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ECOLAW NOW! TOWARDS A GENERATIVE UNDERSTANDING OF LEGAL CULTURE, FROM LAW-AS-PILLAR TO LAW-AS-TREE

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A review of:

Fritjof Capra and Ugo Mattei, The Ecology of Law: Toward a Legal System in Tune with Nature and Community, Oakland, CA, Berrett-Koehler Publishers, 2015, ISBN: 978-1-62-656206-6, 216 pages.

Upon putting down The Ecology of Law (Capra & Mattei, 2015), the image that first comes to mind is one from the 2010 student protests in the United Kingdom. Specifically, I am drawn to flashes of the "Battle of the Books" that saw students shield themselves from police truncheons, using foam panels that bore the titles of a multitude of different books (Griffiths, 2010). Some books are like that: they evoke courage in the body. Courage I mean, here, in the etymological sense of *agere cordis*, "acting of the heart", as though to answer an embodied urge that oftentimes feels immediate and ancient in equal measure. The Ecology of Law is one such book, both theoretically courageous in its transdisciplinarity and practically en-couraging, that lays the inaugural stone of an area of (academic, but also of) engaged and activist research that has been a long time coming, namely legal ecology.

Given the pivotal importance of this text, there are three things I wish to accomplish in this review: (i) to give a flavour for the book's overall argument, and, in a subsequent section, (ii) to offer a sense of my own interpretive journey through it, as well as (iii) to provide a few suggestions for further reflection.

Exploring the ecology of law

The best way to begin introducing the book's main contention is through a spatial metaphor. In another recent work of legal theory, Andreas Philippopoulos-Mihalopoulos distinguishes two aspects of the cultural phenomenon we call "law" (Philippopoulos-

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Mihalopoulos, 2014). First, he contemplates "law" as the striation of space. This is a law that builds corridors and restricts movement as a way to consolidate space, and this aspect Philippopoulos-Mihalopoulos calls law as *logos*. There is, at the same time, another aspect of the law, where its origin as a cultural phenomenon can be discerned more clearly. Indeed, law – like culture at large – can only coalesce in temporary islands of consolidation and fixity, what Shotter calls "dynamic stabilities"(Shotter, 2011), amidst the evolving sea of collective practices of human habitation and emplacement (La Cecla, 2011a, 2011b). Capra and Mattei put this succinctly in a passage worth quoting:

> [I]n the real life of the law, legitimacy does not stem just from a political process. Instead, the most important source of law is the laboratory of real-life experience. The shared uses and values of a community, functional for a given social activity, over time are institutionalized as customs or binding practices. Sometimes known as social norms, these rules enjoy a degree of legitimacy that is much older than the birth of the modern state (Capra & Mattei, 2015, pp. 160–61)

Law, in other words, always arises out of a gradient of "vernacular" (Scott, 2012) practice that stabilises itself over time into custom, only to be superseded as innovative cultural forms and routines gradually renew it. In this sense, to go back to Philippopoulos-Mihalopoulos' spatial metaphors for the law, the latter also has a nomadic aspect, since it is always capable of re-opening itself up in spokes: its lines of flight.

In The Ecology of Law, Capra and Mattei make a sophisticated argument that the law has historically become over-identified with its aspect as *logos*, subjecting the Earth (and the life of human communities on it) to an excessive process of striation. In this sense, I would like to portray this state of things through the image of law as a pillar: something seemingly rigid (pillars can be cast in stone), and towering in its verticality over its surroundings, bearing seemingly no relation to them. The pillar-isation of law, they suggest, occurred in parallel with the development of a mechanistic paradigm in science, through the work of Galileo, who first introduced a focus on measurement and quantification to the detriment of qualitative appreciation. The process was further advanced by Descartes, who lodged the subject-object distinction in the notions of *res cogitans* – the mind as "thinking thing" – and *res extensa* – matter as "extended thing", and by Newton's atomistic and causal view of the universe, that could be captured in veritable "laws of nature". Legal thought, the authors suggest, was not exempt from participating in the same spirit of the time. Specifically, law consolidated itself into a pillar through a number of developments that sought to subtract it from the dynamics of change that pervade all cultural forms, because of their roots in vernacular and concerted practice. This abstraction from the medieval condition of "legal pluralism" (Capra & Mattei, 2015, p. 72) was made possible by lifting the law through the "pincer" of private property, which John Locke argued to be the basic form of legal entitlement, and the theory of state sovereignty stemming from Hobbes' Leviathan (Hobbes, 1651). These pillars have built the façade of a palace that views its surroundings as potential *terra nullius* available for exclusionary occupation, and that vests legal production in the sole hands of the state, guarded by the latter's ability to deploy violence for upholding state-mandated laws. This law ultimately becomes a separate technology in the hands of a professional elite of lawyers, creating a kind of fetishism whereby human communities are no longer able to see that the law is something they actually have a part in creating:

