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LAW, MODERNITY, POSTMODERNITY: LEGAL CHANGE IN THE CONTRACTING STATE

By Brendan Edgeworth
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Brendan Edgeworth's book is an erudite attempt to chart the paradigm of postmodern law and a legal theory appropriate to it. In part it is excellent, in part it falls short of its ambition. Edgeworth is a very able cartographer indeed: the overview of social and legal transformations and the changes in theoretical paradigms employed to understand them is impressive, and provides an invaluable tool to the teaching of the Sociology of Law. But he is also far too fast to discard important legal and philosophical scholarship dedicated to charting the sea change, a 'clearing' exercise that ends up looking rather unnecessary given how tentative and underdeveloped his own suggestions are as to — as he puts it — 'what [comes] next'.

The improbably vast undertaking of providing a cognitive mapping of modern and postmodern law with a further commitment to both elucidating postmodern theorising on the one hand and charting the nature of the new, postmodern, legal order on the other, is undertaken by Edgeworth in seven self-contained chapters. I stress 'self-contained' because some of these, as I have said already, would be a valuable addition to any Sociology of Law syllabus. The short first chapter answers some terminological issues over the various 'isms', modernism and 'postmodernism' and the meaning of its variations: 'post-modernity' and –'isation'. The 'Cognitive Mapping' that follows is a clear and courageous attempt to summarise difficult theories of the postmodern in concise accounts: those visited include Derrida, Foucault and Lyotard, but also Lash and Urry as well as Harvey, Bauman and others. The author argues that the emergence of globalising processes calls for a different set of conceptual tools and paradigms. Understood as a call for a kind of immanent critique for our postmodern age, this is an interesting proposition that requires some further analysis. That said, the endeavour is somewhat hampered by the author's eagerness to rebut the theories he visits before they are allowed to do the work he intends them to, a tendency that is detectable here but in fact mars later chapters. But to quickly complete the picture regarding the book's structure, having

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visited the theories, the author subsequently visits the paradigm of modern law and the Welfare State (chapter 3), then theoretical accounts of it (chapter 4) all of which are found wanting in respect of how they capture the *new* reality. This new reality is described in chapter 5 ('Legal postmodernisation') and the critical theories that account for it in chapter 6. Finally, under the title 'What Next?' the author raises in a 'brief and speculative manner some suggestive lines of inquiry'.[1]

I would like to single out the chapters on 'Modern law and the Welfare State' and on 'Legal Postmodernisation' as quite exceptional. The amount of research that has gone into these is extraordinary and, although an interminable series of references occasionally does get in the way of the narrative, these are accounts well worth reading and recommending to scholars in the field. In the context of the former, Edgeworth has carefully brought together diverse material to produce comprehensive and clear accounts of modernisation processes and the reconfiguration of modern law's spatial and temporal horizons, the rise of the Welfare State and its connection to these processes, their effects on legal institutions and the organising concepts of law. He includes here interesting discussions of access to justice and the rise of corporatism and regulation. The account of 'postmodernisation' in the later chapter is even more thoroughly researched and accounted for. Globalisation processes, he argues, have led to the weakening, even unraveling, of national welfare guarantees; governmental functions have been largely substituted by market mechanisms, contractualisation, privatisation and deregulation; we have had large shifts in access to justice policies; we have witnessed the growing influence of supranational legal norms on domestic legal systems. In place of national legal orders and monistic concepts of sovereignty we now have 'fractured' sovereignty, the pooling and sharing of it with supranational institutions, we have multi-level governance, and a legal fragmentation resonant of a broader social fragmentation or disorganisation. This chapter also includes interesting overviews of the weakening of collectivism in Labour and Employment Law and the shifts of legitimation mechanisms that accompany them, of contracting welfare state rights and of the rise of informal justice.

