretation as both formally correct and replete with morality. Against the positivist lack of interest in ethics, the interpretative scholars assert that the law is all morality and that judicial interpretation implies or leads to an ethics of legal reading.

Undoubtedly the law is interpretation and interpretation is the life of law. The law may follow principles and further values. But two caveats must be added. First, the values a legal system promotes represent the dominant ideology of society—they are the canonical expressions of its social and political power. The 'others'—the poor, the underprivileged, the minorities and the refugees—can find little solace in rules and principles that sustain and are sustained by their subjection. And there is more to it: before and after the mean-

[7] R Dworkin, above n 3, 404.

[8] JB White, *Justice as Translation* (Chicago, University of Chicago Press, 1990).

[9] N Lacey, *A Life of HLA Hart: The Nightmare and the Noble Dream* (Oxford, Oxford University Press, 2004).

ing-giving act, law is force.[10] Statutes, judgments and administrative decisions act upon people and impose patterns of behaviour, attitudes and, ultimately, violent sanctions. As Marxists have always known, and as Robert Cover has pithily stated 'legal interpretation takes place in a field of pain and death'.[11] Law's meaning coerces and legal values constrain. This all-important aspect of the legal operation, fully acknowledged by the early positivists, was underplayed by Kelsen and Hart and became extinct in recent hermeneutics. In the enthusiasm for principles, rights and creative interpretation, the law is presented as exclusively textual and ethical. In contrast to the moralism of hermeneutics, classical positivism was more realistic when it insisted that sovereign power, which in its very nature is coercive, remains central to the operations of law.

We are thus faced with a new paradox. Power relations and practices proliferate and penetrate deeply into the social, often taking a loose and variable legal form. Their common characteristics are few: an often extremely tenuous derivation from the legislative power; more importantly, their link with the increasingly empty referent 'law' which bestows upon them its symbolic and legitimatory weight. If, for positivism, the 'law is the law'—in the sense of law's certification according to internal criteria of validity—the underlying idea becomes now fully radicalised. Power relations are law if and when they successfully attach to themselves the predication 'legal' or, law is everything that succeeds in calling itself law. But contemporary jurisprudence ignores these accelerating developments and continues to be preoccupied, like classical political philosophy, with sovereignty and right, representation and delegation, integrity and 'right answers'. It examines almost exclusively the case law of appellate courts, the most formal and centralist expression of the legal system, arguably unrepresentative of the rest of the law. If positivism fails to understand the moral substance of law, apologetical hermeneutics becomes even more unrealistic by neglecting power or reducing and subsuming it under the operations of legal *logos*. *Auctoritas est potestas non veritas* (Authority is power, not truth).

It appears, therefore, that the presentation of law as a unified and coherent body of norms or principles is rooted in the metaphysics of truth rather than the politics and ethics of justice. The truth of justice is justice as truth. From this it follows that law is the form of power and power should be exercised in the form of law. Power is legitimate if it follows law, *nomos*, and if *nomos* follows *logos*, reason. This peculiar combination of the descriptive and prescriptive, of *logos* and *nomos*, lies at the heart of modernist jurisprudence. The task of critical jurisprudence is to deconstruct this *logonomocentrism* in the texts and

[10] J Derrida, 'The Force of Law: The Mystical Foundation of Authority' (1990) 11 *Cardozo Law Review* 911. This essay delivered at a Cardozo Law School conference in 1988 became the foundational text of the ethical turn in critical jurisprudence.

[11] R Cover, 'Violence and the Word' (1986) 95 *Yale Law Journal* 1601.

operations of law. The hermeneutical moral turn in jurisprudence was welcome; but the moral substance of law must be argued and fought for rather than simply assumed. Furthermore, any understanding of justice, the legal facet of morality, must make the link between justice and the force of law.

