

Books

THINKING THROUGH THE BODY OF THE LAW edited by Pheng Cheah, David Fraser and Judith Grbich, St Leonards, Allen & Unwin, 1996, 274 pp, ISBN 1 86373 604 2.

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Various forms of critical legal theory in the twentieth century have involved a search for the moral or normative foundations of law, a search which has been driven by the decline of the natural law tradition, the social fragmentation of moral systems and the erosion of the authority of the grand narratives of modernity with the rise of postmodernism.¹ The problem for the philosophy of law can be summarised in the question: what is the legality of law? Perhaps in recent social philosophy the most systematic attempt to provide an answer to the issue has come from Jürgen Habermas in *Between Facts and Norms* in which he attempts to provide a democratic foundation for law through his general theory of communicative action.² Basically Habermas argues that formal legal procedures must provide democratic opportunities for moral argumentation. Critical legal theory in general and Habermas's communicative theory in particular can be regarded as systematic and critical responses to Max Weber's criterion of instrumental rationality as the foundation of modern legal rationalism in which law is a legitimate command when it is delivered through the recognised bureaucratic machinery of the state. Legal rationalisation is marked by increasing formalism and predictability, but the essence of law is always the presence of an apparatus of coercion.³ Habermas's response to Weber echoed Leo Strauss's defence of the moral foundation of law in arguing that what is formally legal may not necessarily prove to be legitimate.⁴

We can properly regard the excellent *Thinking Through the Body of Law* (*TTBL*) as a further contribution of critical theory to the defence of the view that law requires moral legitimacy if it is to be normatively justifiable. *TTBL* looks towards recent debates about the human body in continental social theory as an analytical vehicle for such normative re-assessment. While *TTBL* is a radical text, it rejects many existing alternatives to positive theories of law such as Critical Legal Studies, Critical Race Theory, and feminist legal theory, because they offer

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1 Lyotard, J-F, *The Postmodern Condition: A report on knowledge* (1984) defines postmodernism as a scepticism towards the grand narratives of modernisation such as democracy and economic progress.

2 Habermas, J, *Between Facts and Norms: contributions to a discourse theory of law and democracy* (1996). For a critical discussion, see Deflem, M, *Habermas, Modernity and Law* (1996).

3 Max Weber's sociology of law is contained in the posthumous *Economy and Society* (1978) vol 2. For a general analysis of Weber's sociology of law, see Freund, J, *The Sociology of Max Weber* (1968), pp.245-266.

4 Strauss, L, *Natural Right and History* (1950).

an inadequate grasp of the social character of the embodiment of the legal subject. *TTBL* attempts to establish new grounds for a radical critique of law through an analysis of the complex and variable meanings of 'the body', 'the embodiment of the legal subject' and 'the body of the law'. The purpose of this collection of essays, all of which have been influenced by 'the challenge of contemporary French philosophy', is 'to rethink the role of the body in the founding, maintaining and regulation of social consensus and legal systems and to elaborate on its implications for issues of legal responsibility and justice'.⁵ The principal figure in this contemporary French philosophy (of the body) is, of course, the late Michel Foucault, particularly in his *Discipline and Punish*, and the multi-volume *The History of Sexuality*.⁶ The influence of Friedrich Nietzsche, Jacques Derrida and Robert M Cover is also important (particularly in the theoretical essays which constitute Part One).

