Books

ASKING THE LAW QUESTION by Margaret Davies, Sydney, Sweet and Maxwell, LBC Information Services, 1994, 308pp, ISBN 0 45521 242 2

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There have been many attempts to identify the defining features of humanity. One attempt is reflected in our scientific name, homo sapiens. Others, such as homo ludens have been suggested. It is probable that for postmodern philosophy the defining feature of humanity is power. Humanity is the species which by virtue of intelligence, language and technology has the power to shape both the world and itself.

We are the agents and the objects of this power in that we help shape both the physical and the social world, and are in turn shaped by them, especially by the social world, and by the acts of others. Because humans are self conscious and reflective, they realise that they have this power. One of the great human enterprises has been to attempt to impose rational restraints on its exercise of power through religion, morality and law. The aim of this enterprise has been to ensure that power is not exercised in an arbitrary or destructive fashion.

Our ambiguous attitudes to power have complicated the attempt to subject it to reasonable controls. We see power as both destructive and redemptive, as able to destroy and to improve society, to repress and to liberate individuals. Human fascination with power is so great that the abuse of power may appear to be the root of all evil yet its judicious exercise is seen to be the root of all good. We complain if it is used against us but, if we are oppressed, we appeal for it to be used to free us.

In western civilisation, especially with the decline of religion and the rise of secularism in the last two hundred years, the role of law as a means of restricting the arbitrary use of power has grown in importance. Western law relates to the exercise of power in a complex and ambiguous way which reflects our complex and ambiguous attitudes to power. Law is one of the background institutions of our society, in that almost every aspect of social life is regulated by it. At the same time, it is the most important method of exercising power employed by one of the most powerful institutions of western society, the state. Hence, it has often been used by authoritarian states to impose their will on their citizens. Paradoxically, the law has been seen as the major institutional and ideological restraint on the exercise of arbitrary power by such states; the idea that the state is subject to the law is ancient and has often been used to inspire resistance to repressive regimes. Thirdly, law has

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been used to reshape society, to impose reforms and even to pursue utopian visions. Such a central institution has inspired a great deal of theorising, ancient, modern and postmodern.

In *Asking the Law Question,* Margaret Davies has covered much of this theorising. The book aims to examine the ideas of some of the main schools of thought about law. Davies looks at the ideas of these schools through the work of some of their main adherents. Hence the book quotes from writers as disparate as Aquinas and HLA Hart, Derrida and Dworkin to name a few. However, it is much more than a collection of readings with explanatory text. Most of the quotes are short, too short to be considered as extracts and by far the greater part of the book consists of Davies' text. This is for the most part very good; intelligent, witty and erudite. Although Davies has her own barrow to push — she makes no bones about her general adherence to postmodernism and feminism, with one major exception which I shall refer to later, she does not allow her own ideological preferences to intrude on her assessment of other theories to too great an extent. However, occasionally her views lead her to parody the work of others in a way which is not fair but can be amusing.[1] She is at her best in explaining difficult ideas, such as the concept of a sign in Saussure's theory of signs.[2]

One of the most interesting features of the book is that, for the most part, it presents theories of law in a chronological sequence, starting with those which were the first to be developed and proceeding through modern to postmodern thought. Davies admits that she did not originally intend to adopt this format, but that the material tended to structure itself in this way.[3] It has had the important result of showing what Davies calls the "historicity" of ideas, that is the way in which ideas arise out of particular social environments because the people who had them are immersed in the political, social and intellectual institutions of their time.[4]

It also, although Davies does not stress the point but allows the material to make it for her, shows how scepticism about the possibility of placing acceptable moral restraints on the exercise of power by means of law has grown over the centuries and has accelerated in the last twenty years. Early thought about the nature of law tends to be dominated by natural law theory which claims that standards of good and evil and justice and injustice have an independent existence and

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1 A good example is her analysis of Aristotle's explanation of the origins of the State as a natural association: The "natural" state does not grow, in Aristotle's view, from a gumnut, though we all may be better off it did, considering what Aristotle thinks is natural. What it grows from is the natural uniting of men and women into pairs, and the natural distinction between rulers and ruled. So the state's equivalent of the gumnut is the association of men with women and slaves, a grouping which constitutes the household. A couple of points neeed to be observed about this: first, slaves are not men, but secondly, nor are they women. Aristotle insists that women and slaves are distinguished by nature according to their different functions, even though according to Aristotle, some "non-Greek communities fail to understand this and assign to female and slave exactly the same status". (What else is new?) This failure to distinguish between women and slaves is, for Aristotle, sufficient evidence of the non-existence of "men" or rulers in these communities, meaning that they are all, male and female, actually slaves, and subject to the natural rule of the Greeks (at 63).