> To transform the laws, we must transform ourselves in such a way that we can understand their nature, and the tremendous power that we have as a community over the law. We must be aware that laws exist so long as they are obeyed, and that we make them in the choice we pursue as a community between obedience and disobedience. Just as the choice of disobedience by Rosa Parks was necessary to change the status of segregation from legal to illegal, similar resistance is needed to change extractive laws and practices from legal to illegal (Capra & Mattei, 2015, p. 176)

In parallel with this fetishism is also a polarisation of the institutional imagination: between the seemingly inescapable alternatives of private initiative facilitated by property law, or state intervention through public law. What is left out of this dichotomy, however, is the realm of the commons, which is where legal creativity – under the guise of organisational innovation – still has a possibility to move in tune with the life of its surroundings, so that human communities may co-evolve with the other ecological presences that populate their environments.

The focus on the commons as a site of legal productivity is, I believe, where another image of the law can begin to "take root"; namely law as tree.

The law as a tree remains a striation: a presence endowed with a degree of stability that arranges the space around it. Yet, it arises and is fed from the undergrowth and its striation is not so much one of closed corridors, but rather an open trellis around which other life may find room to grow. A law that recovers a sense of itself, as the always provisional signposting of a landscape of concerted practice, can – like a tree – end up becoming the pivot of a legal ecology that looks less like a palace, and more like a forest garden[1]. That is: a space produced through a mix of design and emergent self-organisation, where trees (or, out of metaphor, human law-giving practices) serve as a tool for scaffolding space into microclimates that enable the growth of a diverse and resilient organic community.

However, the authors do not stop at a visioning exercise, and offer an inspiring presentation of the concreteness of the law's self-production at the grassroots level. Indeed, even if they mention earlier a "right of resistance", that right is much richer and multi-faceted than may be suggested by the defensive image of students mounting book-shields, which I offered in the beginning. Rather, resistance is closer here in meaning to "[travelling] in obdurate and contrary direction" (De André, 2005), for the active sense it conveys of tending to an altogether different and positive vision of community (instead of merely opposing the *status quo*). For this journeying, Capra and Mattei use the term *commoning*. Of course, given the shifting grounds of vernacular legal production, it is impossible to crystallise commoning into a definition, beyond the active tending to and enjoying of the commons. In the same spirit of autonomy and self-definition, commons can in turn be "anything a community recognizes as capable of satisfying some real, fundamental need outside of market exchange […] [i]n addition to physical public space, this may also include institutional organizations such as cooperatives or commonwealths, trusts in the interest of future generations, village economies, water-sharing devices, and many other arrangements, antique as well as current. Its utility is created by shared community access and diffuse decision making" (Capra & Mattei, 2015, p. 150).

To transform the "legal system" into an "ecology of law" that has commoning at its heart, Capra and Mattei go on to schematise a three-pronged strategy: (i) re-claiming the law from its present state as a technology in the exclusive domain of a professional technocratic elite, and democratising it through a diffuse understanding of self-organisation at the community level

1 For an accessible introduction to forest gardening, see Crawford (2010).

as the primary source of law (Capra & Mattei, 2015, pp. 131–32); (ii) re-establishing the genetic connection between community needs and the laws governing them (Capra & Mattei, 2015, p. 139), which entails turning the former from grounds of exception to the default options of private property and state sovereignty, to their immanent structuring principles. Last, but not least, Capra and Mattei suggest (iii) pushing legal innovation in the direction of generative ownership, i.e. towards the development of innovative forms of stewardship for the commons, encompassing anything from worker-run factories and cooperatives, to solidarity purchase groups (*gruppi di acquisto solidale*), and from community land trusts and conservation easements - harmonising sustainable land use with protection from extractive development - to community banks (Capra & Mattei, 2015, pp. 145–46).

Interpretive signposts and new departures

Given the paradigmatic importance of the vision that Capra and Mattei articulate, I feel called upon – as one of the first reviewers - to offer future readers my own interpretive suggestions, as well as to share some of the lines of further reflection and intervention that I feel the book makes possible, given how it promises to open a new field of ecological know-how motivated by legal production and design.