GENERAL AND RESTRICTED JURISPRUDENCE

Now we can understand why the dominant type of legal thinking may be called restricted jurisprudence. By revolving around the question 'what is law?' jurisprudence becomes an endless interrogation of the essence or substance of law. It assumes that there is a number of markers or characteristics that map and delimit the terrain and define what is proper to law. But once the question has been posed as a 'what is' one, the answer will necessarily give a series of predicates for the word 'law', a definition of its essence, which will then be sought out in all legal phenomena. As a result, a limited number of institutions, practices and actors will be included and considered relevant to jurisprudential inquiry and a large number of questions will go unanswered.

General jurisprudence, on the contrary, returns to the classical concerns of (legal) philosophy and adopts a much wider concept of legality. It examines the legal aspects of social reproduction both within and without state law. In this sense, general jurisprudence is concerned not just with posited law, but also with what can be called the law of the law. Interdictions, commands and norms have played a central role in social life from Moses' Decalogue to Freud's superego. They organise religion and animate the ethics and aesthetics of existence. Laws define the political reason through which societies develop their idea of the common good. All legal aspects of the economic, political, emotional and physical modes of production and reproduction are part of a general jurisprudence.

A general jurisprudence addresses all those issues that classical philosophy examined under the titles of law and justice. Today it includes the political economy of law, those global processes and institutions which regulate flows of capital and people from Nairobi to Neasden, privileging some and turning others into refugees without rights; the transitions from Empire to nation which characterise the postcolonial condition; ideological and imaginary constructions and scenarios through which we understand ourselves and relate to others; ways in which gender, race or sexuality create forms of identity that both discipline bodies and offer sites of resistance; the action of rights which allows people both to acquire and to contest identities. And as legality operates both at the level of social being and social existence, a general jurisprudence examines ways in which subjectivity is created as a site of freedom and of subjection.

One major part of this process takes place in families, by means of the law of the father and the mother. For psychoanalysis, the characteristic mode of operation of the unconscious is the desire-inducing prohibition, and our

responses to this law contribute our identity. Indeed, from the position of the individual subject of the law, this prolix legality touches all aspects of existence and leads to the modern versions of the classical *ars vivendi*, the art of living, of which law and ethics was a central part. The art of life addresses the question of how one lives and should live one's definition. It has two moments. The first is the raising of one's life into a problem, into a process that needs to be examined. Life choices, even when they are not fully free, require justification. The second moment addresses the way in which one lives the choices, partly forced and partly free; the necessary compromises that are the stuff of life. It is to those defining structures that we now turn.

THE LAW OF SOCIAL BEING AND SOCIAL EXISTENCE

Towards a Communism of the Heart

Modern jurisprudence has neglected the big philosophical questions and has avoided what we will call the 'ontology of social life'. If the law plays a central role in social reproduction, this omission has seriously affected the integrity of the discipline. According to the ontology proposed in this book, social being is not reproduced through the static repetition of an essence or a series of laws but in a dynamic passing on and constant re-constitution of social relations. Social being is always a becoming—its essence is to unravel itself in historical existence—which is another name for the lived experience of people. In this sense, social being represents the 'whole' of social existence and cannot be broken down into neatly arranged regions or instances of autonomous operation. Many Marxists, for example, compartmentalised this wholeness, by creating an architecture of foundations, bases and superstructures, and privileging some level, mainly the economy, against others. This aspect of the Marxist tradition has been widely condemned and, in our opinion, justly so.[12] It represents a particularly impoverished understanding of the complexity of social being. The problem with much Marxism, but also with other 'scientific' approaches, such as evolutionary biology and law and economics, is that they confuse the disciplinary organisation of inquiry with a solid part of social reality. In so doing, they turn what is just a perspective on the world, albeit a necessary one, into a part of the world. To this extent we would agree with Max Weber. The object of the science of economics or of jurisprudence is projected as the 'reality' of the economy or of law—the creations of the history and imagination of the discipline become a thing that circularly justifies its disciplinary predilections.

[12] See E Laclau and C Mouffe, *Hegemony and Socialist Strategy: Towards a Radical Democratic Politics* (London, Verso, 1985).