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## **Nobody's Law: Legal Consciousness and Legal Alienation in Everyday Life**

***By Marc Hertogh, London: Palgrave MacMillan, 2018. 215 pp. ISBN: 978-1-137-60396-8***

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This book both builds upon and criticizes legal consciousness literature. Like seminal legal consciousness authors Ewick and Silbey (1998), Hertogh focuses on the meaning of law in people's everyday lives. What does law mean in the context of, for instance, a public school or the construction industry, or how do front-line officials involved in redevelopment of a run-down neighbourhood experience law and cope with matters of law? Hertogh uses detailed case-studies from these three areas, in conjunction with a thorough analysis of statistics on public attitudes towards law and legal professionals, to formulate a firm critique on the key assumption of legal consciousness theory—that law is omnipresent. The hegemony of law—the idea that law dominates every aspect of people's lives—is convincingly disputed by Hertogh. He takes the opposite stand—that 'legal regulation seems to become more alien within citizens' experience' (p. vi). His central aim is 'to develop a new analytical framework of "legal alienation" and to study this process in several detailed case studies' (p. 15).

According to Hertogh, legal consciousness literature suffers from empirical, methodological, and conceptual flaws (pp. 9–12). Empirically, its authors seem to ignore evidence from surveys and social protests, such as the 'yellow vests protests' in France, which show that people do not fully embrace the legitimacy of the justice system. This point of criticism is further outlined by an analysis of surveys on public opinion in the Netherlands (Chapter 2) and further explored analytically in Chapter 3. Methodologically, Hertogh argues that the salience of the law is often presumed rather than problematized. Studies put more emphasis on *how* rather than *if* law dominates ordinary people's daily lives. In Chapter 4, he offers a modified methodology in which the focus on law is regarded as both an independent and a dependent variable. Conceptually, legal consciousness literature is biased by focusing too much on state law and legal institutions, such as courts and law offices, and the differences between the 'Law in Books' and 'Law in Action' (Pound 1910). Instead, Hertogh revisits the idea of 'living law' by Eugen Ehrlich: the obligatory (social and legal) norms ordinary people experience, which may be very different from the norms for decisions applied by the courts (pp. 69–70). Following Ehrlich's distinction between perceived law and official law, Hertogh defines 'legal alienation' as 'a cognitive state of psychological disconnection from official state law and the justice system' (p. 14).

In Chapter 3, Hertogh presents the analytical framework for studying the process of legal alienation. First, he distinguishes four potential types of ‘legal alienation’: 1. *legal meaninglessness* (‘the sensed inability to understand the law and to predict the outcome of legal processes’), 2. *legal powerlessness* (the perceived inability to control the outcome of legal processes), 3. *legal cynicism* (a state of normlessness in which legal rules are no longer regarded as binding), and 4. *legal value isolation* (the values of the law are replaced by one’s personal values) (pp. 55–57). Then, he distinguishes normative profiles in a two-by-two matrix, answering two questions: Are people aware of the law, and do people identify with law? This results in four normative profiles: legalists, loyalists, cynics, and outsiders (pp. 57–60). Hertogh argues that decades of law and society research have shown that the *homo juridicus* model underlying legal doctrine is not accurate. People are never fully aware of the law and never fully identify with the law. On the other hand, people are seldom total outsiders. His normative profiles may therefore be read as a sliding scale from ‘legal identification’ to ‘legal alienation’ (p. 59). Cynics and outsiders show strong feelings of ‘legal powerlessness,’ ‘legal cynicism,’ and ‘legal value isolation.’

Like any analytical model, Hertogh’s model depicts inherent generalization and may easily be misunderstood. He warns the reader that normative profiles are indeed *profiles* and not persons. And, although he speaks about ‘the law’ in general, it may very well be ‘that someone’s normative profile in relation to criminal law may be very different to the way in which he or she relates to civil law, copyright law, or European law’ (p. 60). Unfortunately, Hertogh leaves it to the reader to figure out how his model exactly relates to Ewick and Silbey’s famous model of ‘before,’ ‘with,’ or ‘against the law.’ The novel aspect seems to me to be that Hertogh recognizes that some people place themselves outside the legal order (law is simply not a point of reference for them), whereas the notion of legal hegemony in the model of Ewick and Silbey assumes that all actions of people are seen in relation to the law.

Although the empirical data in Chapter 2 and the three case studies in Chapters 5, 6, and 7 are drawn from the Netherlands, the findings have a broader meaning. In the presentation of survey findings, for instance, the broader message is that Western European countries cannot continue to simply pat themselves on the back for doing so well in international Rule of Law indices. While the Netherlands ranks fifth out of 126 countries in the World Justice Rule of Law Index 2018–2019, national surveys show that there is a sizable minority of ordinary people (approximately 35 percent) who in fact do *not* trust judges or the justice system and are discontented about the speed, transparency, and fairness of legal procedures (p. 42). While the conventional view of Dutch Legal Culture is that there is solid support for the Dutch justice systems, Hertogh argues that in fact it is characterized by ‘sullen toleration’ of the justice system (p. 43). Among people who are most sceptical, we find an overrepresentation of older people and people with lower levels of education. Findings regarding gender, income, and ethnicity are inconclusive (pp. 159–160).

