LEGAL PLURALISM:

TOWARD A

MULTICULTURAL CONCEPTION

OF LAW

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ABSTRACT

The increasingly cosmopolitan nature of the nation-state, plus an increasing scepticism toward the modernism that has informed the scientific-legal nexus of late-capitalist society, creates the conditions within which a "multicultural" conception of law might emerge. This thesis evaluates the extent to which the field of legal pluralism can contribute to the development of such a conception. To facilitate this, I distinguish between three epistemological perspectives through which legal pluralists approach the study of law: post-realism, post-modernism, and post-pragmatism. In order to identify the conceptual resources that they might contribute I interrogate each with three questions: what definition of law does each imply?; what conceptions of alternative legal-subjectivity does each contain?; and what prospects does each envisage for an alternative conception of law? Two fertile ideas emerge from legal pluralism as a consequence: that law exists within the field of socio-cultural diversity rather than over it, and that law is ontologically distinct from justice. An image of multicultural law emerges from these dimensions. This substitutes law's current emphases on the codification of normality and the justification of power with an exploration of how alternative conceptions of sociality, democracy, and law might be empowered to emerge. I argue that this conception does not fully escape the positivist paradigm against which it is set. Specifically, it tendentially creates pluralism into a totalising discourse. As a consequence, it is at risk of becoming another instance of an emancipatory project that mutates into a form of regulation. A naturalised account of regulation is built into my argument to alter that positivism in a way that allows the emancipatory impulse of legal pluralism's project to survive.

PREFACE

The process of writing this Ph.D. thesis has steadily progressed into an exercise in confronting the self. More specifically, it has become a confrontation with the existential uncertainty that appears to underpin the very notion of self-hood. Ostensibly, the subject matter of the thesis is legal-pluralist theory and the text is written in that vein. My treatment of the theoretical issues generated by legal pluralism has, however, been informed by a number of questions that the project has prompted me to revisit concerning self-hood, the construction of identity, and personal meaning. Legal theory, it seems, is particularly adept at prompting such questions. In that regard, law, philosophy, and theology seem to be synonymous forms of discourse. Possibly, this reflects legal theory's intimate connection with questions about how to justify decisions. Lawyers, because they ultimately rely upon violence to legitimate their definitions of reality, must also engage in this same pursuit of justification in order to authenticate their reasons for defining social relations as they do.

The pursuit of justificatory foundations in the socio-legal arena has been shaken by idealist assaults - in the guise of post-modernism and pragmatism - on the hubris of totalising explanatory theories. Liberal individualism, Marxism, and feminism, to name three of the main "culprits," have come under increasing pressure to jettison - or at least moderate - the mechanisms that gave them such explanatory force (for example, reductionism and functionalism). It is far from clear, however, what ought to replace these mechanisms as resources for constructing meaning and identity. One option, as post-modern and pragmatist accounts tend to do, is to employ pluralism as a totalising discourse. Following Fredric Jameson, I am not sure that this is possible (Jameson 1961: 195). The notion of pluralism only makes sense when it is positioned in relation to a non-contingent standard: God, industrialism, or humanistic utopias, for example.

At a personal level, the hubris of the orthodox Protestantism that informed my early emotional-intellectual development has likewise been shaken by questions about the limitations of totalising narrative. As will become evident through this thesis, my own position

has congealed around a confrontation with the prospect that silence lies beneath our attempts to interact with the ground of our being. This has developed through my growing awareness that a space exists between my consciousness of social embeddedness and an awareness that my consciousness of that embeddedness cannot be reduced to its historicity; consciousness is always situated but its form is not reduced to the content of its situation (in Sartre's terms, this irreducible aspect of consciousness is its *facticity*, the necessity that consciousness is situated but that the form that its situatedness takes is ultimately inconsequential). This dialectic between the consciousness of materiality and the irreducible awareness of consciousness, moreover, fails to explain the existence of the consciousness that is apparently aware of itself. All attempts to address the issue apparently meet with silence.

These matters, in turn, have prompted questions about how to proceed in the absence of categorical knowledge about how to continue. Following Charles Taylor, this is a question about how to find or found sources of morality that are not tied to the totalising extremes of either social engineering or individualistic expressionism (Taylor 1994: 510). This, I suggest, is also a question that lies at the heart of legal theory. It asks how the institution of law might construct, stabilise, and sanction meaning and/or identity in the absence of foundations for justifying those meanings and identities. The law's need to define "what is" is emblematic of the self's need to find personal identity and meaning.

In my engagement with this problematic I have not travelled the apparently popular route of post-modern/pragmatic pluralism (where-in the concept of truth is substituted with the situationalism of prevailing convention). My Protestantism has instilled too much realism within my subjectivity for that proposition to lodge easily. Pluralism cannot be a self-sufficient paradigm. In light of this - and again in sympathy with Charles Taylor's questioning about how moral horizons might be constructed without injurious effect to subjects or sociality - my personal problematic has become that of how to position myself relative to the concept of "totalising discourse." It is only the totalising forms of discourse, I sense, that give rise to meaning and identity. One possibility I find is to position myself relative to its opposite, to the

ephemeral fluidity of plurality. This is the realm that produces totally contingent forms of identity and meaning, that is, meanings and identity that cannot exist beyond the momentary context within which they are conceived. I find myself situated between these two extremes, theorising about what it means to "act" between them, drawing from each one tools to both forge meaning and to transgress that meaning. This, as I suggest in the body of the thesis, is also where the issue of multiculturalism is situated, within the pressure to both conserve socio-cultural identity and to relinquish static notions of identity. This is the domain where constructed socio-legal subjects reconstruct their form. It is the realm, as I like to think of it, of our *non-authorial authoriality* or, as Taylor refers to it, the domain of "personal resonance" (ibid.: 512). This, as both Taylor and the legal pluralists reviewed here suggest, is the realm from which we might expect to see emancipatory images of justice emerge. I now wish to explore that prospect.

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