LAW AFTER MODERNITY


This is a book I would not have read had I not been asked to review it. I am glad I was asked: the work is interesting, the arguments clear, and the book is well-written. It is the latest volume in the Legal Theory Today series.

The book has twelve chapters broken into three main sections: introduction and conclusion (chapters 1 and 12); a discussion of some main approaches to legal theory (chapters 2, 3, and 4); and a discussion of critiques of legal theory and implications for the connection of justice to law (chapters 5 through 11). The book includes an unusually large number of images because Douglas-Scott promises to use them as part of his argument, and not just as illustrations.

Douglas-Scott argues for pluralistic conceptions of law, focusing on richness, historical embeddedness, and cultural contingency. He argues that while Pluralism is preferable as description of law, it is unclear whether Pluralism is normatively attractive or if adherence to Pluralism will advance justice. Douglas-Scott does not offer his own concept or definition of law and suggests that project has little point. Instead, he offers a list of salient features of practices that may qualify as law: (1) A belief in relative autonomy or closure of law; (2) Characterization of law as systematic, fairly orderly, and capable of existing in the context of separate 'legal systems'; and (3) A tendency to identify law with the nation state, or at least to stress the importance of state law, together with a reluctance to delve too deeply into the multi-dimensionality or plurality of law, whether global, regional or sub-national.

Chapter 2 addresses autonomy of law and legal theory. Put another way, it is a critical examination of the notion that law is an autonomous normative system as understood, e.g., by Legal Positivists. The idea of autonomy is that a legal system in some way provides its own normative grounding and legitimately displaces other normative systems. There is useful discussion of Hart and Raz in this context, and a fair summary account of a general Positivist approach, which, for Douglas-Scott, all fail. This is because a crucial part of the Positivist argument grounds legal autonomy in extra-legal sources or devolves into mystery. Along with discussion and critique of Hart and Raz, there are interesting discussions of varying lengths of non-Positivist figures such as Dworkin, Derrida, Marx and Weber. In the end, Douglas-Scott concludes that it is not really possible to account for autonomy of law or to provide a definitional account of law, both of which are frequently seen as an integral part of Positivist programs.

Chapter 3 addresses consideration of law as a system of rules or institutions, leading to a conclusion in favor of Legal Pluralism as a descriptive account. The central aim of the chapter is to extend [*177] Douglas-Scott's critique of Positivist theory and to highlight its shortcomings as description of law. From the perspective of theory, Positivism is built on a view of law as a system of rules. There is, however, no adequate account of law as rules, in part because there is no adequate account of rules more generally. To the extent that Positivism is built on rules, e.g., primary and secondary rules, the approach fails because, first, the kinds of rules are not effectively distinguishable, and, second, the demand for a single or common source for rules cannot be met. Although Positivist accounts appear to require a unitary source for any legal system (and to require autonomy of each such system), the historical and sociological evidence is strongly contrary. There appear to be numerous forms or systems of law that either lack a unitary source or...
which cannot be squared with the autonomy claims, including, for example, public and private international law, religious law, customary and indigenous law, alternative dispute resolution systems, and, on consideration, common law, all of which, in various forms, overlap in application. The clearest, if not the most compelling, set of examples are the complex systems of the European law: EU, Euro-Economic, ICC, EUCHR, National courts, and so on. Hence, Legal Pluralism.

Chapter 4 furthers the discussions of Pluralism as a descriptive theory of law, taking up some conceptual issues. The descriptive work is built around comparisons of law, on the one hand, and art and literature on the other. The more conceptual portion of the chapter addresses several defects in Pluralism as a theoretical or conceptual account of law. Pluralism seems to lead into incoherence with respect to definitions of law, and faces serious difficulties in identifying or providing any over-arching principles that might organize the subject of law, or connecting law and justice in a useful way, and ends up trivializing the notion of autonomy of law. These difficulties point to a normative problem for any Pluralist approach to law. The commitment to multiple overlapping legal systems severely undermines the possibility that there is a coherent or sufficiently broad normative foundation for law or for choice among legal systems, which matters a good deal if there is to be a moral critique of a legal system or set of systems. Chapter 5 develops this difficulty by focusing on the ways in which, e.g., private legal systems, globalization of markets and law, and private regulatory entities, undermine or block recourse to justice as a guiding normative standard. Privatization of legal functions, for example, effectively excludes public interests and social values, displacing public values (and norms) with those of private interests, thus devaluing justice.