In order to re-introduce the commons as sites for vernacular and de-centralised legal production, Capra and Mattei engage in a gripping and highly accessible alternative history of legal and scientific thought, and of their mutual contaminations. Their argument throughout is that – as the mechanistic paradigm has been losing ground in mainstream science since at least the beginning of the twentieth century – the time has equally come for a shift from law-as-pillar to law-as-tree. Yet, seeds of an ecological wisdom had been there throughout those histories. In science, for instance, Leonardo Da Vinci and Goethe are mentioned as important advocates and practitioners of a non-reductionist study of living forms, that anticipates the complexity revolution of the early twentieth century. In law, the vernacular emergence of legal arrangements within face-to-face communities, most prominent in the Middle Ages, constitutes the historical precursor of modern-day commoning and community lawyering.

In this last respect, I feel it would however be misleading to read in the book a utopian claim for returning to a romanticised vision of a face-to-face past. Restoring the dignity of the commons as a source of law entails, by necessity, giving them their historical due. At the same time, it would be tantamount to a strawman to say that the authors merely argue to go back to a lost Golden Age[2]. To return capital to the realm of the commons involves, instead, sophisticated engagement with the legal form in today's globalised world, with all its challenges and opportunities. Commoning for Capra and Mattei is not, I would suggest, to be seen as a romantic hope, but rather as the bleeding edge of legal innovation, a kind of "law 2.0", that finds in the medieval history of commoning the ancient heart of a contemporary movement seeking to shape legal culture and ethical sensititivies:

> Nostalgia for an order that is long gone is of no use. Nor is it helpful to deny the progress that in many areas, such as medicine, capitalism has brought to some. While many people today, especially in the West, miss a community, nobody misses the quality of pre-modern

2 That this is an issue that warrants clarification, however, is apparent from the kind of conundrum exposed by Quilley (2015) in relation to an ambiguity, in ecological activism, between yearning for a romanticised past and acknowledging, for instance, the importance of individual rights achieved, in the West, through ecologically-taxing regimes of liberal democracy.

> subsistence farming life. Strong community bonds develop today at any latitude among commoners challenging the established legal order, risking arrest and other sanctions in long-lasting collective struggles to protect a territory from fracking or extraction or a public building from being sold. These bonds can provide the needed twenty-first-century transformation from homo economicus into homo ecologicus. The brutal break with the medieval consciousness that we described above precluded the gradual development of a commons-based legal system, where jurisprudence could have purified community from its less-than-desirable aspects (Capra & Mattei, 2015, pp. 152–53)

Therefore, the medieval history of the commons can be primarily regarded as a rhetorical device deployed in the entirely contemporary attempt to shift the cultural possibilities for legal and political intervention towards a commons-centred paradigm[3].

Another interpretive suggestion, this time of a terminological nature, I would like to advance in relation to Capra and Mattei's discussion of the shift from "laws of nature" (in science) and "mechanistic jurisprudence" (in law) towards "ecological principles/patterns" informing ecoliterate scientific and legal practice. Indeed, the words "pattern" and "principle", when they are used to signify a more complex, non-linear and imagistic (rather than algebraic) version of the earlier "laws of nature", risk being toned down in their potential for a radical paradigmatic shift, as exemplified in this passage:

> These principles of organization, or principles of ecology, are today's equivalent of what used to be called the laws of nature. They are perhaps more subtle, and they are formulated in qualitative ways – in terms of patterns of relationships and processes – but they are as stringent as Newton's law of gravity (Capra & Mattei, 2015, pp. 176–77).

Indeed, this passage left me with the question of what it is that actually makes ecological principles and patterns qualitatively different from the earlier "laws of nature", and not just other laws (of the same mechanistic sort), different only in degree of accuracy or predictive power?

In response to this, I would suggest that a more effective grasp of the paradigmatic break between a mechanistic and an ecological worldview can be obtained by looking at the different modes of engagement that "laws" and "patterns" respectively portray. "Laws" embed a position of externality vis-à-vis the (bio-physical or social) world they purport to apply to, as though they captured the true mechanism behind reality (and enabled control of it), with matter and bodies simply obeying in closed loops, without being themselves centres of autonomous and spontaneous organisational processes. Talk of "patterns" and "principles" implies, instead, their primary adoption as flexible orientational devices, immanent to the heuristic activities and organisational processes within which they are discerned. In other words, "while we may continually use the same word to refer to a recognizably witnessable aspect of an unfolding phenomenon, we can do so, not because it has objectively the same form out in the world as a [law-like] pattern, but because it can often 'remind' us of other past experiences with a similar unfolding time-course to them" (Shotter, 2014, p. 316). In Capra and Mattei's argument, "patterns" and "principles" indeed portray this distinctive character of the ecological approach, namely of it being a "coherent and clear way of thinking in the process" (Capra & Mattei, 2015, p. 187 emphasis added). That is: a strategic mode of inquiry that performatively uses perceived

