OREN BEN-DOR, *THINKING ABOUT LAW: IN SILENCE WITH HEIDEGGER* (OXFORD: HART, 2007)

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Thinking about Law is a fascinating and rich study about access to justice. It is a rich study because it draws heavily from the pre-Socratic view of justice and the relation of the Hebrew language with justice. It is fascinating because it takes on critical and analytic approaches to law. Ben-Dor associates legality with three elements: rights, duties and values. Legality, he also suggests, has a special methodology. Those familiar with his earlier book, *Constitutional Limits and the Public Sphere: A Critical Reconstruction of Bentham's Constitutionalism*,¹ will recognize the analytic technique or what Ben-Dor describes as the "corrective method." As for whom Ben-Dor signifies by "critical legal studies" (and it is of note that he does not capitalize the term perhaps for this reason), he has in mind Jacques Derrida, Emmanuel Levinas and Zygmunt Bauman (p. 26) with a few references to Drucilla Cornell (7.88, 7.99). He takes for granted that critical legal theory includes the works of J. Lacan, P. Legendre, E. Bloch, A. Honneth and E. Laclau (p.29). Ben-Dor certainly understands the critical approach as very different from what Matt Kramer and Brian Leiter take as critical legal studies.² In the language of this Journal, critical legal studies, for Ben-Dor, includes law and society, feminist legal thought, critical race theory, the humanities and law, law and literature as well as access to justice. With the latter examples in mind, the thrust of Ben-Dor's *Thinking about Law* is two-fold: a critique of all contemporary theories about law as well as the nitty-gritty black-letter law approach to 'what is law?' and secondly, a study of access to justice as thinking about law, a view that contemporary jurists and philosophers have heretofore failed to address according to Ben-Dor. In this regard, Ben-Dor's book is insightful in begging whether access to justice is the same as access to posited rules and access to legal institutions of the state. Ben-Dor juxtaposes justice with the craving for an encyclopedic totality of concepts (rules and values). I shall highlight Ben-Dor's critique of the encyclopaedic approach and then deal with several concerns that Ben-Dor's critique raises in hopes that he proceeds to address them in his future work.

When it was created and as it remains today, the scope of this Journal addressed access to justice instead of access to law. In this spirit, Ben-Dor rejects the "correctness" in favour of truth or aletheia. For several decades, scholars have been aware of something seriously wrong with the analytic technique (or "correctness") that many professional university law teachers have taken for granted in our smorgasbord case-books, our a-historical and a-ethical hypothetical examinations, and our efforts to break from the analytic method by falling back upon posited values as the explanation for and need to transcend the foundation of "correctness". Ben-Dor explains that such an understanding of truth as correctness

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1 (Oxford: Hart, 2000).

2 Matthew H. Kramer, *Objectivity and the Rule of Law* (Cambridge: Cambridge University Press, 2007), esp. 16-38, 234-5; Brian Leiter, *Naturalizing Jurisprudence* (Oxford: Oxford University Press, 2007), 18-20, 41-44, 57; Gerald J. Postema, "Objectivity Fit for Law" in Brian Leiter ed., *Objectivity in Law and Morals* (Cambridge: Cambridge University Press, 2001), 99-143, at 101-05.

renders language “dead, mere-idle chatter [gerede], inauthentic” (2.53). Such a view presupposes that language is outside the subject/jurist/philosopher (2.61). Language is considered a matter of definition and lexicography. The philosopher elaborates a philosophy about language rather than a philosophy constituted through language. The jurist and philosopher “crave” for fixed concepts, better known as rules, principles, policies and categorized values (2.59, 2.72). The concepts are “univocal” in that they reduce particular social experiences to an abstract oneness. The kernel here is that there is an actuality with which the analytic method fails to be concerned. The more that the legal official or philosopher craves for the decomposition (sic. analysis) of concepts, the more does s/he forget the actuality that concepts reify. In this respect, one is reminded of other important works that explained how legal language reifies social life. I have in mind Georg Hegel, Georg Lukacs, Edmund Husserl, and Peter Gabel. But, in contrast with the latter group of phenomenologists, Ben-Dor explains the reified encyclopaedic totality of concepts and its consequential inaccessibility to justice in terms of something far deeper perhaps and certainly something far more mystical than Hegel’s sense of the invisible drive to know. This is the point where Ben-Dor’s constructive theory of justice enters the picture.

