

## THE MURMUR OF BEING AND THE CHATTER OF LAW

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Oren Ben-Dor *Thinking About Law in Silence with Heidegger*. Oxford: Hart Publishing, 2007, xvi + 414 pp. ISBN 978-1-84113-354-6

Oren Ben-Dor's *Thinking About Law in Silence with Heidegger* constitutes one of the most painstaking and patient endeavours to locate the *difference* between the world of Heidegger's thought and the world of the law to date. In a way, it is nothing less than Heidegger's central concern with the ontological difference between Being (*Sein*) and beings (*Seienden*) that is at issue in Ben-Dor's exploration of the difference between Heidegger's *ontological* thinking of Being and the *ontic* concerns of the law. The law is indeed a good point of departure for locating this ontic-ontological difference, for there is hardly anything else (the discipline of accounting may be another example) in the affairs of mankind that marks itself as so thoroughly concerned with the fully defined and identified aspects of things. Heidegger himself never said much about the law, but another tradition of philosophical thought, namely Marxism, refers repeatedly to the law as the apex of the human attachment to identification and calculation. Law, wrote Marx in his *Critique of the Gotha Programme* of 1875,

“can by its nature only consist in the application of an equal standard, but unequal individuals (and they would not be different individuals if they were not unequal) can only be measured by the same standard if they are looked at from the same aspect, if they are grasped from one particular side, e.g., if they are regarded as workers and nothing else is seen in them, everything else is ignored.” (Marx 1989: 86-87)

Almost a century later Adorno would echo:

“Right is the primeval phenomenon of irrational rationality. It makes the principal of formal equivalence the only applicable norm. It cuts all sizes over the same last. Such equality, in which differences perish, surreptitiously privileges inequality”.<sup>1</sup>

Heidegger also included Marxism under what he called “metaphysical humanism”, that is, the metaphysics that reduced the essence of humanity to a presence that could be known and defined (Heidegger 1978: 311-360). And the core of his thinking consisted in a relentless endeavour to articulate a critique of this metaphysics which he generally also referred to as the “metaphysics of presence”. However, an invocation of the Marxist resistance to the identification, reification or commodification of essences serves well to give those not familiar with Heidegger's though a starting clue as to that which is centrally at issue in Heidegger's critique or “destruction” of the history of the metaphysics of presence. And as such it also provides one with a good point of entry into Ben-Dor's location of the difference between Heidegger's contemplation of the question of Being and the world of law and legality.

In contrast to understandings of man or the human in terms of an a-historical essence that transcends the unique historicity of the human being and all things human,

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<sup>1</sup> Translated from Adorno (1975) 304: “Recht ist das Urphänomen irrationaler Rationalität. In ihm wird das formale Äquivalenzprinzip zur Norm, alle schlägt es über denselben Leisten. Solche Gleichheit, in der die Differenzen untergehen, leistet geheim der Ungleichheit Vorschub.”

Heidegger's analysis of authentic human existence in terms of a *Dasein* (*being-there* or *there-ness*) articulates a mode of existence that does not simply exist, complete in itself so to speak, from which state of completeness it subsequently enters time and engages with an exterior world. According to Heidegger, human existence *ek-sists*. It *stands-out* of itself into the unfathomable openness and freedom of time, the unlimited freedom of time to reveal to humans the infinite possibilities of their existence or *ek-istenz*. Human existence as authentic *Dasein* is thus an irreducible exposure to the infinite mystery of that which time brings to bear on this existence. Humans, however, can close themselves off from this temporal mystery of their *ek-sistenz* and most often do so. They do so by becoming fully occupied or pre-occupied by the concerns of the everyday world. The every day (*alltägliche*) world of *das man*, Heidegger calls this world; the world in which people do not engage with the incomparable ways in which *Being* or time calls them to exist uniquely or singularly (as Jean-Luc Nancy (1996) would put it later in a unique re-articulation of Heidegger's thought), but do as everyone does, do as *they* do, as *one usually does* (Heidegger 1979: 166-180). In his later work Heidegger would articulate the response to Being's unique call to *Dasein* to *ek-sist* in terms of a consciously precarious poetic dwelling in the fourfold dimensions of earth and sky, mortals and immortals (Heidegger 1954: 157-179, 181-198) and as an existence that is poetically "on its way to language" (*Unterwegs zur Sprache* – cf. Heidegger 1986).

