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Law and Outsiders: Norms, Processes and "Othering" in the 21st Century

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When the Law is more than the law.

Cian Murphy and Penny Green's collected volume *Law and Outsiders: Norms, Processes and 'Othering' in the 21st Century* is drawn from papers presented at the 2008 International Graduate Legal Research Conference. They state in their preface that the essays represent some of the best doctoral level scholarship conducted in law schools today, and this may be true in more ways than one. For while the book's title suggests an exploration of norms and the processes of demarcating and even creating the 'other', many of the early essays in the volume are far too deferential to the law to see how the law itself is an instrument not only of governmentality, but also in separating bodies to be ruled differentially, distinctively, and decisively. However, the second half of the volume begins to bring more focus to the problems of differentiation and distinction.

In his chapter on judicial review, Nelson Dordelly-Rosales quotes U.S. Supreme Court Justice Antony Scalia decrying a notion of a 'living-tree' of judicial interpretation, suggesting that such dynamic social engagements actually lead to anti-democratic outcomes. Scalia states simply "[w]hat democracy means is that the majority rules…If you do not believe that, you do not believe in democracy" (p. 45). Yet, just who constitutes a majority is not so obvious. Moreover, the very law which is to defend Scalia's democracy can be used to distinguish who is recognised within a polity and who is not; who is counted and who is ignored; and who is afforded rights and who is denied. These issues are taken up most directly in the chapters contributed by Egle Dagilyte and Diego Acosta. In each they examine social rights, residence, and representation in the European Union. Acosta examines the mechanisms that afford certain protection to Third Country Nationals in the EU, namely protections for the freedom of movement and against expulsions for Turkish nationals who have lived in Germany and elsewhere for long periods of time; Stephen Coutts adds a third chapter on migration with an examination of the *Akrich* ruling on lawful residence. In all three the issue of movement and residency is a contested mode of distinction. Some bodies move freely through the space of the EU and can settle where they choose; other bodies are subject to regulations depending on from whence they came; and still others yet are subject to further scrutiny depending on their interactions with regulatory bodies during their stay in the EU. Even though many of the cases cited move through the European Court of Human Rights, it becomes clear that these rights are not borne by the individual, but are conferred by the state, even when the ECHR finds that a right may be a human right. Marton Varju's analysis on this very question of the interface between ECHR rulings on broad interpretations of human rights and specific EU laws is particularly engaging and insightful.

This debate is also at the heart of Vincent Depaigne's chapter visiting Jürgen Habermas' (1996) notion that the tension between the universal and the particular is the "Janus face of the modern nation-state" (Depaigne, 2011: 251). Recasting the opposing views of Rene Rousseau and Edmund Burke regarding the source of rights – from the sovereignty of the individual or from the sovereignty of the state – Depaigne offers three 'models' for approaching this tension between the universal and the particular. In each he recognises the role of the state in determining the status and protections for minority groups. As such the distinction between each model is a political one. The politics of law is also particularly acute in Dorota Gozdecka's analysis of Blasphemy laws in the EU. In both chapters the engagements of the community, its standards and its tastes, are seen as political contests. These contests are clashes of norms and are settled through not only juridical judgment but also community opinion.

This is the focus of the concluding chapter by Craig Reeves. Comparing Hannah Arendt and Theodore Adorno's perspectives on judging and judgment, Reeves finds the distinction between them as their different visions of community. Reeves suggests that Arendt's community is "flat and

undifferentiated", while Adorno's conception of community is dynamically structured through material practice (p. 289), particularly those that create solidarity of humanity, transcending individual interests (p. 288). By taking up Adorno's notions – confronting the absence of freedom for others, fighting against suffering, and building what Adorno called a "solidarity with tormented bodies" – Reeves suggests that it is identification with those who are excluded that will build a critical engagement with the world. It is also this solidarity of suffering that results in the recognition of rape and sexual assault as war crimes, as described in Benedetta Faedi Duramy's contribution. For it is not enactments of such abominations on women during war that is new, but rather it is the recognition that such violence is an offense to all of humanity that is new. It is the recognition of the suffering of women and a new global solidarity among and with women that contributes to a greater sense of universal justice. Moreover this attention to the suffering of others is a far different view of human solidarity and democracy than Scalia's simple interpretation of the importance of majority rule.

Unfortunately the collection lacks a clear articulation by the editors of their vision for the book and their reasoning for the organization of the essays. Introductory and concluding chapters by Murphy and Green would have provided a frame for reading all of the contributions. Also a number of the early essays are very technical and do not address the processes of 'othering' mentioned in the subtitle. Nevertheless explorations such as this, in the use of law as an instrument of governmentality to separate bodies, are important engagements not only for law students but also for all students and scholars of social research and politics. Likewise, it is encouraging to see the law as a subject of critical inquiry from law students, for in the end the applications of the law and the constructions of juridical orders are enactments of power.

Bibliography

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