For, no matter how well-intentioned, the legal scholar in her/his effort to transcend the reified world of rights, duties and values, according to Ben-Dor, chokes when s/he raises her/his voice (3.72). What is being choked is justice and justice radically differs from the concepts that reify experienced meanings. Ben-Dor even attributes such choking to Levinas’ transcendence of legality by the ethics of the recognition of the particular stranger. For Levinas, according to Ben-Dor, is stuck in the signifying language that represents justice rather than that expresses the presence or immediacy of justice vis-à-vis the individual human being (6.16, 6.117). Levinas’ stranger is derived from the subject’s (and the subject includes the jurist and the philosopher) language and this just differentiates the stranger from the subject as an ontic difference.

Interestingly, Ben-Dor leaves his most precise and strongest attack to the harm which critical legal studies causes. What is that harm? The harm is that the critical scholar claims to have replaced the corrective thinking, noted above, with a theory of law that claims to be grounded in actuality when, in fact, the scholar participates in and reinforces the concealment of that actuality. Indeed, what is even more harmful, the actuality is forgotten. Access to justice studies, as part and parcel of the critical approach to legality, is open to Ben-Dor’s charge. By peeling the skin off the layers and layers of reification, the critical (or access to justice) scholar differentiates one layer from another without ever accessing the actuality that is the generating source of justice. Ben-Dor describes this differentiation as “ontic” rather than “ontological”, terms that I shall address in the next paragraph. Instead of thinking about justice, the access to justice scholar conceals and thereby distorts justice to such a point that, the more rigorous the analysis and ‘corrective thinking’, the more is justice forgotten.

What, then, is this actuality that Ben-Dor has in mind? This is the point where Ben-Dor introduces Martin Heidegger’s alternative view of truth: *aletheia*. The key is that Heidegger (and Ben-Dor) aim to elaborate a truth that radically differs from the ontic differentiation of one level of reification vis-a-vis the next (4.54).

This quest for a radically different foundation from ordinary rights, duties and values is not new for access to justice scholarship. Some, such as Herbert Hart, James S. Coleman and Gerald Postema, have sought to ground legality in posited social facts, facts that are recognized as a concept. Contemporary jurists often offer this as the foundation of reasons for action, called rules, doctrines, principles and values. Ronald Dworkin has also grounded the legitimacy of such rules (concepts) and the like in a perfectly cohesive narrative or what he calls a “law beyond law”. Hans Kelsen, for his part, claimed that the ultimate authority of a norm (which he understood as an act of will) was the presupposed Grundnorm which, in turn, he defined as a mere concept.³ Ben-Dor’s Heidegger closets such efforts as mere examples of “correction” which “distort” the radicality of the foundation of the “correction”. Ben-Dor thereby lops off the experiential body, the social facts, the law beyond law or Grundnorm. They are mere ontic differences of concepts. Even Levinas fails to escape from the dead language of ontic differences because his ultimate foundation of legality is the concept of Being (5.105, 5.117). Levinas’ and all other efforts to address access to justice have dissolved into theories, philosophies about, and other forms of metaphysics (7.51, 7.117). The consequence has been that the substantive content of rules (concepts) are perpetuated, rather than examined with reference to justice.