Law and the world of legality and rights, contends Ben-Dor, confines us to an existence that has closed in upon itself, a world no longer exposed to the fourfold interplay of heaven and earth, mortals and immortals, a world no longer underway to language, a world no longer articulating itself in response to the open eventfulness of existence as *ek-sistenz*. The law is for Ben-Dor the apex of the calculating world of the *they*, the world in which everyone does as everyone else does, where everyone does as the reasonable man does (Ben-Dor 341-342). Indeed, the law is surely not the abode of poetic exceptions (or excuses) that mark the mortal dwelling on earth that Heidegger had in mind for the authentic response to the unique call of Being.

Can anything be done as regards this calculating closure of the law vis à vis the call of Being, the beginnings of which closure Ben-Or remarkably also detects in Levinas' invocation of an ethics beyond ontology, an ethics "otherwise than Being" (Ben-Dor 171-305)? Ben-Dor's thinking about the law with Heidegger sets out to resist this closure of the law onto itself. He sets out to resist this self-insulation of the law vis à vis its own Being by a thinking *about* law in a way that would expose it again to its Being. He announces this endeavour thus:

"The call for thinking about law is not about yearning to have no law but rather about learning the Being of law. But to learn the Being of law we must first immerse ourselves in those factors that entrench ontic being and thinking with and through law. *There can be no thinking-Being about law without listening to the unsaid of law's ontic determinations.* We need to lay bare, uncover and unmask the moment of withdrawal of law's Being in order for us to unlearn and endeavour occasionally to overcome the various concealments of that very moment." (Ben-Dor 96, italics in the original)

At issue in thinking about law ontologically instead of just ontically is, then, a thinking that retrieves the moment in which law's Being withdraws from its being, that is, from its mere existence as an everyday ontic entity. A thinking that would not at least occasionally engage in this retrieval of law's Being, would leave the law *entrenched* in its every day ontic existence. We shall come back to this word

“entrench” shortly, for Ben-Dor makes a strong statement regarding law’s ontic entrenchment towards the end of his book that requires incisive scrutiny. Let us first look more closely at *the unmasking of the moment of withdrawal* that is at issue here by taking a closer look at the “aboutness” that is at issue in the phrase “thinking [ontologically instead of just ontically] about law”. Ben-Dor writes:

“The main challenge here is to point towards the uniqueness of ontological ‘aboutness’ in the case of the law and to its connection to the ‘aboutness’ of truth, language and ethics.... [T]he perspective from which the articulation of ‘aboutness’ occurs requires us to go deeper and nearer than the average *everyday* sense of the lawyer, the jurist, or people more generally. Having said that, the everydayness of the law is always the starting point for ontological thinking. The difficulty is that transcending the average everyday sense of the law may well alienate those people who participate in the average everydayness of the law. Such everydayness, being a yardstick for the plausibility of their thinking about law, including the defence of a theory of law, may well hinder such very thinking. The understanding of ‘people of the law’, those who quite often ‘just get on with the law’ and who are involved with and through law on a daily basis, however critically, precisely by already knowing what they do, cannot yet engage with the question of the Being of law.... Even those who engage in critical legal scholarship, those, for example, who expose the ideological dependency or some other contingency of a specific content of law may not yet give us a clue as to that ‘aboutness’ that we are after.... We need to overcome the mundane everydayness of law in order to let the Being of law be thought about. The most difficult thing to do is to let in *the nearest* call as that aboutness that is thought provoking.” (Ben-Dor 81)