2 *Asking the Law Question,* 229–37.

3 Id at 9.

4 Ibid.

await our discovery. Once discovered, whether by revelation or right reason or by some other method, these standards can be used to evaluate human legislation. Only that legislation which conforms with the standards of the natural law is accorded the status of law.

By the early modern period, doubts about the existence of natural law standards had grown to the extent that natural law ceased to be the model for most legal thought. Positivism replaced it. According to this theory, law was made by people and was valid if made in accordance with the proper law-making procedures regardless of its content. Positivism was in part a sceptical reaction to the natural law claim that correct standards of good and evil awaited our discovery. However in its early forms at least, it reflects a confidence in the ability of human reason to develop rationally acceptable laws to govern human behaviour. Individuals were invited to surrender their own power to a supreme law maker, the State, which would be capable of ending the strife of the war of all against all and establishing peace.

Surprisingly, positivism enlarged rather than reduced the claims for law as the most important way of organising social life. Theorists such as Hobbes argued that the creation of a State with the power to regulate the lives of its subjects through law was a necessary prerequisite for civilisation.[5] Although it appears paradoxical, the increased role for law is a natural result of growing scepticism about the existence of universal standards of right and wrong. If universal standards do not exist there is greater scope and greater need for the community to decide standards for itself and to impose them on the recalcitrant. The state, acting through the law, became the obvious institution to perform this task as other institutions of social control, such as morality and religion, which are based on the idea of universal standards, lost their appeal.

Although sceptical of the view that there were universal values to be discovered, positivism was not sceptical about the possibility of rationally determining and applying the rules which were to be used to govern social life. In its early forms, such as the positivism of Bentham and Austin, positivism was coupled with utilitiarianism, which proposed a scientific approach to determining what rules were most conducive to human happiness. The early positivists did not doubt that human activity could be controlled by well drafted rules if they were enforced consistently. Bentham in particular was a supporter of codification and believed that in a properly drafted code, the law would be clear and would leave the judges with little discretion.

The realists were the first school to consistently attack the usefulness of rules as a means of controlling social behaviour. As Davies points out, much of this attack was directed at the vagueness and artificiality of the concepts in which legal rules are normally expressed.[6] Although much of this attack on legal concepts was misdirected because legal concepts are needed to structure facts in order to give them meaning and to enable us to determine the legal consequences which flow from them,[7] the realist scepticism about the usefulness

5 Hobbes, *Leviathan.* See in particular ch17 where Hobbes deals at length with the advantages of forming a Commonwealth and living under law.

6 *Asking the Law Question*, 120–8.

7 A point succintly dealt with by Davies, ibid at 126–8.

of rules and the concepts in which they are expressed has become part of received wisdom about the nature of law and is picked up by law students very early in their degrees.[8]

In spite of their scepticism about the usefulness of rules as a means of social control, the realists were reformers who believed that the law could be used as an instrument of change if judges and other officials ceased to use rules to avoid responsibility for the consequences of their decisions and openly discussed the relevant policies. Their successor, the critical legal studies movement, has been less optimistic. Whereas the realists limited their critique to the notion that law consisted of a logically coherent set of rules which could be applied to individual cases, the Crits have extended some of the realist criticisms to the whole of the legal system.

In part this was a response to some of the answers which were developed to the realist critique. If the realists were right in claiming that rules did not bind judges and that therefore judges should take into account relevant policies when deciding cases, there is little difference between legal and political decision making. Both ought to be based on rational policy analysis. If there is little difference between the two, it is difficult to justify allowing judges rather than politicians to decide some of the matters over which they now have jurisdiction, particularly matters to do with human rights. To defend the role of the courts some commentators claimed that the important difference between legal and political decision making lies not in the standards which are applied but in the processes which are used in making the decision.

This defence of the difference between law and politics focused attention on the legal process. Therefore, it was not surprising that those who believed that law was no different from politics would focus on that process and attempt to bring out its political implications. Hence the Crits extended the realist critique from an attack on rule-based decision making to an attack on the whole legal system, arguing that it was biased towards certain political values, those of liberal individualism.[9] The Crits also rejected these values, arguing that they were incoherent or inhumane or both.

This attack was so fundamental that it amounted to a wholesale rejection of the existing legal system and the society of which it is part. Therefore, the Crits did not aim for reform. Rather they saw themselves as revolutionaries who hoped to clear the ground for something better and argued that reform might delay the revolution.