Where Heidegger and Ben-Dor differ from predecessor efforts to address access to justice is their description of the radicality of the foundation or what Ben-Dor calls the “essence” of law. For the foundation is something other than a concept such as a concept of recognition or a Grundnorm (a concept without a will). Ben-Dor describes the ultimate essence as Being with a capital ‘B’. This Being is not the unrefined being that critical legal studies have aspired to access. Ben-Dor describes Being as “inexpressible” in legal language (6.72), as a “mystery” (6.72, 8.59), as a “secret” (6.83), as “groundlessness” (7.63), as “hidden” (9.64), and no doubt in other synonymous terms. It may be difficult for the reader, seeped as most of us are in the Anglo-American analytic and empirical tradition, to understand what could be a foundation without being a concept. But that is precisely what Heidegger and Ben-Dor hold out as Being. Being is pre-conceptual (2.87). Sometimes, the Greek word *ek-sistence* is said to describe Being (6.116). More often, Heidegger describes Being as a “clearing” or “the light” (9.50). Being is the “fecundity” – that Benthamite term – of law. In his later works, poetry best manifests (not represents) Being. Being is immersed in the “murmur” of language before signs represent or even express meaning to objects. When rights, duties and values are analyzed as law, they conceal Being. So too, when the critical scholar elaborates a theory about law, s/he too conceals Being. The rights, duties and values as well as the critical theory of law do manifest Being. This distance from Being arises from a forgetfulness. Jurists have forgotten justice when we have represented one doctrine in terms of another, one theory in terms of another.

The best that we can say, then, is that one thinks when one thinks about Being. This thinking is a long ways from one’s thinking about the facts of a case or the doctrine of *terra nullius* or the social assumptions presupposed in the con-

3 See generally, William E. Conklin, “Kelsen on Norms and Language” (2006) 19 *Ratio Juris* 101-26.

tent of the interpretation or the facts or of the doctrine. The thinking about facts, doctrines and social assumptions concerns “correction” or validity. But thinking about law, according to Ben-Dor, involves thinking about the essence of law. And the essence of law is not law (4.132). The essence of law is the mysterious hidden inexpressible and inaccessible Being. The essence of law protects this mystery (4.132). The essence of law protects the ek-sistence of being. Being is a non-concept and therefore, according to Ben-Dor and Heidegger, inaccessible. The essence of law is concealed in our everyday professional discourse of the analysis of rights, duties and values. The more rigorous the analysis of the rights, duties and values, the further are we from the essence of law and the further do we distort the essence of law. This is so of the critical legal scholar just as it is of the black-letter lawyer. A theory about rights, duties and values explains justice in terms of concepts. Thinking about law involves thinking about Being. This thinking is silent in that Being is inexpressible as a representation. Rights, duties and values are representations. Thinking addresses the pre-representational clearing (3.76). Thinking about law never puts people before or under the law (4. 134). That would treat law as a thing, as an object in an objective world separate from Being (3.31, 3.34). Thinking about law is pre-conceptual and pre-things (6.120).

This pre-conceptual character of Being renders a radical strangeness to Being (and Justice). Its strangeness, so radically different from corrective or analytic reasoning, is a mystery. Thinking responds to the secret or mystery of law. Thinking responds to the call of the radical stranger, Being. In this way, thinking about law transcends the subject and the object, the subjectivity and objectivity, the values and facts – all of with which the contemporary legal scholar and jurist are preoccupied (3.36). Further, the representations of rights, duties and values reduce and then separate one individual from another as a reified legal person. In contrast, Being manifests a togetherness or *mit-sein* that offers the possibility of togetherness as primordial to concepts (that is rules and theories) (4.86, 5.85). Empathy characterizes the being-with or togetherness of unreified beings (8.79). But all this togetherness and empathy is forgotten as officials and philosophers proceed to conceptualize, analyze and theorize about the intellectual differences between rights, duties and values. Despite its inexpressibility, the secret of law legitimizes legality. Put differently, laws are binding because of the inexpressible secret of Justice which is concealed as one decomposes rules, doctrines, values and other standards. Worse, the officials, legal scholars and philosophers cause harm to others by forgetting that they have forgotten the importance of the essence of law.

When we think about law, then, we do not conceptualize law or represent it as a sign (2.83). All we can say is that we are “near” or “far” from Justice as we speak and write about rights, duties and values and as we endeavour to unconceal how the discourse about rights, duties and values and theories has concealed Justice. This nearness and farness is not the problem which this Journal has often addressed. The nearness and farness is nested in the ‘is’ of an unrepresented and unrepresentable actuality. This actuality is the most thought-provoking thinking about law (3.17). It is hardly the actuality of the ‘law and society’ studies, empirical studies and analytic political and social philosophical scholarship that has been published in this Journal. It is an actuality – and it must be an actuality

– since the discourse about rights, duties and values distorts and smothers the radical strangeness, and yet the essence, of law.

