



Respuesta a Luis Gómez Romero e Iker Nabaskues

Kangaroo Courts and The Rule of Law. The Legacy of Modernism

**Desmond Manderson,
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Tie that bind

I have been asked to write a few words in reply to the review essays which appear in this volume in response to *Kangaroo Courts and the rule of law – the legacy of modernism*. It is more than appropriate; it is a privilege to have critics; any critics, to be honest, since a hostile reader is infinitely preferable to no reader at all, but especially ones as wise and generous as these. I have learnt more in reading their responses to my work than I am able to summarize here, but I wish to thank them for the honor they have done me in engaging with my book as carefully and as vigorously as they have.

It is more than appropriate, it is a privilege that this commentary should appear in the journal *Eunomia*, that is, a publication devoted not to order or value as such but to 'good order', to the question of the relationship that ought to pertain between harmony and order, governance and good governance. These questions have been at the centre of debates about justice and law for thousands of years. Not so very long ago the dispute between HLA Hart and Lon Fuller centred precisely on such questions. Fuller said that the 'oughtness' of law implied not just order but 'good order'; Hart demurred and pointed out that just because law was a structure of obligation did not make it necessarily moral. 'The baffled poisoner', he pointed out, might equally say that he 'ought' to have given her a second dose. The two legal thinkers divided precisely on the question of law and economics.

Many hundreds of years earlier, Ambrogio Lorenzetti's mural was given pride of place in the Palazzo Pubblico in Siena. The panoramic *Allegory of Good Government*, and its companion piece the *Effects of Good Government*, might be said to be the visual representation of *eunomia*, indeed perhaps even, in its strictest sense, its constitutive moment. Lorenzetti, as long ago as 1339, did not produce a representation of order, diagrams of lines of authority, summaries of rules, or catalogues of principles. On the contrary he portrayed in the most vivid manner a

complex web of relationships in which can be seen and felt a fluid and dynamic harmony, in which the ropes that bind us each to each other are kept in precisely the right balance of tension and release to allow the community to flourish. Lorenzetti's images give us a feeling that the most successful law is a dance, an oscillation, and a rhythm.

Professor Nabaskues is right to rebuke me for positing too crude a distinction between style and plot, form and content. As he says, they are indissolubly connected, and we can see in Lorenzetti, for example, how closely the style and feel, the emotional register of his painting is associated with the political principles he avows. The rhythmic feet of the ensemble seen dancing in the streets of his ideal city are not merely celebrating or ornamenting the Sienese *polis*; they are literally constituting it by their relations, by their feelings, and by their movements. But I cannot help feeling that the difference between Professor Nabaskues and myself, on this point as on most of his remarks, is one of emphasis. There is no difference between form and content, true; but it seems to me that a great deal of law and literature writing in recent years seems almost willfully ignorant of just this point. In the process it has given remarkably short shrift to the affective and stylistic elements of prose writing. In a strange paradoxical twist, literature is too often reduced, by legal writers, to a set of principles to be extracted from the teeth of the text like a *ratio* from a court decision. One of the tasks of *Kangaroo Courts* was to bring to bear a more holistic and less reductive analysis of works of literature.

So too the distinction I make between a way of reading the novel which aims at drawing out its 'moral' and a way of reading the novel which is more pluralistic and dialogic in orientation, is no doubt overdrawn. Professor Nabaskues is right to say that a novel could hardly avoid having *some* connection with morals, both in terms of its characters and its readers. But there is a world of difference between saying that all characters have morals and saying that all novels have 'a moral'. Yet this difference is often ignored by writers in the field. The former may be true; the latter is definitely false. In Lawrence, as I have tried to show, the error is a fatal one. If one looks for the 'moral' in the story, one will consistently miss both the counter-points to which it gives voice, and the overall tension, disagreement, and (as Lawrence puts it) 'polarity' that his books, *Kangaroo* in particular, seek to stage and not resolve. The moral reading of a novel, the sense that it is, as George Eliot put it, a kind of secular sermon, found its apotheosis in nineteenth century realism and in the narrative didacticism of writers like Eliot, Dickens, and Tolstoy. Not, as Bakhtin and Nabaskues point out, in Dostoevsky. The 'modernist movement', I insist, dismantled the moralistic novel though of course never ignoring the moral elements of its discourse or the discourse of its characters. That is not the same thing and it seems to me critical to a reconstruction of the field of law and literature to think about what that moral ambivalence and poly-vocal instability does to the question of justice and the idea of the rule of law.