Some feminists and critical race theorists have joined the Crits in their political attack on the whole of the legal system, but from a different point of view. Despite their differing viewpoints, all of these theorists tend to argue that the legal system represents a privileged viewpoint, that of the white male, and silences other conflicting viewpoints, including those of women, ethnic

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8 It has also become a major concern of later jurisprudence, both of those concerned to support the realists and of those concerned to defend the usefulness of rules and of legal concepts.

9 There is a lot of critical writing on this point. Davies in Chapter 5 provides a good introduction to the movement and its main tendencies.

minorities, and gays and lesbians. Davies documents and comments on many of these attacks from varied points of view.

The loose collection of philosophical ideas often referred to as postmodernism lies behind and gives theoretical muscle to many of these attacks. Davies is at her best in explaining these ideas and how they have been used to support the claim that the law represents a privileged position which benefits one particular group in society. The two strands of postmodernism with which Davies is most concerned are structuralism and its offshhoots and the deconstructionism of Derrida.

Structuralism is derived from a theory of language. It argues that we form concepts by exclusion and by drawing boundaries. Hence we learn the bounds of a concept such as "dog" by learning what falls outside the concept, that is by learning what animals are not dogs. In an important sense, the drawing of these boundaries is a political act in that where we place the boundary can define who is entitled to the benefits of the group and who is not. For example, if we place green activists into the category of "scruffy dole bludgers", we are likely, whether intentionally or not, to place little weight on their views. Closer to home, the definition of basic legal concepts such as "person" has been used to deny the benefits of the law, including such fundamental benefits as the right to own property, to categories of adults. In other words, basic concepts, rather than being neutral descriptions of the world, can reflect decisions about the distribution of the benefits and burdens of social life and have privileged some at the expense of others.

The insights of structuralism have profound implications for philosophy. Modern philososphy has sought the foundations or basic ideas of areas of thought in order to provide sound underpinnings for theory. If structuralism is right, there may be no sound underpinnings because there are no pure concepts. All concepts and the theories which are based on them represent a choice of where to draw the boundaries and hence of what to exclude. Other choices could produce different theories. More importantly, the theoretical concepts in large part take their meaning from what is excluded. Hence western thought tends to be dominated by a series of dichotomies; subject object; matter spirit; real ideal; theory practice. All of these categories, which we tend to think of as natural, are constructed by a process of exclusion and can only be understood as mutually exclusive pairs.

If the basic categories of our thought embody choices about where to draw the boundaries, it is possible to view the whole of our thought as contingent, as one way of viewing the world among others. Derrida's deconstructionism, especially his law of genre, strengthens this interpretation by pointing to the ambiguous nature of most fundamental concepts which neither belong to nor are separate from the disciplines they define.[10] For example, Hart's rule of recognition is not a typical legal rule, in that, unlike other legal rules, it is not valid but is constituted as a social practice which is accepted by the particicipants. Because of the ambiguous nature of all such basic concepts, no system of thought can contain its own justification within itself. For example, a system of law cannot be self-validating. It can contain criteria for determining the

10 Discussed in Davies, 265–8.

validity of the rules of the system, but those criteria cannot be used to determine their own validity. Hence, Hart's rule of recognition which contains the criteria of validity for the system, is not valid but merely accepted.[11]

The fact that systems of thought cannot be self-justifying is of special relevance when considering the nature of law. Derrida points out that that there is an intimate relationship between law and force. Law is used to provide a justification for the application of the force which the State commands. However, every legal system begins in an act of force which it is incapable of justifying because it is that act of force which creates it as a legal system. Until that act of force succeeds, the legal system does not exist and therefore is incapable of validating any use of force. Hence we have to live with the paradox, that law, which is intended to justify the use of force by the State, itself owes its origins to a legally unjustified act of violence.[12]

Derrida's thesis that all law originates in an unjustifiable act of violence may be seen as completing a sceptical critique about the adequacy of law as a means of imposing moral constraints on the use of force so that that critique now embraces every feature of law. This scepticism began with doubts about the existence of universal standards of the good and the just, developed with the claim that it was impossible to govern society by applying general rules made in advance, proceeded to claim that legal processes and techniques embodied an alienating political dogma and attacked as arbitrary such concepts as the responsible individual on which the law is based.[13]

Davies catalogues the development of this scepticism. However, perhaps because of her own postmodernist sympathies, she is not sceptical enough about many of the sceptical positions which she considers. Although she is aware of the political views and agendas behind many of the sceptical critiques of law and therefore knows that much of the criticism is a criticism of the politics of less sceptical theories, she does not consider the extent to which their scepticism is inconsistent with their political aims. In particular, she is silent as to the political and legal implications of rejecting the universalist and rationalist traditions which the sceptics attack. Of course, it is not a defence of a philosophically indefensible position to show that much is at stake if it is abandoned. However, when considering the views of critics who use sceptical arguments to support political criticisms, it is necessary to consider the political implications of the sceptical arguments to ensure that the debate is not one-sided.