Ben-Dor's Heidegger raises the prospect that it may not even be possible to access justice. This prospect clashes with much access to justice scholarship. To take Cicero, Thomas Hobbes, John Locke, Hegel and Hart, as examples, justice is only possible after beings have (allegedly) acquired a language and thereupon been able to come to agreements and to establish civil institutions. But Heidegger offers that beings are immersed in a murmur or clearing anterior to such a civil society. Interestingly, this notion – this Beingness in a pre-legality that is non-conceptual – is the critical distinction that H.L.A. Hart makes between legality and pre-legality. As Hart writes, “what is crucial is the acknowledgement of reference to the writing or inscription as authoritative, i.e., as the proper way of disposing of doubts as to the existence of the rule.”⁴ The pre-legal world is “unstated” and lacks writing. That is, it lacks a (written) language (Hart believes). Ben-Dor points out that Hart “craves” to establish a legal theory that already reifies human experience (3.69). Hart stereotypes non-state history, just as did Cicero and Seneca, Hobbes and Locke, Immanuel Kant and Hegel. Civilization (and legality) is said to begin when beings have “leapt” from the “barbaric” animal-like world (without a language) to the world of optic differences which conceal truth (3.70). Political leaders still take us to war because they fail to think about Being (3.74). Impartiality, equality before the law, the judge as the third, reasons as guiding and causing action: these are some of the meta-ethical concepts of the civilized legal order (7.94, 7.95). Even international human rights law conceals justice by superimposing concepts and metaphysics over the pre-legal world about which we claim to know by knowing our concepts (that is public international law rules). Justice is reduced, concealed, and then forgotten, all in the name of justice, the rule of law and civilization.

Ben-Dor's adoption of Heidegger's theory of access to justice raises several questions that beg a response, however. I now wish to raise three such concerns.

First, Ben-Dor is preoccupied with the act of intellectualization which ex post facto categorizes unreified presence. One can only respond to the hint of primordial Justice. This is authentic thinking (4.134). If the official, scholar or philosopher decomposes rules, principles, policies and values, s/he just re-thinks the legal without addressing the absent and concealed Justice that remains forgotten by the act of intellectualization. The problem is that if we analyze concepts as if they are things ‘out there’ in objectivity, we do not think about law. For, we would only think about the essence of law if we think about Being. Justice is said to dwell in the house of Being. Justice calls upon us to think and to respond to Being (6.120). But as Being (and Justice) are inexpressible, human thinking is silent. We are only near or far from its house. Justice is located at a territorial distance from corrective reasoning.

In a sense, Justice is what Hegel and Levinas describe as the Third. The Third adjudicates disputes between the subject and legal forms. Without thinking about the hidden Justice concealed inside analytic or critical legal discourse, any wrong committed between two individuals will be distorted or “falsified” if it is believed

⁴ H.L.A. Hart, *Concept of Law*, 2nd ed. (Oxford: Clarendon, 1994), 95.

that the judge, rather than Justice, is the Third (7.39). This is best reflected when the judge, as an official of the state, adjudicates a dispute between the state and the stateless being. Legality is inevitably tilted towards the state and it thereby distorts actuality (Justice), however rigorous the “correction” vis-à-vis the dominant concepts in the legal discourse.

Similarly, when the critical legal scholar translates insights from a discipline that seems different from law (for example, economics, psychoanalysis, literature), the content of concepts is treated as if it is composed of “things”. We have heretofore considered such things as ‘truth’ (4.13). The thing is a unit in objectivity. This objectivity contrasts with Ben-Dor’s view that there is an inner language about Being, concealed in the objectified discourse (32). Meta-physics wins out. And Justice is all the more concealed by the trendy inter-disciplinary projects. As a consequence, just as the ‘man from the country’ faces the door into the castle of Law in Kafka’s parable at the end of *The Trial*, human beings, as individualities, cannot enter into the Castle. The man from the country exists in experiential space and time before the legal structure encloses his being.