Again, the disagreement between Professor Nabaskues and myself on this issue is surely one of emphasis. He correctly insists that justice 'is not a synthesis, it is a decision, it implies taking a stance, deciding on a particular issue.' The real task of my book was to try and think through this very modernist predicament, that is, the distinctive combination of contingency and necessity that shrouds and shadows our modern experience of legal judgment. The question goes back to turn of the century modernism, and is still intensely current. How can we accept the loss of transcendence in law and value, and yet not concede – as the nihilists, Dadaists, and Critics insist, that there is nothing to legal judgment but some form of partisan politics. That is the real question that Lawrence was struggling with then and that we are still struggling with now. My aim in *Kangaroo Courts* was to learn from Lawrence and in



the process to come up with some kind of coherent answer myself. It seems to me that it was and is possible to embrace –really embrace, not just with reluctance but with alacrity– the uncertainty and the polyphonic discourse of modern law; while still finding a defensible articulation of the rule of law and the value of legal judgment therein.

The alternative to finding a way through the thickets of modernism is to give in to fantasies of transcendence or to despair. Professor Nabaskues rather nicely, and sharply, disagrees with my reading of the tradition of popular culture heroes who take on the law in the interests of justice. He points out how strongly the superhero is limited –not by the laws of physics or probability, to be sure, but by moral values and by ‘the same principles defended by the law.’ On this reading, Superman or Batman and the rest are agents of legality (albeit in disguise). I see the point but in the end I don’t agree. A recent edition of *Law Text Culture* curated by Dr Luis Gomez-Romero, my second critic in this volume, shows how much the genre of the superhero gives voice to the urgent alienation of the modern world, and in particular modern youth culture, from the institutional structures of modernity. On the one hand Superman and his ilk are needed because of the enervating impotence of the legal system. On the other hand, their adventures stage a dramatic encounter between ‘law’ and ‘justice’ every bit as uncompromising as the encounter between Superman and Luthor, whose name you will recall is *lex*; or between Batman and the Joker, whose exploitation of the machinery of institutions for his own anarchic purposes seems uncannily, it seems to me, legalistic. A lawyer is a joker in an expensive suit. Indeed, the only exception to this opposition between superhero and legality is the Canadian superhero Captain Canuck. He has no super powers at all. He turns his captives over to the authorities. At his most desperate, he holds a press conference. And as a superhero he has been almost a complete dead loss. The only law Captain Canuck ever broke was the law of the genre. A superhero must be an outcast and an out-law. He is, in the most philosophically rigorous sense of the word, the *supplement* to the legal system, its *pharmakon*, poison and antidote.

Dr Gomez-Romero’s own work on popular culture shows just how deep-seated the yearning for a rescue figure has been in the discursive history of modern law. And in his reply to my recent work, he takes this argument in a surprising new direction. He pays me what I think is the ultimate compliment, that of applying my methods and approaches to a different novel and a different social context. The reading he produces by applying my methodology to Lawrence’s next book, set in Gomez-Romero’s own homeland of Mexico, is nuanced and powerful. He justly chastises me for a static reading of Lawrence limited to one small encounter, Australia –my own homeland. Like the good student of literature he is, Gomez-Romero inevitably asks, ‘and then what?’ And what happened next was Lawrence’s encounter with Mexico in *The Plumed Serpent*, in which his consistent interest in questions of law and justice, myth, power and freedom, are given new tests under new circumstances.

In neither case does Lawrence indulge the *amour propre* of his guides, but instead tries to absorb local knowledge ‘warts and all.’ If this sometimes makes for disconcerting reading, Lawrence’s critical assessments seem only to have gained force over time. Gomez-Romero demonstrates just how the different contexts in these two countries leads to *different* tragedies. At the same time, reading Lawrence’s two novels highlights just how uncannily their contemporary circumstances seem to continue their historical arcs. In other words, Lawrence’s literary mythologies, now one hundred years old, continue to speak to these countries’ twenty-first century predicament. The tragedy for Australia in the 1920s was how alien the language of reactionary modernism seemed to the diffident

instrumentalism of the place. Modern-day Australia seems still to sustain an almost unparalleled culture of hedonism and anti-intellectualism. But the tragedy of Mexico was just how *plausible* the language of reactionary modernism seemed. Modern-day Mexico seems still to combine a culture of savagery illuminated –and sometimes clouded– by a passionate intellectualism. The writer Donald Horne famously christened Australia ‘the lucky country’ —he did not mean it as a compliment; he meant it as a curse. The curse of Mexico, on the other hand, is that it is not a lucky country. Australia’s luck has led to a dull complacency that enrages a good many of its citizens. Of Mexico, say what you will, neither dullness nor complacency spring to mind.