The book is organised around this interrogation of the body and law, but it also attempts to address a number of crucial issues in contemporary Australian political and legal debates such as *Mabo v State of Queensland (Mabo)* (for example in two essays by Paul Patton and Elizabeth A Povinelli). Part One of the volume deals with the ethical implications of the role of the body and embodiment in the constitution of the legal subject as an element within the body politic. Part Two deals with race and aboriginality as illustrations of the role of law in the inclusion/exclusion of specific bodies from the body politic, and in particular from the 'national-constitutional body'. Part Three presents a variety of juridical illustrations where the body has a fundamental relationship to concepts of property. For example, Rosalyn Diprose raises a number of instructive legal issues around questions relating to ownership of bodies, control over body tissues and commodification of bodies in medical experimentation over reproduction, surrogacy and blood donation. Part Four returns to the theme of law as a system of discipline, for the production and management of types of bodies, and it includes a provocative and imaginative article on sexuality and racial bodies by Terry Threadgold and a study of 'the dangerous individual and the social body' by Rosanne Kennedy. The volume concludes in Part Five with a response from feminist legal theory by Frances Olsen. In theoretical and thematic terms, these essays are organised around a critique of Cartesian ontology and around a commentary on the so-called 'sameness-difference' debate in which either ontological differences between individuals (such as sexual differences) should be recognised by the law or ontological sameness between individuals (such as humanity) should be affirmed by legal universalism. These two themes (post-Cartesian embodiment and the politics of difference) contain the outline of an answer to the question of the legality of the law. This argument which is not explicitly formulated in *TTBL* would suggest that law which inscribes the Cartesian rational subject cannot be justified because it negates the real nature of human embodiment with all its richness and diversity.

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6 Foucault, M, *Discipline and Punish: The Birth of the Prison* (1979) and *The History of Sexuality* vol. *An Introduction* (1981). For an overview of Foucault on power, the political and law, see Simons, J, *Foucault and the Political* (1995).

Readers who are not entirely familiar with the complexities of French social theory should not be deterred from reading *TTBL* which attempts to grapple with genuinely important political and legal problems with considerable analytical freshness and theoretical verve. There are a number of basic issues in the recent debate over the place of the body in human culture.⁷ Social historians have been fascinated by the metaphoricality of the human body, especially as a medium for developing theories of society. One specific illustration is the idea the king's body as a metaphor for society as a whole, namely for the body politic. This notion was expressed in the theory of the King's two bodies, one earthly and corruptible, the other sacred and enduring.⁸ The complexity of the body at the interface between biology and culture has been the main topic of twentieth-century anthropology (for example Margaret Mead and Mary Douglas). Anthropological field work demonstrated that traditional divisions between men and women in western society were in fact culturally specific and social rather than biological. Anthropological relativism has been adopted and developed by radical feminists such as Judith Butler to argue that the materiality of the body is not a given phenomenon of nature but an effect of the structure of linguistic practices. Therefore, male/female gender differences are the products of patriarchal modes of interpellating the subject in gender categories. In short, the body is socially constructed.⁹ Finally, the frailty of the human body and the precarious nature of human existence has been embraced by social philosophers as a basis for analysing the moral foundations of human rights in terms of a philosophical analysis of ontology which has its origins in the work of writers like Martin Heidegger and Emmanuel Levinas.¹⁰ From a legal point of view, these issues begin to become immediately relevant in discussions of torture, violence and legality. *TTBL* engages with legal violence over the body in, for example, David Fraser's analysis of the Nazi *Rechtstaat*.

Recent interest in the metaphoricality of the body in fact derives from Nietzsche's philosophy of language and his epistemological perspectivism. This philosophical framework provides a radical basis for the critique of Cartesian positivism. It can be argued that the whole of *TTBL* is clearly an attack on the Cartesian legacy, for example in Moira Gatens's seminal reflection on Spinoza's analysis of body. In fact, we could argue against Weber that René Descartes rather than either Calvin or Luther provided the 'spirit of capitalism', because Cartesianism embraced possessive individualism, a positivistic epistemology of scientific knowledge, a mechanistic view of causation which was radically secularist in its consequences, a triumphalist perspective on technology and finally a mechanistic understanding of the human body as an extension of cognition. Within the university system, aprioristic, dogmatic Cartesianism was eventually rejected in the period 1740-60 and replaced with probabilistic, empirical Newtonianism.¹¹ Nevertheless, Cartesian visions of

7 The broad features of this debate are discussed in Turner, B S, *The Body and Society* (1996).

8 These medieval theories of corporate power were analysed in Kantorowicz, E H, *The King's Two Bodies: A Study in Mediaeval Political Theology* (1957).

9 See Butler J, *Bodies That Matter: On the Discursive Limits of "Sex"* (1993). For a critique of constructionism, see Turner B S, *Regulating Bodies: Essays in Medical Sociology*. (1992).