Against this background, one misses any role for the experiential body in the concealment of Justice. Ben-Dor claims that Justice is concealed in the traditional doctrinal and theoretical analysis. Ben-Dor presupposes that all we have to address is the “mindedness”. The mind’s concepts are said to conceal Justice. But Edmund Husserl’s early writings and Maurice Merleau Ponty’s *Phenomenology of Perception* turn one’s attention to the experiential body’s meant objects rather than objects posited by the mind. Indeed, it is remarkable how little Ben-Dor concerns himself with experiential meaning as pre-conceptual. Has he not left out an important element of legality? Is there not more to legality and ontic differentiations, as he would put it, than concepts?

Second, this silence about the experiential body in the ontic differentiations leads us to another concern. Ben-Dor, drawing from Heidegger, emphasizes that language is a prison-house. He uses the metaphor quite frequently. Well then, if we are all entrapped in the signifying relations of language as Derrida claims and as Ben-Dor finds problematic of Levinas, why does Ben-Dor associate Being with the Good? After all, the “corrective reasoning” of the professional knowers invariably displaces and conceals the discourses of the non-professionals. The unconcealment of the analyzed doctrines and theories might well disclose other prison-houses of languages. The non-professional will not be able to understand, ‘connect with’, recognize or be a part of the alleged prison house of the professional’s language. The harm – and this is Ben-Dor’s initial concern (p. 7-11) in his Introduction – is perpetuated in the untranslatable rupture between prison houses of the professionals on the one hand and those of the non-professionals on the other. This harm is all the more problematic when one considers how collective memory and experiential time play a role in the signifiatory ontic relations. Ben-Dor misses memory and time in his elaboration of ontic relations (2.33, 2.18, 3.30, 8.9). And the harm is ultimately at issue when one appreciates that a different or an “untranslatable gap”, to use Lyotard’s term in a very different context,⁵

⁵ Jean-François Lyotard, *The Differend: Phrases in Dispute* trans. by Georges van den Abbeele (Minneapolis: University of Minnesota Press, 1988).

dwells between the unexpressible Justice and the prison house of signs that represent ontic differences. I am at a loss as to how the professional knower's thinking about law as a "nearness" or "farness" from an inaccessible Being will break or escape from the bodily suffering produced by that thinking. And I am not sure, although I may be wrong here upon reading this 414 page book without the aid of an index, that Ben-Dor guides us as to how to escape from the prison-house of legal significations. Indeed, at one point, he writes that we must "leap" from the "one-sidedness" of law to thinking about Being (3.82). Ironically, this is the very term used by Hart when he describes the need "to step" from the "primitive" to the modern concept of law and Hegel, and Kant when they describe how the lawyer and legal philosopher must "leap" from the "barbaric", uncivilized, "pre-legal" traditional stateless society to the structure of concepts and institutions in a state-centric society.

Be that as it may, thirdly, there is an important presupposition in Ben-Dor's and Heidegger's description of the house of Being about which we must think. This is their sense of space as territorially bounded. Ben-Dor describes how one is "near" or "far" from Justice by virtue of the extent to which s/he thinks about Being (6.125). This "near-far movement", he distinguishes from the "punctuation" and "correction" that characterize the analytic project of decomposing doctrines, rules, principles and the like. Justice is described as a "site" (4.13). Indeed, Justice is located in a "house" (9.10) or a "dwelling" (ch. 9). Further, *aletheia* is sited in a "clearing". The clearing or house of Justice is empty of things (9.10) – that would only occur in a signifying language where signs represent things, we are told in his chapter on Levinas' "ontic logic" (ch. 7). That said, a clearing presupposes that there is a natural boundary of trees, at least, about the clearing. Indeed, the "aboutness", about which Ben-Dor writes as the key to thinking about law, might well be this territorial 'aboutness' that encircles the unrepresenting clearing from which human languages are generated. A clearing only exists if there is a border separating the clearing from a forest. Indeed, the house of Justice or what Heidegger and Ben-Dor describe as the "ethical dwelling" is bounded by walls: "the house is a house of boundaries" (9.11). The dwelling is described as "fourfold" where beings live "as neighbours" (9.43).

