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Explorations in Law and Society: Toward a Constitutive Theory of Law

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BOOK REVIEWS

Explorations in Law and Society: Toward a Constitutive Theory of Law

Alan Hunt

New York: Routledge, 1993, 381 pp.

Reviewed by Michael Osborne[†]

Alan Hunt's project is "neither autonomous law, nor dependent law, but constitutive law."¹ He wants to avoid the naive and incorrect assumption of liberalism that law and legal theory are autonomous, and the equally unsatisfying view of law as determined by social relations which is held by some Marxists. Such a constitutive theory would account for the interactive relationship between law and society: while each influences the other, neither is reducible to the other.²

The book is a collection of previously-published articles. As such, it lacks the thematic unity that one would expect were it written as one work. What unity it does have derives from the fact that Hunt's scholarship has, over the course of the two decades spanned by this book, frequently revisited the themes one finds running through the collection. Among his concerns are the way that Marxists have failed to account for the legitimacy that law has acquired in modern capitalist societies (discussed principally in chapter two, "Law, State, and Class Struggle"); the dichotomy between coercion and consent upon which both Marxist and non-Marxist thought impales itself (chapter four, "Dichotomy and Contradiction in the Sociology of Law"); the deficiencies of the politics of law and justice of the left in the face of the growing centrality of law (chapter five, "The Politics of Law and Justice"); the "fear of the body snatchers" demonstrated by CLS scholars and the problem of the relative autonomy of law (chapter seven, "The Theory of Critical Legal Studies"); the assertion by Foucault that

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¹ A. Hunt., *Explorations in Law and Society: Toward a Constitutive Theory of Law* (New York: Routledge, 1993) at 182.

² *Ibid.* at 179.

law has been ousted as the principal locus of power in society (chapter twelve, "Foucault's Expulsion of Law"); and the paradigm shift from government to governance, and from law as rules to law as regulation (chapter thirteen, "Law as a Constitutive Mode of Regulation"). Needless to say, this list does not nearly exhaust the ideas canvassed by Hunt, but it does perhaps serve to show the purposeful eclecticism of his work. For these all relate, in one way or another, to his central project, which is for law "to be understood not in itself, through the introspection of self-referentiality, but rather from addressing the connectedness of law, from viewing law in its location interacting with and interpenetrating other social processes."³

One of the principal elements of Hunt's argument is the notion that "the fundamental difficulty and problem confronting all legal theory lies in the exploration and resolution of the dualism of coercion and consent."⁴ Law is coercive, yet, in liberal theory, it is based on consent. What is more, the law actually obtains the consent of those it would coerce. This paradoxical dichotomy is bridged by the concept of domination theory. The law operates through "repressive domination" as well as "ideological domination."⁵ The latter refers to the manner in which law legitimizes the existing social order and produces the assent even of those who are oppressed by it. The two work together. Thus, "in the pure form of the bourgeois democratic state the primary role in the maintenance of the social order is fulfilled by the process of ideological domination and that repressive domination plays a secondary and reinforcing role."⁶

Given this constitutive role of law, it is not surprising that Hunt sees law as important. This may seem a truism to most, but to a socialist or Marxist who holds that law is but a repressive tool in the hands of the ruling class, the important fact is not the law itself, but who wields it. But in fact, Hunt holds, law has achieved a growing centrality in society. Law engages ideological symbols; it encourages some conduct and discourages others; its language—the language of "rights," "duties," "equality," and "justice"—permeates political discourse.

³ *Ibid.* at 303.

⁴ *Ibid.* at 76.

⁵ *Ibid.* at 49.

⁶ *Ibid.* at 52.

This principal purpose of the book, as has been noted, is to construct a constitutive theory of law. Certainly the outlines are there, but the journey that Hunt proposes to the reader at the beginning of the book has not yet found its destination. If there is a terminus, it is to be found in the concept of law as a constitutive mode of regulation in the final chapter. This conception allows law to be seen in terms of its connection with the governance of society, or the process of how society is regulated in its broadest sense. The notion of law as autonomous must be abandoned, for “[l]egal autonomy is grounded in a belief in the severability of law from other related social phenomena.”⁷ And it is precisely Hunt’s point that law is deeply woven into the fabric of society.

What flows from Hunt’s theory of law is a new conception of public law: “the model of law as regulation can be seen as a shift toward public law that focuses on the varied means whereby extensive fields of social life are made subject to regulatory intervention.”⁸ And the notion of public law itself will “embrace the regulatory activity of territorial states, the enormous regulatory productivity of quasistate institutions, professional and institutional agencies, and the regulatory activity of economic agencies.”⁹ This gives rise to a rediscovery of legal pluralism: law is not to be conceived with a capital “L,” as some brooding omnipresence, but as something which is present in various forms in society, in both public and private institutions (according to the traditional conception):

At the heart of this endeavour is a concern to give full recognition to the lessons of legal pluralism, that we should recognize the diversity of legal phenomena and avoid falling into the presumption of a unitary entity “the Law,” while at the same time to give due recognition to the importance of both state as a political agency and to state-law.¹⁰

Thus Hunt has formed what might be termed a legal theory for the contemporary state. The experience of most of us is that we are governed by a myriad of institutions, of which the government is but one. We are, to be sure, subject to income tax laws and the rules of the road, but we bump up even more often against the rules of

⁷ *Ibid.* at 304.

⁸ *Ibid.* at 306.

⁹ *Ibid.* at 307.

¹⁰ *Ibid.* at 307.

our workplace or place of study. Our freedom of action is limited by legislation, but it is also limited by contracts that we have entered into as by far the weaker party in the bargain. If I read Hunt rightly, then what his theory allows is an expansion of the notion of law and government to include potentially all of the forms of regulation and governance to which we are subject.

One of the most enjoyable aspects of *Explorations in Law and Society* is the author's willingness to turn commonly held assumptions upside-down. When discussing the propensity of Critical Legal Studies (CLS) scholars to attack liberalism as being internally incoherent, he notes that CLSers also reject the rationalist epistemology that demands internal coherence.¹¹ So they attack the very basis of their own critique. But more to the point, Hunt plays with the notion that this incoherence may in fact be a strength, and not a weakness, of liberalism: incoherence makes room for flexibility and discretion, for judicial weighing of values, producing what Hay called "the peculiar genius of law."¹²

This book is not for the faint of heart. Indeed, behind the clever titles hides prose of bewildering complexity. Moreover, much of the discussion assumes an easy familiarity with contemporary Marxist, critical legal studies, post-modern, and deconstructionist legal scholarship. This is understandable, but nonetheless unfortunate, for it makes the work rather difficult to approach.

Another phenomenon the reader will encounter is that the key ideas in the book are constantly being taken up and reformulated. Hunt presents not only the central ideas in his theory, but their evolution as well. This is both an advantage and a disadvantage: an advantage because the notion of law as constitutive of society is seen under many different aspects, and a disadvantage because the reader remains unsure of the precise formulation of Hunt's doctrine.

All in all, *Explorations in Law and Society* is a work whose willingness to pursue novel ideas will tantalize, and whose reformulations of the relationship between law and society will enlighten.

¹¹ *Ibid.* at 169.

¹² *Ibid.* at 173.