I added the italics on “the nearest” in the last sentence in order to highlight a prominent theme in Heidegger’s thinking that comes to the fore here. Heidegger averred that the representational engagement with things and the objectification that takes place in this representation leave humans stuck in a world that is already far from that which is closest to them, namely, the Being of beings that precedes the objectified and represented state of beings as mere beings, separated from their Being. Following Ben-Dor one can say: The objectifications and representations already in play in quotidian engagements with the law as a being (a defined entity, albeit a cultural or social entity) among other beings, make humans miss what is closest to them as far as the law is concerned, namely the very Being of law. This missing or passing over (this “forgetting” as Heidegger refers to it) of the Being of law, misses or passes over (forgets) that which comes first in humanity’s relation to law, namely, the *eventful opening* of a relation to law. This eventful opening of a relation to law is closer to humans than all representations and objectifications of law, be these representations practical as in the case of legal practitioners, theoretical as in the case of jurists and legal theorists generally, or critical as in the case of critical legal scholarship. This is the remarkable paradox that Ben-Dor points out with his scrutiny of the *unique aboutness* at issue in thinking ontologically about the law: That which appears closest to humans as regards the law, the mundane everyday familiarity with the law, already causes humans to miss and pass straight over that which is really closest, namely the *Being* of law. In this passing over of that which is closest in favour of the objectifications and representations of law that are “already out there” in everyday life occurs a *forgetting of the Being* of the law that is closer to humans than the representational possibilities of the law. These representational possibilities of law come “later”. The *Being* of humanity’s relation to law comes “before” and actually conditions the representational possibilities of law.

Some pages later, Ben-Or returns to this forgetfulness or forgetting of Being in practical, theoretical and even critical theoretical representations of law. He now invokes the Being of law that is closest to us (but gets passed over in these

objectifying representations of law) as a “murmuring”, the “murmuring of the Being of law”:

“We must contemplate both how ontic thinking about law and the significance attached to law have become so pervasive as well as how questions about law’s primordial significance, that is about the Being of law, have become so deeply forgotten. In asking what is it to think reflectively about law, then, there is a crucial difference between, on the one hand, the necessary falling into theorisation about law – which is part of the ontological/ontic process – and, on the other hand, the thoughtless process of critical thinking that replaces one theory of law with another. These may look similar, but they could not be further apart. The first characterises thinking, while the second characterises the entrenchment of forgetfulness. As we shall see, with Levinas, one of the most misleading modes of forgetfulness of the Being of the law is to be highly critical of the mundane being and thinking with and through law by providing for ethical thought which is other to thinking with law. This mode of forgetfulness also claims to be highly critical of theories of law. Indeed such a mode has many Heideggerian echoes. It will become all the more difficult, but *crucially important*, to differentiate between the ‘aboutness’ of such a mode of forgetfulness of the Being of law and the ‘aboutness’ that comes as the murmuring of the Being of law, albeit including this mode of forgetfulness in such murmuring. (Ben-Dor 97)

Notable here is Ben-Dor’s inclusion of Levinas’ thought under the forgetfulness of Being. I shall not go into this assessment of Levinas’ thought here. Suffice it to note that he makes a significant point with which Levinasian scholars may well want to take issue (Ben-Dor 171-305). More pressing for my engagement with Ben-Dor’s Heideggerian thinking about the Being of law are the following questions regarding this passage:

The passage states that the ontological thinking of the Being of law and the “thoughtless critical thinking” about law that merely replaces one theory of law with another, “could not be further apart”. Why does Ben-Dor insist on this separateness or apartness between “thoughtless critical theory” and the thinking about law that attends to the “murmuring of the Being of law”? And how does he square this separateness or apartness between thoughtless critical theory and the thinking that attends to the “murmuring of Being” when the latter, according to the last line of the passage, also includes within it, as part of it and not separate from it, the mode of forgetfulness of Being exemplified by “thoughtless critical theory” and other everyday and mundane engagements with law? And what might this attendance to the murmuring of Being mean to the mundane lawyer or theorist lost in sheer forgetfulness of Being, assuming for a moment that this forgetfulness and murmuring of Being are sometimes completely apart (could not be further apart according to Ben-Dor)?