Ben-Dor admits that the boundary that protects Justice (and he holds legal officials, scholars and philosophers to a duty to protect such a boundary) has a "spatial character" (9.13). But this spatial character is of a territorial sense. Indeed, Ben-Dor clarifies that "[t]his is the sense in which I would interpret the notion of 'world' in [Heidegger's] Being and Time as having a space and directionality. ... The boundary is a characteristic of the ontological difference" (9.13). The House of Being is like a jug whose exterior clay, not the representation of the things in its content, characterizes its jugness. Ben-Dor relates this walled structure to the Hebrew language (9.13). But walls distinguish a house from the uncultivated wild that remains untouched by civilization. Lucretius and Cicero remind us of this as civilization advances from animal-like creatures and monsters in a borderless wildness. Further, the boundary of the house of Being unfolds as the human beings are preoccupied with their signifiatory differences. That being so, the house of Being (and of Justice) is humanly constructed rather than being invisible and unexpressed after all. Has Ben-Dor not collapsed the invisibility of

Justice (invisible by being inaccessible to legal language) into the very significant (or ontic) differentiations that lack Truth as Being by his own claim? Being is “unbounded” within the (territorial) boundaries. Justice is said to be located “beyond” ontic and signficatory differences. We are left, then, with the possibility that access to justice, for Heidegger and Ben-Dor, invariably involves violence by and against beings on either side of the linguistic structure of ontic differences. For, boundaries separate the house of Being (and of Justice) from the languages which imprison the human being. The violence is all the more a cause of harm if the experiential body constitutes meanings that are expressed before objects are signified as signs in the prison house of language.

Critical issues remain with Ben-Dor's Heidegger. Ben-Dor has raised explanations as to why the traditional preoccupation with concepts (as exemplified by rules, doctrines, rights, duties, and conceptualized values) conceals justice nested in layers upon layers of reified human experiences. He does so with an extraordinary breadth of learning in several languages and from several intellectual traditions that draw from Hebrew, pre-Socratic thought, Anglo-American analytic jurisprudence and phenomenology, aside from Heidegger's own extraordinary depth of insights about Justice. Ben-Dor offers us, in response to these traditions, the possibility that Justice is nested inside layers of reified analyses of dead concepts.

This Justice, though, is inaccessible to human languages for the latter are preoccupied with binary distinctions between and amongst signs that represent things whereas Justice is inexpressible and therefore inaccessible from the prison house of legal language. Justice, after all, is sited in the house of Being and Being, being inaccessible to human beings, is divine. This might not be surprising, given Heidegger's own theological training before he embarked upon his studies under Edmund Husserl. And Ben-Dor hints at the possibility that Being is divine throughout his fascinating and remarkable effort (4.142, 9. 43): “[t]he essence of law, dike, is the divine law within which human beings preserve their essence as dwellers in the boundary of the fourfold” (9.43). Being unfolds as “the oneness” of the fourfold. Interestingly, Ben-Dor explains as an after-thinking in the last paragraph of the “Coda” and in italics that “[t]he divine must intervene in order to protect itself against its own legalization. As humans we are already conceived as messengers of the divine” (p. 406). This sense of the divine is hardly recognizable if one confines oneself to the traditional studies of natural law in the tradition of analytical jurisprudence.⁶ This being so, we are all to the better for Ben-Dor's originality.

Ben-Dor's arguments and insights suggest that justice is inaccessible. All we can say is that we are “near” or “far” from Justice. This inaccessibility humbles the scholar and teacher of law who might otherwise hold out legal and constitutional rights, duties and values as constitutive of justice. And yet, the very separation of the professional's language from justice begs that one remain in dread of the violence that might ensue in the name of this Justice that remains inaccessible to the professional's language.

⁶ See, e.g., Mark C. Murphy, *Natural Law and Practical Rationality* (Cambridge: Cambridge University Press, 2001); John Finnis, *Natural Law and Natural Rights* (Oxford: Clarendon, 1980).