Chapters 5 through 9 concern law and justice. Chapter 5 develops an argument that Pluralism perpetuates injustice, at least as a practical matter, in particular through privatization of legal activities and functions, economic globalization, and the like. Chapter 6 starts with an examination of the links between the theory of justice and the theory of law. This quickly runs into issues of international justice and injustice, and the difficulty of finding principles of justice appropriate at both the international and local levels. Douglas-Scott suggests a turn from ideal to non-*ideal* ideal accounts of justice, as advanced, e.g., by Sen. The idea here is to look at areas of agreement on justice or injustice without seeking agreement on the explanations for the judgments. Chapter 7 takes as its starting point that no universal theory of justice is possible, and asks whether it is nevertheless possible to provide an account of legal justice. Douglas-Scott thinks so. The way forward is to abandon the idea that the normative core of law is conceived of as an autonomous system of rules. Instead, he advocates placing a concern for human rights at the core of conceptions of justice, thereby deriving the usual sorts of values characteristic of rule of law from agreement on the importance of human rights. Thus, one gets to the norms for law as general in character, relatively clear, certain, public, prospective, stable, and derived from equality of subjects before the law, a tenet which itself comes out of a concern for human rights. Chapter 8 navigates a claim for a role for justice in law through the standard critiques of Critical Legal Studies. Chapter 9 addresses the difficulty of finding a grounding for human rights and how, if none is found, human rights may nevertheless play a central role in legal theory, effectively supplanting justice. Acknowledging the serious obstacles facing any positive account of human rights, Douglas-Scott suggests that the foundation is in a concern about injustice, that human rights are a way to talk about injustice and suffering.

Chapters 10 and 11 are about Cosmopolitanism. The upshot of these chapters is that cosmopolitanism cannot provide a universal account of law or of legal justice.

Chapter 12 sets outs Douglas-Scott’s conclusions. How we understand law has changed with a new Pluralist paradigm coming into place. During the period of modernity (which seems to mean the post-Enlightenment to mid-20th century), there was an inclination to systematize law into legal systems and offer theory of those systems. The entire approach under modernity has been cast into doubt by 20th century developments. How then to conceptualize law? One must differentiate the descriptive from the normative Pluralist account. Douglas-Scott argues for the greater descriptive accuracy of Pluralism (which places boundaries on adequate theory) but not for a normative superiority of Pluralism. Law has an ‘aptness’ for justice – law holds out the possibility that realizable justice, i.e. legal justice – is the normative grounding. The sense of justice that drives legal justice and the rule of law derives from a sense of injustice. That sense of injustice does not provide a transcendental foundation for justice and human rights.
Douglas-Scott’s book has a number of successes. It provides good discussions of a wide range of thinkers and arguments, a good deal more than canvassed here. The survey of views is wide and largely accurate. While one might cavil over the space devoted to this or that thinker or argument, nothing of major significance was overlooked or treated unfairly. But that is also an area of disappointment or caution. Too much of the book is devoted to canvassing the positions and arguments, using the survey and discussion to present Douglas-Scott’s argument indirectly. Not enough space was devoted directly to Douglas-Scott developing his positions. The recourse to a sense of [*179] injustice has some attraction, but the actual argument for a sense of injustice as a normative core for legal critique is ultimately weak. And sometimes Douglas-Scott is over-inclusive. It is past time to retire Critical Legal Theory critiques – they are built on caricature and painful mistakes. There is also a kind of deep uncertainty in the work about what modernity and post-modernity are. Many of the arguments and positions attributed to post-modernity are not at all new, but have deep historical roots. But the book’s one big disappointment was the failure of the promise that arguments would be advanced by inclusion of art. Sad to say, that promise was not met. The figures included in the book are certainly interesting and apropos of their locations in the analysis and arguments. But the figures do not really advance any line of argument. The images remain illustrations. Perhaps I am not the right audience. For one who is a practicing lawyer with background in philosophy of law, this book was fun to read, and interesting. It does a good job of making its case for Pluralism. I suspect that, in the end, Douglas-Scott is a bit too optimistic about the normative problems, but that may not be a defect. It is a work I can and do recommend.

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