At issue here is not just a petty focus on an apparent contradiction in the passage quoted, but something that marks a core moment of indecision or ambiguity in Heidegger’s thought that also comes to burden Ben-Dor’s admirable Heideggerian thinking about law. Heidegger’s epochal thinking introduced into the discourse of contemporary philosophy a difference between the ontic and the ontological. Heidegger called this difference the “ontological difference” (*ontologische Differenz* - cf. Heidegger 1978:132). He pointed out that this difference can be remembered as the differential event through which Being both manifests itself in but also distinguishes itself from beings by withdrawing from them (Heidegger 1980; 260, 332-333; 1984: 126, 144), but he also showed that this difference can be forgotten in ways that give rise to a separation between Being and beings. In the wake of this forgetfulness, neither the manifestation of Being in beings, nor the difference between Being and beings remain discernible. However, Heidegger’s own thinking was subject

to this forgetfulness in a most intriguing way. He would equivocate throughout his work between two understandings of Being and truth.

On the one hand Heidegger would invoke and explore in incomparable fashion a *remembering* understanding of truth or Being in terms of an *aletheuein*, that is, in terms of a disclosure of Being in which Being gives itself to beings, but also withdraws from the beings it thus renders present. And in terms of this *remembering understanding* of Being, the very forgetfulness regarding the withdrawal of Being from the beings that it renders present, the very forgetfulness that indeed characterises all concerns with the manifest presence of present beings or present entities (the everyday presence of things with which *das man* is preoccupied), is according to Heidegger, also the manifestation of Being's withdrawal (*letheuein*). On this count, the very forgetfulness regarding Being becomes, for a *remembering understanding* of Being, the irreducible flip side of the "murmuring call of Being". In other words, forgetfulness is the irreducible flip side of the *remembering understanding* that recalls the murmuring call of Being. At play here is the deep phenomenological insight that any attention to present concerns consists in a double forgetting, the forgetting of concerns that are not present and the forgetting of this forgetting. Things (*these* things instead of others) become present for us through this double forgetting. The *remembering understanding* of Heidegger's phenomenology seeks to undo the second forgetting by pointing out and remembering the irreducible first forgetting through which attention becomes possible (Cf. Heidegger 1978: 193, 409; 1980: 360-368). This is the consistently "ontological" side of Heidegger's thinking in terms of which the ontological difference consists in a two-directional dynamic of a *giving disclosure* and *concealing withdrawal* of Being through which present concerns with beings become possible as a forgetting of the "full" and infinite potential of Being.

On the other hand Heidegger also sometimes invoked a rather ontic history of Being in terms of which certain periods of metaphysical thought was less metaphysical and less forgetful of Being than others. According to this history of Being the pre-Socratic Greeks were much more in tune with and less forgetful of Being than the thinkers of the major history of metaphysics that would begin with Plato and finally come into its own with Nietzsche's unmasking of this history of metaphysics as the will to power (cf. in general Heidegger 1961 and more specifically Heidegger 1980: 205-263). This side of Heidegger's thinking thus embodies a history of falling away from the truth of Being. It relates a typical tale of fallenness (*Verfallsgeschichte*) in terms of which the attuned, respectful and thankful dwelling in the murmuring of Being of the early Greeks increasingly got displaced and replaced by the brazen forgetfulness of Being evident in modern humanity's technological reduction of its environment to nothing but a source of supplies for the nihilistic fulfilment of its needs (cf. Heidegger 1985: 9-40). Such is the state of modern humanity's fallenness, Heidegger would famously aver towards the end of his life, that "only a god could still save us" (Heidegger 1976). Ben-Dor ends his book by quoting this very statement. That he chose to do so, suggests an endorsement on his side of this history of humanity's fall from the grace of Being that marks this second line of Heidegger's thought. I shall return to this suggestion shortly. Suffice it to say for now that such an endorsement would explain much of the rather damning assessment of law (specifically human rights law) that also comes to the fore towards the end of the book.