A broader message can be drawn from one of the case studies regarding non-discrimination law in the context of a public secondary school. Previous rulings of the Equal Treatment Commission incited sceptical reactions (‘This ruling is ridiculous. What planet do these people come from?’) (p. 104). This time, the Commission ruled that the school was wrong to suspend a female Muslim teacher who refused to shake hands with men. The ruling set aside the school’s own rules regarding equal treatment, that, for example, shaking hands is the best way to prepare their pupils for the labour market. It turned out that the school director had a totally different view on equal treatment, but he was convinced that he was ‘a better guardian of Article 1 of the Constitution than the Equal Treatment Commission’ (p. 98). After he

learned of the ruling, he showed all the signs of having feelings of legal meaninglessness, legal powerlessness, legal cynicism, and even legal value-isolation. This case again demonstrates that law is not pervasive. For the school director, as for most other respondents, 'it is not the law that defines their understanding of equality, but rather their own idea of equality which shapes their attitude towards non-discrimination law' (p. 103). Hertogh does not prescribe what conclusions the Equal Treatment Commission should draw from this case, but instead describes the gap in the meanings of equality and clarifies what both meanings entail.

This observation brings me to the aspects I like and dislike about the book. First, I admire the purely empirical perspective. I believe there is no single normative stance in this book towards what legal professionals should or should not do. This reminded me, as a social scientist, what law and society research are really about: providing thorough empirical analysis of societal issues, without judgment. Socio-legal academics working in a law department (I am no exception) are so easily infected by the normative perspective of most of our colleagues that we tend to forget what sociology is about.

Second, the mixed method approach proves to be very useful. Hertogh combines insights from large surveys on confidence and trust and his own quantitative research on legitimacy and compliance with interesting case studies, including in-depth interviews, parliamentary inquiry data, and a secondary analysis of a policy evaluation study. Also refreshing is that his analysis that people tend to move away from law is not restricted to ordinary people or activists, but also shines a light on companies and professionals, such as public service workers or police officers. They too can become alienated from law, as illustrated in one case study (Chapter 7). In Hertogh's view, even judges may become alienated from law, for instance in their search for more responsive ways to address litigants and solve their underlying problems. In the Netherlands, administrative judges—and those in other areas of law as well—have become more critical of the effectiveness and responsiveness of law towards society in the past ten years. In the terminology of Hertogh, they suffered from a feeling of legal powerlessness. In the past ten years, they have striven to become more receptive to 'actual' problems and try to handle cases in a way that enlarges perceived procedural justice.<sup>1</sup> This example also reveals a less comfortable aspect of speaking in terms of legal alienation: it is a rather negative way of describing the process of what is going on, and I certainly would not describe these judges as cynics. The notion of legal alienation raises scepticism in itself.

The book offers a convincing critique of existing legal consciousness literature's overestimation of the importance of law. Hertogh is right to draw attention to the cynics and outsiders, who are an easily overlooked minority. Understanding these people's problems, their drive for action, and their protests is essential, and even more so in light of recent history in countries such as Hungary and Poland showing that populist politicians can quickly benefit from this electorate, causing a backsliding in the values of democracy and Rule of Law (my qualification again: Hertogh's approach is non-normative; he remains silent on why we should seek more insight into public disenchantment with the justice system).

A point of criticism is in regard to the rather implicit argument that it is a historical development that law disappeared from society, comparable to the process of secularization. Hertogh argues that the growing number of legal rules makes it harder for people to know the

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<sup>1</sup> Verburg and Schueler 2014.

law and identify with it. This is a process similar to what others have described as ‘legal inflation’— an increase in the number of legal rules leads to a decrease in the normative value of legal norms (p. 180). After reading the book, I am not convinced that the process of legal alienation nowadays has become more prevalent. I think it is a phenomenon of all times and places, and I find very little empirical evidence in the book to substantiate the claim that more people are alienated from law now than in the past. In his criticism of the idea of legal hegemony, Hertogh seems to overreach to the other side of the spectrum, and nuance is lost. The historical claim, although implicit, is also in contradiction with what Hertogh writes in the introduction: ‘The aim of this book is not to measure the present scope of “legal alienation” or to trace its historical development over time’ (p. 15).

A second and last point of criticism is that this book could have been more than merely a critique of the existing literature. It has the potential of offering a new theory on legal alienation. Although Hertogh offers a useful toolbox for research on the matter, I had hoped to find more information in the book addressing the question of *why* people become alienated. For instance, do people become alienated from disinterest in law, a disagreement with the law, or disappointment in the justice system? To what extent do previous encounters with the law affect opinions of trust? And how do experiences with one area of law affect opinions about other areas of law? The book offers the beginning of an answer, but it is not yet a full-blown theory with explanatory and predictive power. It would be nice to have a theory capable of actually predicting under what circumstances people become alienated from law. Nevertheless, the book provides an important basis and an inspiration to move this project forward from critique to a grounded theory.

## References

**Ewick P and S Silbey** (1990) *The Common Place of Law: Stories from Everyday Life*. Chicago: University of Chicago Press.

**Kovács K and KL Scheppele** (2018) ‘The fragility of an independent judiciary: Lessons from Hungary and Poland—and the European Union, *Communist and Post-Communist Studies* 51(3), 189 – 200.

**Verburg, A and B Schueler** (2014) ‘Procedural Justice in Dutch Administrative Court Proceedings’, *Utrecht Law Review* 10 (4), 56-72.

**World Justice Report** (2018-2019) Rule of Law Index 2019, [www.worldjusticeproject.org](http://www.worldjusticeproject.org).