10 For example, Bauman Z, *Life in Fragments: Essays in Postmodern Morality* (1995).

11 Ruegg W (ed), *A History of the University in Europe* (1996), vol 2, at 586.

the human body as a machine remained influential. Contemporary medical and behavioural sciences, which have been generally hostile to the notion that subjective experiences of the phenomenology of embodiment by the patient are important for understanding disease, can be said to have its origins in the assertion 'cogito ergo sum'. *TTBL* wants to claim that Cartesian individualism, positivism and rationalism are the very foundations of modern legal rationalism and therefore any thorough transformation of legal theory and practice will require an overthrow of the legacy of Descartes. In Cartesian legal theory, Law and Reason are happily conjoined, and the legal subject is male, disembodied and rational. Women's bodies are by definition marginal, dangerous and perverse. Women's bodies with their irrational flows of blood need medical policing in the interests of social order. Previous forms of critical theory (CLS and CRT) have failed to replace Cartesianism with an alternative view of the body which comprehends the body as a social product and embodiment as a basic feature of social relations as such.

The problem of the body emerges in *TTBL* most acutely in the sameness-difference debate. One version of legal equality requires that we treat men and women as 'the same'. However, some critics have argued that equal treatment under the guise of universalism subordinates women (and children, gay men, aboriginals, the politically and socially deviant, the disabled, ethnic minorities and the mentally disturbed) by failing to recognise real and actual differences in society. From the perspective of social constructionism, one might argue that, since the body is an artefact, differences between people which appear to be natural or biological are merely artificial. Whether we treat people as the same or different might then depend, not on an 'essentialist' view of human beings, but on the social and political context. If bodies are socially produced, then differences must be arbitrary and artificial. Olsen claims that 'The issue between sameness and difference depends entirely upon context. Women can be oppressed by same treatment and they can be oppressed by different treatment. In some contexts differences should be deemphasised; in other contexts it would make no sense to do so. The same is true of many discussions'.¹² While this assertion may be valid from a sociological perspective, it is lame as a general guide for law making, because it provides no useful criteria by which contextual decisions could be comparable. In short, this appeal to sociological contextualism may be a dangerous solution, because it would presumably increase the legal discretion of (male) judges over (female) bodies.

This difficulty in the sameness-difference debate indicates a general failure for *TTBL* as a whole. There are radically different approaches to the body in contemporary (French) social theory, and one important contrast is between the phenomenology of Maurice Merleau-Ponty and the poststructuralism of Foucault. Because Foucault wanted to reject the existentialism of Sartre, Foucauldian social theory has rejected any discussion of 'lived experience' of the body. For example, it is difficult to see how a social theorist inspired by Foucault could produce a valid or useful theory of pain. By contrast, Merleau-Ponty's work lends itself perfectly to the study of the 'lived body' and 'lived experiences' of

12 Id at 216.

pain, suffering or death.¹³ In order to understand the actual impact of torture and legal violence on the human subject, the work of Foucault is of little help. By adopting the framework of Nietzsche and Foucault, *TTBL* cannot provide a comprehensive approach to the body of the law, and it cannot ultimately go beyond the platitudes of social contextualism in the same-difference debate. By contrast, the phenomenology of the lived body can provide a philosophical basis for a belief in a common humanity which does not re-install the patriarchal Cartesian body. Instead, it emphasises the frailty of human life, the precariousness of our embodiment and the importance of human rights as a protective social safety-net against state violence. It expresses the importance of empathy in human social relations, the role of emotions in moral actions and the centrality of human embodiment for any broad re-formulation of the notion of the legal subject.¹⁴ While *TTBL* has opened up a major area of interest for jurisprudence and for political theory, the collection of essays as a whole fails to engage with the broad range of approaches to the human body in modern philosophy. As a result, these essays give a somewhat partial, unidimensional and inadequate answer to the question: what is a body?

13 See Merleau-Ponty, M, *Phenomenology of Perception* (1962). See Mallin, S B, *Merleau-Ponty's Philosophy* (1979).

14 See Turner, B S, "Outline of a theory of human rights" (1993) 27 *Sociology* 189-217. For a discussion of amorous and malevolent sympathy, see Morrison K F. "I Am You": *The Hermeneutics of Empathy in Western Literature, Theology and Art* (1988).