3 On the central role of social movements in shaping collectively-practicable pathways for concerted ethical action, see more generally Pleasants (2008).

similarities - and metaphors bridging hitherto separate domains of experience - to find a heuristic footing in practice, without attempting to close down to a "law" the fundamental organisational autonomy (and continual openness to variation) of our bio-physical and cultural worlds. Later in the book, the authors make it even more explicit that the ecological paradigm in science and law is indeed centred on an appreciation of a "dynamic process of coevolution" that honours emergence and autonomous self-organisation (Capra & Mattei, 2015, p. 177). Therefore, on balance, I am persuaded that Capra and Mattei use "principles" and "patterns" in this second sense, despite the occasional ambiguity when the distinction with mechanistic "laws" of nature is spelled out less clearly. It is therefore submitted that these terminological hesitations do not alter the gist of their argument, and hopefully the suggestion advanced here can pave the way for other readers not to get caught in this apparent ambiguity.

In view of what has been said so far, the transition from law-as-pillar to law-as-tree also evokes a number of fundamental shifts in the nature and forms of legal practice, of which I wish to now give a cursory overview: these are some of the novel possibilities that The Ecology of Law has the merit of making relevant to the domain of the law. First, an ecoliterate understanding of the law is one that retains an awareness that its striations (i.e. the consolidation of custom) are performative achievements of concerted practice, occurring inside an evolving milieu populated by presences human and nonhuman. Legal forms become, on this reading, provisional equilibria in the dialectic of addressing a community's needs, rather than *a priori* solutions deducible via logical reasoning. Law, therefore, is transformed into "a bridge to the future based on experimentation and on learning from mistakes, past as well as present" (Capra & Mattei, 2015, p. 144): a kind of culturally-mediated ethical deliberation against the grain of practice.

In this sense, developing such an "ecological order" through concerted experimentation requires "ecoliterate people" (Capra & Mattei, 2015, p. 180) that will be capable of navigating the process of trial and error with the compass of a radically different know-how. And such know-how stems, first and foremost, from the ability to inhabit space "slowly" and tread on it "lightly", with the caution and care mandated by respect for its ecosystemic presences. This type of learning is not merely one of a conceptual sort, but one that requires retraining one's very embodied habitus around new ritual centres. In this sense, I have argued elsewhere (Russi, 2015) that the fundamental continuity of cultural forms implies that such a re-training cannot leave untouched what people – often without explicit conceptualisation – consider to be the gravitational pivots that ground their embodied poise for acting in the world, what Gordon Lynch (2012) calls their sense of "the sacred". Therefore, I have a feeling that the sort of pre-conceptual learning entailed in the journey towards ecoliteracy, for the purpose of helping bring about an ecolegal order, would greatly benefit from contamination with deep ecology (Abram, 2011), Goethean phenomenology of nature (Kidd, 2015) and/or liberation theologies (Hathaway & Boff, 2009), particularly in consideration of their attention for the simultaneous nurturing of political, ethical and embodied sensitivities.

Another important step that is now relevant to the legal conversation is a dialogue with the process wisdom and the rich array of case-studies existing in organisation and management studies. There is, in fact, a growing diversity of starting points, beyond the all-too-common for-profit corporation that has traditionally formed the focus of organisational research. In this context, "commoning institutions" are being increasingly recognised as deserving of closer scrutiny and active engagement for continual evolution and improvement. [4]

4 In this sense, the volumes by Parker et al. (2014) and Lewis and Conaty (2012) are just two examples of a fertile new field of study around the possibilities and practice of alternative organisation, bringing into focus the vernacular

Conclusion

In sum, my assessment of The Ecology of Law is that it does a tremendous service to the public role of the law by taking it out of the ivory tower of academic debate and the coveted halls of law firms, and engages it in a dialogue of mutual discovery with the history of the natural sciences. The end result is a book that will be tremendously useful to all those – not restricted to an academic background - who were not educated as lawyers (but also to many of those who were, and always found in the law something slightly out of touch with the ways of the world). They will find in it a call to appropriate their collective faculties as law-makers and, in turn, as makers of their own history (Cox & Gunvald Nilsen, 2014). In view of the above, this is not just a book that is set to shake the foundations of legal theory for good, but a strategic weapon in the hands of all commoners, en-couraging them to reclaim what is theirs with the benefit of "a vision and a plan" (Capra & Mattei, 2015, p. 188).

process of juridical production of the commons (via experimentation, "best practice" and custom formation). Capra and Mattei mention another study in the book that seems to follow roughly the same trajectory, by Marjorie Kelly (2012).

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