Be it as it may, there are enlightening moments in both of these two sides to Heidegger's thinking. A denial that we have learned or inherited anything from the rather far-fetched *Verfallsgeschichte* that marks the second side of his thinking outlined above, would also have to deny that the ecological movements and consciousness of our time benefitted in any constructive way from Heidegger's reactionary and parochial conservatism regarding modern technologies. But one must nevertheless take care not to endorse this parochial side of Heidegger in an unqualified manner, for such endorsement would not only signal an irresponsible oblivion regarding the authentic and romantic quest for Being, truth and real existence of the conservative cultural revolution of the Weimar and post-Weimar era of which Heidegger's own early concern with authentic *Dasein* and his political misadventures were part and parcel (cf. Safranski 64-76, 231-255). It would also fall foul of the rigorous demand that issues from the other side of Heidegger's epochal thinking, namely the demand that no ontic history and no ontic assessment of aspects of human existence be taken as the full truth of Being. This demand surely also applies to the notion that the pre-Socratic Greeks still had a regard or sense of Being that somehow got lost for two thousand years and was only rediscovered again when an exceptionally gifted Black Forest philosopher single-handedly began to re-read the history of European philosophy in a way it has never been read before. Taking this historical narrative seriously cannot but undermine the most original thought on which it turns. It cannot but undermine the understanding of Being as exactly that which withdraws from whatever it renders present. Taking this narrative too seriously would turn the history of Being into the "truth of Being" from which it has never withdrawn or no longer withdraws, the full truth of Being that is no longer a matter of *aletheuein* but a simple correspondence between knowledge and a present reality (albeit present knowledge about the past). The history of *aletheia* would become subject to truth understood as a realistic correspondence between knowledge and reality; subject in other words, to the very correspondence oriented epistemology that Heidegger's invocation of *aletheia* sought to resist. Taking Heidegger's *Verfallsgeschichte* of Being too seriously is to fall prey to the metaphysics of presence that his own thinking unmasked so brilliantly.

This rather extensive engagement with the Heideggerian demand that we do not endorse Heidegger's history of Being uncritically may leave the impression that I am simply imputing such an endorsement to Ben-Dor. This is not the case. The scope of the book is simply too broad and multi-faceted to allow for such an imputation. However, one also does not draw sufficient assurance from Ben-Dor's text that his deeply thoughtful engagement with Heidegger's work steers clear of such an endorsement. In fact, there are a number of worrying passages and points in this beautiful book that suggest the opposite and require critical scrutiny. And this critical scrutiny is offered here solely as an invitation for Ben-Dor to take the important project launched with this book further so as to again engage with that which has again withdrawn from and therefore remains unsaid also in this book. In other words, the critical comments offered below takes nothing away from this book that has not been taken away from it already for reasons of it having become this book and not another.

What are the points of concern then? Let me begin right at the end and work my way back to the "contradictory" paragraph highlighted above. I have already mentioned that Ben-Dor ends his "thinking about the law in silence with Heidegger" with the

famous line Heidegger uttered in his interview with *Der Spiegel*: “Only a God can save us still.” What can the ontological thinking about the Being of law mean for the mundane and everyday need to continue with the practical and theoretical and critical improvement of law so as to possibly edge a little closer to a little more justice on earth, if it simply retires with a fatalistic denunciation of such theory and practice as hopeless without a major *deus ex machina* turn of events? Again, such a denunciation is not unequivocally evident in Ben-Dor’s book, not even here where it expressly invokes Heidegger’s notion of the god that must come to save us. After all, one can also argue that there is some godliness involved in every significant improvement of law, however small, given that such improvement is quite likely to turn on the angelic or demonic enthusiasm of someone somewhere.<sup>2</sup> And the possibility of re-interpreting Heidegger’s statement that only a god can save us in terms of imperfect redemptions by non-sovereign gods (so as to explain how things sometimes “miraculously” improve, albeit mostly only modestly and briefly so<sup>3</sup>) has surely been opened by Derrida’s engagement with this statement (cf. Derrida 2003: 159-160). Ben-Dor may well have something similar in mind at the end of his book, but this is not entirely clear and it would be good if his future work would become clearer on this point. But for such clarification to become effective, he would also have to dispel impressions of a rather Manichean rejection of everything law can offer us on the last pages of his book. The lasting impression with which the end of his book leaves us is that of an outright rejection of everything law can offer us as just not up to scratch with the silent poetic dwelling in Being, thinking about being and listening to the murmur of Being that true Heideggerian thinking offers us. At times the denunciations become quite exuberant. Writing about human rights, Ben-Dor exclaims:

“This book, rather than being about human rights, is about the right to be human amidst the pervasive domination of human rights and the ethical grounds of these rights. The ‘right’ to be human could not be further away from the legal notion of human rights. The very language of human rights makes it seem [sic] unnecessary for the language of Being to speak out. Again, amidst the sanctification of the idle chatter of human rights lurks, in silence, the ethical imperative that preserves the Being of humans. In this violent lurking, the essence of law, the essence of law, ethics and humans are fugally connected” (Ben-Dor 402-3).

One discerns again the tension already pointed out in a passage quoted above. On the one hand the passage invokes a complete separation or apartness between the idle chatter of human rights (the legal) and the language of Being. Again Ben-Dor avers that they “could not be further away” from one another. On the other hand, there is the recognition that the language of Being still lurks, in silence, in this idle chatter, and thus still preserves the Being of humans. What exactly is at stake here? Does the passage imply a Manichean split between being and the pervasive domination of human rights (mere idle chatter!) and the Being of humans? Or does it articulate a recognition that human rights constitute a worthy albeit frustratingly imperfect and often misused endeavour to safeguard the dignity of humans? That the discourse of fundamental legal rights is imperfect and unsatisfactory in many ways has been acknowledged even by a typical liberal “human rights” political theorist such as John Rawls (“that discourse can seem shallow because it does not set out the most basic

<sup>2</sup> Enthusiasm (en theos) in “mythological Greek” was the being in god of the enthused or the being of god in the enthused (cf. Kerényi 1976: 200).

<sup>3</sup> Consider the end of apartheid in South Africa and the end of any abuse of power; should we not also sometimes thank the gods that we no longer have Bush and Blair around, irrespective of continued misgivings one may still have about the state of British and American politics?

grounds on which we believe our view rests” – Rawls 1996:242). But to ridicule human rights to the point of denouncing them as “idle chatter” is tantamount to denying that they have any significant relation to human concern with the existential dignity and Being of humans. Denouncing human rights as “idle chatter” effectively severs the link between human rights and the legal, on the one hand, and Being, on the other. In other words, it effectively severs the very link that the allusion to a “silent and violent lurking of Being” within the “idle chatter” of human rights endeavours to maintain. And the denouncing voice gets worse:

“The entrenchment of the legal is a crime against humanity, and Being sends us constant reminders of that.” (Ben-Dor, 405)

It is quite ironic that a denunciation of “the entrenchment of the legal” can itself become so “legalistic” that it would go so far as to invoke the legal concept of a “crime” for the purpose of this denunciation. Does this irony not reflect in its own terms just how thoughtless these denunciations threaten to become, at least ontologically speaking? Does it not reflect indeed “how far apart” these denunciations have already become from a consistent thinking of Being that discerns not only a uni-directional withdrawal of Being from beings, but also the bi-directional *withdrawing-manifesting* of Beings in all beings? And is this reference to “the entrenchment of the legal [as] a crime against humanity” not rather rich when it is made in the guiding shadow of a thinker who, for all his brilliance, for quite a while condoned the vulgar racist brutality of the political movement that was historically responsible for the “first” crime against humanity and the need to forge this almost incomprehensible term? And does this reference not become intolerable when it is the Jewish thinker Emanuel Levinas who, instead of Heidegger, suddenly finds himself associated with a crime against humanity? For according to a simple line of common logic, Levinas is surely alleged to be somehow involved in a crime against humanity if “the entrenchment of the legal is a crime against humanity” and “the legalisation of ethics and morality [is] entrenched by Levinasian transcendence”. This allegation of some such involvement of Levinas in a crime against humanity is given further credence by the allusion to the “callousness” of Levinas’ thought that directly follows this assessment of “the entrenchment of the legal as a crime against humanity”. Ben-Dor may well be making a good philosophical point against Levinas in this book (I have not engaged with this point in this discussion, but there may well be an innovating move in the Heidegger/Levinas debate in the offing here), but this insinuated or implied association of Levinas with a crime against humanity is not worthy of serious philosophical thought or consideration. The statements at issue here – “human rights = idle chatter”, “the entrenchment of the legal = a crime against humanity”, “the callousness of Levinas’ entrenchment of the legal” - serve no purpose other than staining this fine book with lapses into rhetorical indecency.