Gomez-Romero’s critique of *Kangaroo Courts* takes the argument about Lawrence and law in new and exciting directions. At the same time, he identifies an important objection to my own work. For Gomez-Romero, each place treads a distinct path through modernity and with different consequences for the relationship between polarity, uncertainty, and the rule of law. My book concluded by defending a culture of uncertainty, of unresolved conflicts, and of judgment as an exercise in the provisional. I saw these necessary attributes as virtues of a highly social understanding of the rule of law. ‘Justice,’ I wrote, ‘is like the rest of us. Its frailty is its strength.’ But as Gomez-Romero points out, ‘the critique of the rule of law... cannot function without a basis of legality, and of a civil society in which stability and social commitment are taken for granted.’ In short, in a place like Mexico in the 1920s where untrammelled violence was normalized through myth and history, positivism was a dream not a nightmare. Walter Benjamin’s divine violence likewise seems not creative but destructive. In Australia, Lawrence explored the fantasy of what such violence might accomplish. In Mexico he witnessed what it actually did accomplish in the inevitable hands not of gods but of men. In *Kangaroo*, Ben Cooley’s desire was naïve and deluded; in *The Plumed Serpent*, the parallel figure Huitzilopochtli did not so much share it as exploit it for his own cynical purposes. Gomez-Romero persuasively reminds us that ‘modernity is not unique, and its crises are plural. In this non-Eurocentric sense, *modernities* entail several competing master narratives and cultural contextualizations that result in multiple legal crises.’ The implications and resonances of these crises take very different forms in different places.

At the same time, there is I think a commonality which is worth emphasizing. Again, the commonality is not substantive but methodological. Granted, the contingency and polarity of the rule of law cannot and should not be applied universally. But beneath that claim lies another –of the relationship between literary and cultural traditions and legal resources, of the ways in which context determines meaning, and of the role of affect in the constitution of law. I struggled in this book to reclaim the important relationship between law and literature while at the same time reconfiguring it– not as a short cut to moral values but as a long cut to a dialogue about justice in which a much wider community would meaningfully participate. Reconnecting law and literature will give legal values back their particular histories and their particular contexts, and will help communities as a whole participate in what to make of -and out of- those histories and contexts.

Around the world, many international organizations promote ‘the rule of law’, especially when it comes to third world countries. But very often what they mean by this is the application of a particular set of institutional structures and forms. What they *don’t* very often mean is any sense of public engagement, participation, or transparency of process. I think in trying to fashion legal institutions in challenging contexts, whether we are talking about Mexico or Australia or somewhere else in the twenty-first century, we should pay far more attention to their literary and aesthetic traditions, and the resources those traditions provide to speak about values,



narratives, and social relations in complex and meaningful ways. D.H. Lawrence saw that too; he saw the ways in which narratives, speech patterns, and mythology gave people resources through which to engage in political action. He was often highly critical of the use and abuse of them, from England patriotic rhetoric during the first world war to Mexican revolutionary rhetoric after it. But his response was not to dismiss or despair of our mythic lives, as to find more sensitive ways of intuiting its force and more reflective ways of responding to it. In a very general sense both *Kangaroo* and *The Plumed Serpent* concern mythologies and the modern world.

Civil society, as Dr Gomez-Romero insists, is the essential foundation to legal discourse. It finds its deepest roots and its highest branches in literature and the creative arts. Look again at Lorenzetti's *Effects of Good Government*. One wonders if the title — which, after all, was not Lorenzetti's — is apt. This is not a question that anyone has thought much about. But are those dancers really just an 'effect' of government? Or are they rather and more deeply its cause? Hand holding hand, foot echoing foot in time with the music. Moving through space and time, working pleasurably together, separately but in pursuit of a common goal. In what sense - culturally, historically, emotionally- can this be reduced to an 'effect'? The rhythmic harmony and the social relations of trust Lorenzetti's dancers literally *embody* are not epiphenomenal to civil society but intimately bound up with it. The dance makes the law.