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Book Review: Michael Giudice, *Social Construction of Law: Potential and Limits*

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ABSTRACT

Book Review: Michael Giudice, *Social Construction of Law: Potential and Limits*, Cheltenham, UK, Edward Elgar Publishing, 2020, 160 pp., ISBN: 978 1 83910 321 6

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That law is socially constructed is so ubiquitous a statement in law and the humanities as to render itself dangerously close to 'common sense'. The subheading 'Potential and Limits' is the key to Giudice's original argument in which he suggests that law is both socially constructed; yet retains a 'natural' core. When teaching critical theory, I encourage students to examine anything they understand as 'common sense' as a potential blind spot for bias and assumptions deeply ingrained in ideology. As such, the attempt to examine exactly such a potential blind spot is exactly the sort of problem legal philosophy should seek to address.

Giudice's text is illustrative of traditional philosophy of law techniques and will be an interesting read for students or academics of legal theory or philosophy. It is an ambitious attempt to delineate to what extent human groups have agency to construct (and reconstruct) law, and to what extent law has a 'natural core.'

Giudice takes issue from the outset with what he contends is an 'apparent consensus' in contemporary legal philosophy, that law is a social construction or *artefact.*(p. 1). The basic assumption he intends to disrupt is that if law is socially constructed, then to understand law, we need to understand human social behaviours and relationships (p. 2). Using techniques that typify classical philosophy, Giudice reaches for logical propositions to make his argument. If law is socially constructed, he argues, human societies should know no limits in shaping law into whatever we would like it to be. He argues that the nature and needs of human existence are such that there is an essential or natural core to law, not subject to the shifting shapes of social construction.

Giudice's text is a useful exercise in jurisprudential thinking, especially with regards to an application of analytical jurisprudence that will be instructive for anyone

working with (or within) legal theory or legal philosophy. He takes a conceptual analysis approach to the questions of whether the *concept of law* or *the nature of law* are socially constructed, and to what extent. Importantly, Giudice argues that how we conceive of law matters for our legal and political *possibilities* (p. 6.) and suggests that there may be ways in which we socially construct concepts of law that are not inevitable. Giudice is not dismissive of the value of social constructionism as a means of analysing law. On the contrary, he asserts that much of law *is* socially constructed but maintains that there is a core of law which is natural.

Utilising the state as a case study for a model of a legal system, Giudice attempts to demonstrate how the concept of a legal system is socially constructed and the political costs associated with this way of conceiving law (p. 6.). In analysing the assumption of *a legal system,* he seeks to demonstrate some political costs associated with 'thinking the law' in the terms of the legal system (p. 7.), but notes (almost as an aside) that he does not deal with the question of 'is Indigenous law, law?' He focuses on the interrelations of different legal orders and suggests that if the *idea* of a legal system is socially constructed, then there may be other ways of understanding or conceptualising law that are more useful or helpful. Later, when describing Indigenous law, Giudice uses the language of 'the legal orders of other groups' as distinct from 'law' and describes the ways in which a colonial legal system has sought to understand and deal with 'other legal orders' is manifest in colonial legislation asserting authority over those peoples (p. 68). The argument appears to be that because colonial Canadian law conceives of itself as a source of authority over Indigenous people that it is in fact so. While there are clearly arguments to be made about recourse to the use of force and legal positivism when establishing what is law, making assumptions along these line runs the risk of reifying colonial discourses of sovereignty. The author later suggests there may be multiple ways of understanding or conceiving of law than state-based systems, so this feels like a missed opportunity to examine with a truly critical lens the multiple ways in which law can be understood. Indeed, later Giudice states that the ways in which communities 'conceive law' can shape the political options readily available (p. 33) and that the 'commitment to expose what is believed to be natural or necessary is actually a political or social choice' (p. 50).

Giudice presents an argument that normative systems of hierarchical rules are a feature that can be understood as creating a distinction between law and other domains such as the political or the cultural. This argument presupposes that law is distinct from morality, politics, and justice, but does not articulate how this occurs. The hint is in what he suggests are the constituent features of law. The core features of legal systems suggested by Giudice include validity and hierarchy of norms; supremacy (in that the norms of that legal system should be understood as supreme from the values/norms of other legal systems); independence or autonomy – that they provide their own source of validity; and comprehensiveness – that they govern comprehensively over a given territory.

Giudice accepts, to a degree, the premise that social and cultural factors are (at least partially) responsible for shaping law but is unconvinced by the argument that all concepts are open to conceptual shifting and raises a question about whether it would be ethical to attempt to do so where a concept is vehemently or intractably disputed within a given society (such as the naturalisation versus socialisation of gender for example.) Precisely for the reason articulated earlier by Giudice, that the 'commitment to expose what is believed to be natural or necessary is actually a political or social choice' I feel it is problematic *not* to attempt to shift and/or interrogate such concepts in the furtherance of a more just society. There is a tautology at play in this argument, in that concepts which are naturalised, are not concepts about which there is vehement disagreement or intractability. The very essence of a naturalised concept is one which the society takes for granted as an assumed and essentialised one. Giudice states that conceptual revision does not always create an empirical shift in the concept itself, positing that there are differing levels of conceptual shift that can be created using conceptual revision, but emphasises that 'not all changes to the application conditions of a concept' lead to a change in the concept itself (p. 31). I disagree, and

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would suggest that conceptual stretching is exactly what conceptual revisionism achieves. While the concept may be shifted slowly, the very fact of its revisionism is an indication of its shift and a responsibility we hold as jurists to work towards a more just future.

This is an excellent overview of conceptual explanations of law, and a bold attempt to deal with one of the more well-established truisms within law and the humanities, although it misses some of the nuance of the critical traditions in its attempt to justify the key argument and the strict adherence to formal philosophical techniques. In presupposing a separation between politics, morality and justice, the political and justice imperatives of the argument are obscured in a way that removes the agency we hold to work towards a more just understanding and application of law.