What, after all, makes the poetic listening in silence to the murmuring of Being so sublime that law and human rights, in comparison, turns into idle chatter and a crime against humanity? This is perhaps the encompassing question to which Ben-Dor will hopefully respond in future work. The whole book repeatedly invokes a stark contrast between a sublime Heideggerian listening to the murmuring of Being and a thinking about Being, on the one hand, and the banal reality of law, on the other. Nowhere does he make an effort to explain the potentially redeeming qualities of a Heideggerian thinking about law in a way that might beckon or lure an ordinary (fallen) lawyer towards this thinking. I happen to be a legal theorist who has over the

years remained convinced of the continued significance of Heidegger's work for legal theory. But there is no point in preaching only to the converted and there is a lot to be said for preaching to the converted in a way that renders them deeply uncomfortable with their convictions. As things stand now I would not be surprised if the average lawyer and legal theorist would simply not understand what Ben-Dor is getting at in this book. And this failure to understand may well not be unilaterally due to the mundane lawyer's "banal reified thinking", but also to the complete withdrawal of this particular "thinking about the Being of law" from the world of law in a way that could not leave them "further *apart*". A strange new apartheid threatens Ben-Dor's engagement with Heidegger that is surprising for those who discern in Heidegger's thinking a significant thrust towards a post-apartheid theory of law (cf., for instance, Van der Walt 2005).

It should be clear from the above that Being and beings do not fall quite as apart in my reading of Heidegger as it threatens to do in Ben-Dor's reading. In my reading, the very withdrawal of Being from beings is also the way Being renders beings present and manifest. This reading of Heidegger does not deny the devastation and cruelty that often accompany this withdrawing manifestation of Being in beings, but it nevertheless seeks to hang on to an understanding of Being in which Being remains the Being *of beings*. Heidegger of course took leave of this ontological terminology in his later work, but to the extent that this language can still be argued to mark an essential moment of his thought, his later thought surely still prompts us to discern the lingering (*weilende*) remainder of Being in beings in the very withdrawal of Being from beings. It surely does not prompt us to read a Manichean split into this withdrawal, however much the interview with *Der Spiegel* might induce one to think otherwise.

Why does Ben-Dor equate human rights discourses with idle chatter? The notion of "idle chatter" that he invokes here derives from Heidegger's description in *Sein und Zeit* of the everyday language of Das Man as *Gerede* (chatter). *Gerede* concerns the trading of a relatively fixed set of commonplaces that characterise the language of individuals whose existence is no longer exposed to the infinite possibilities of linguistic expression (cf. Heidegger 1979: 167-170) that render human language irreducibly incomplete and irreducibly transitory or *unterwegs*, as Heidegger would articulate this thought in *Unterwegs zur Sprache*, one of the crucial works in the later phases of his thinking. At issue in this work is a language that responds to its historicity or historical situatedness as if responding to that which language *says to us* (on language as a saying-to us or *Zusage*, cf. Heidegger 1986:180-182) or a beckoning (*Wink, winken* - Heidegger 1986: 117, 141); a language that remains alert to a painful *threshold-existence* (*Schwelle* - Heidegger 1986: 26-27) which it cannot cross so as to finally arrive and from which it cannot retreat or insulate itself.