This is all well documented and described, a rich and successful undertaking. Problems do begin to appear, however, with the account of the state of socio-legal theorizing. I do not want to imply that Edgeworth's forays into the legal-sociological theories of modern and post-modern law are without value. Quite the contrary, many are thoughtful and the writing is always very clear. One example of this is his engagement with Teubner (and Willke) whose theory of 'reflexive law' is an attempt to overcome problems of the regulatory State by suggesting that in order to directly

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1 Brendan Edgeworth, *Law, Modernity, Postmodernity: Legal Change in the Contracting State* (2003), 264.

bring about the desired changes in certain spheres of society, government increasingly takes to regulating itself as a means of regulating society. What I do want to say, however, is that there is generally an impatience about the theories visited, with short expositions followed by sweeping critiques, the complexity of much of the theoretical work radically reduced. Of course, as Roger Cotterrell noted in another review of the book, Edgeworth is trying to paint on a huge canvas, and the sheer range of the undertaking creates its problems.[2] There are those problems, however, that should have been avoided. For example, the main criticism of the theories of regulatory law (Friedman, Selznick, Unger) appears to boil down to claim that they were written too early! What else is one to make of the claim that 'these theories do not provide a complete set of conceptual tools to understand the nature of contemporary law' because they 'focused exclusively on welfare states.' This is both odd and untrue, given that scant reference is made to Unger's more recent magnum opus *Politics* as well as all the work that has followed that. Unger's typologies are 'too rigid' we are told. Apart from this being a strange criticism of a scholar obsessed as no other with the idea of 'plasticity' throughout his work, aren't all typologies 'rigid', in the sense of being highly selective simplifications? The question surely has to do with what content is given to the 'types' and it is not clear where Unger may have gone wrong here. Those, on the other hand, who did focus on contemporary law, Edgeworth tells us, did so by being *too* selective. But we are not given a relevant threshold here of what would have been 'adequate' because the author is too eager to debunk these theories (although a slightly more favourable treatment is reserved for some in later chapters.)

Problems appear with the 'postmodern theorising' of postmodern law too, in the chapter 'Critique and Reform'. Edgeworth is equally uncompromising here; his general argument is that 'while this genre of theorizing has offered some partial and innovative insights into law its overall contribution is largely unconvincing and unhelpful'.[3] This is a startling claim given that these 'insights' have been sought amongst the 'postmodernists' only, and given how many of them are discarded here as 'unconvincing and unhelpful': Foucault, Derrida and Lyotard for one, as well as the majority of post-modern voices in Anglo-American legal theory. There is something haphazard, straccato and sweeping in the critiques here. For example, in the discussion of Foucault we have the unusual and ill-conceived strategy of using Weber's distinction between power and authority as a corrective to Foucault's analysis of discipline, the argument if I understand this correctly, being that if Foucault had paid attention to Weber's 'richer hermeneutical framework' he would not have subsumed the question of legitimation to that of discipline! But even at the more general level the critiques are too sweeping. It is one thing to argue that

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2 Roger Cotterell, (2005) *Social & Legal Studies* 14 (1).

3 Ibid 206.

Foucault's emphasis on governmentality, or more precisely the binary opposition between law and governmentality, renders his theory unhelpful to the kind of critical task that Edgeworth envisages, and another to level the kind of comprehensive and indiscriminate critique that both detracts from his prescriptions for critical analysis of law and leaves him vulnerable to all kinds of counter-claims regarding the usefulness of Foucault's project. Derrida is seen as insufficiently attentive to the concrete processes of law, and Lyotard's diagnoses and prescriptions against meta-narratives are described as premature and unnecessary. Edgeworth thus creates a kind of impasse for himself: he wants socio-legal enquiry to re-orient itself to the postmodern and transform itself in the process. And yet the critical task that he envisages for it has to do with how legal analysis might come to play a progressive role understood very much in a modern vein, where the 'primary objective is political rather than metaphysical'[4] where legal orders need to be understood in sociological terms and where, consequently, significantly more attention needs to be paid to the analysis of institutions and concrete institutional mechanisms.

I have perhaps over-emphasised what I see as the shortcomings of the book in the preceding paragraph. The book in fact is a cause of both excitement, with the sharpness of its analysis, and frustration with its over-reach. I would like to end, however, on a positive note because there is much of value in this work. The book provides a rich, clear, perceptive and precise account of the law's development from its modern to its postmodern form.

4 Ibid 261.