If it is true that human rights discourses often degenerate into idle chatter, however fervent and committed the indulgence in this chatter, it is so because these discourses are often offered as self-evident remedies for the fundamental emancipatory concerns of the law, remedies that no longer relate these emancipatory concerns to contingent histories of law, that is, to contingent histories that obscure these emancipatory concerns as much as they illuminate them. But facile denunciations and criminal accusations (Ben-Dor: "The entrenchment of the legal is a crime against humanity") of these reductions and degenerations of the language of law and human rights alter

nothing and can expect little more than ridicule from those who work with the law on a daily basis, often with the sincere hope of at least “holding in check the misfortune of how things are” (Michelman 8).

What then, does the attentive listening to the “murmur of Being” offer to those who sincerely work with the law in the hope of containing and perhaps even reducing the sheer misfortune of things? I have previously sought to address this question with reference to the sacrificial destruction of plurality that the law exacts whenever multiple claims to justice give rise to legal conflicts or conflicting interpretations of law that need to be resolved with reference to one interpretation of law. The Heideggerian thought at issue here is this: Being hosts an irreducible plurality of possible manifestations and forms of human existence, all of which must be reduced to one such expression or manifestation (one correct understanding) whenever the law is called upon to resolve intractable moral and socio-political conflicts. This sacrificial reduction of the irreducible ontological plurality of Being to the ontic univocity of legal meaning, this forgetting of the infinite plurality of Being in favour of univocal legal interpretations, is incircumventible. But this incircumventible forgetting need not be forgotten. Legal interpretation need not terminate in double forgetfulness. Legal interpretation can meaningfully and significantly be required to remember the inevitable forgetfulness of legal hermeneutics and the destruction of plurality that it wreaks. Thus can legal interpretation at least maintain an indirect regard for the plurality it is always bound to destroy. Thus can it *keep in play, alongside* the pronounced words of law, a silent murmuring of law. Thus can it keep in play, *alongside* the law, that which the law must *set aside*; thus can it *keep in play alongside* the vociferous and sonorous legal meanings that it has to coin so as to decide a case, the elegiac murmur of the infinite possibilities of legal meanings that ruins and *sets aside* (Van der Walt 30, 146-148).

Ben-Dor’s listening to the murmuring of Being takes a different route. It ultimately turns on an extensive exploration of a Heideggerian poetics of Being in ontologically suggestive Hebrew phrases (Ben-Dor 385-406). Beautiful as this marvelling exploration comes across, it hardly bears any relation to the concrete language and problems of law and surely makes no effort to articulate such a relation. There is one point earlier in the book (Chapter 4) where Ben-Dor appeared to be on the verge of a real inquiry into the relation between the thinking of Being and concrete questions of law. “What does all of this have to do with the ‘real’ law that is so familiar to lawyers and indeed, for that matter, jurists, such as codes, statutes, case law”, he asks there (Ben-Dor 137). But nothing comes of this question in the end.

Perhaps the exploration of the Heideggerian resonances that come to the fore in the close readings of Hebrew phrases in Chapter 9 has a completely different aim. Perhaps it is offered to somehow offset or relativise Heidegger’s condonation of the anti-Semitism of the National-Socialist movement, as if all were just a huge misunderstanding and as if Heidegger’s thinking were actually deeply and poetically Hebrew. This reading of Chapter 9 is not impossible and I expect that more hagiographic readers of Heidegger may well want to go down this line of interpretation. But it is surely not what Ben-Dor can be getting at here, for such a vulgar reading would surely not be worthy of the fine scholarship in this book. But refusing this vulgar reading also requires accepting that the point of Ben-Dor’s poetic Hebrew/Heideggerian engagement with the murmurings of Being in the final chapter

of the book, exactly where one could have expected some firmer clarifications if not conclusions, remains largely unexplained. The question as to what all of this means for “‘real’ law” (the question posed in Chapter 4) remains in need of a response. One will therefore have to wait for a further explication of the relevance of the poetic Hebrew/Heideggerian murmurings in Chapter 9 for the real language and questions of law. Only then might we also come to understand better the relevance of this formidable text for the theory of law. There is much more work to be done here. Ben-Dor surely has the scholarly ability, philosophical sensibility and poetic sensitivity to do this work and one therefore has good reason to await his future engagements with Heidegger and the law attentively.

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