In particular, most of the postmodern and feminist positions considered reject the objectivist, universalist and rationalist tendencies of Western thought. These tendencies underlie many of the most important values in Western law and politics, such as democracy, the rule of law and the concept of equality. If universalism and rationalism are indefensible, it is difficult to defend these values. For example, the natural law traditions which lie behind the growth of

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11 Hart, H L A, *The Concept of Law*, (2nd edn, 1994) at 107–10.

12 Derrida, J, "The Force of Law: The Mystical Foundations of Authority" in Cornell, D, Rosenfeld, M and Carson, D (eds), *Deconstruction and the Possibility of Justice* (1992).

13 However, Derrida is not a complete sceptic in his view the every open-ended nature of law makes justice possible; id, 16–24.

international human rights law, such as that embodied in the International Convention on Political and Civil Rights and the activities of groups such as Amnesty International, claim that the natural law is objective, universal in application and discoverable by the exercise of reason rather than the result of a particular culture. If the idea that individuals have basic rights which are not culturally determined is a philosophical mistake, it is hard to justify the Conventions or criticism of regimes which ignore their provisions.

Similarly, the rule of law assumes that it is possible to constrain the power of rulers by requiring that that power only be exercised in accordance with rules laid down beforehand. If rules do not constrain the choices available to the people who apply them, the rule of law provides no protection against arbitrary power. If that is the case, many important principles of the criminal law, such as the principle that no person should be punished for an act which was lawful when committed, are illusory.[14]

It is arguable that the rejection of some of these concepts will undermine the goals of the critics. For example, some feminists have argued that the core values of traditional western thought are repressive and have been used to justify the oppression of the less powerful, such as women and racial minorities. They want more than reform of the legal system. They argue that the concepts which lie behind our legal thought are so necessarily and irredeemably biased that no just system can be based on them.

For example, some feminists have attacked the concept of objectivity both in the law and generally. Objectivity is the ability to look at something as an object, to distance it from ourselves and to consider it as something separate. Hence, when we attempt to make an objective judgment, we try to consider the matter dispassionately and attempt to rule out personal prejudices, interests and preferences. Objectivity may be contrasted with subjectivity. A subjective assessment is from the point of view of the assessor and makes no attempt to be dispassionate or to rule out personal prejudices, interest and preferences. Feminists have attacked the notion of objectivity on the basis that the existence of an object implies the existence of a subject, that is of some person who is relating to the object as an object. They argue that the concept of objectivity is loaded in that it leaves the subject out of account as if there were not one there. However, they claim that there is such a subject and that subject has a point of view. If no subject is identified, it is likely that the point of view will be that point of view which is socially sanctioned. As men are the more powerful in our society, that point of view will be necessarily male. The way

14 Much of the work of HLA Hart can be interpreted as an answer to the Realist scepticism about the binding nature of rules. For example he attempted to demonstrate that law was independent of politics by showing that legal concepts did not entail the existence of imaginary or metaphysical entities and were not necessarily masks for unstated political judgments. Instead, he argued that they had an empirical basis in our practices of language. Therefore, he argued that they could be defined in an empirical and neutral way by means of the definition in use; "Definition and Theory in Jurisprudence" (1953) 70 *LQR* 37. Similarly, in *The Concept of Law,* he applied similar techniques to the concept of law itself to show that law was an empirical phenomenon which was separate both from morals and politics. That he failed does not affect the political importance of his enterprise because if he had succeeded, he would have demonstrated that it was possible to institutionalise values such as the rule of law.

to avoid privileging this socially sanctioned male point of view is to abandon the notion of objectivity which gives it its privileged status and to make clear the point of view from which all judgments are made.

Whether or not the feminists are right in their attack on objectivity, the political implications are ones which are not likely to advance their cause or the cause of any group who are disadvantaged. The traditional way for the disadvantaged to put their case is to appeal to the fair-mindedness and dare one say it, the objectivity of those in power. They have pointed to their unfair treatment and have demanded that society recognise their grievances. Although they may have used some force to support their demands, only rarely have the genuinely powerless been able to take what they see as theirs by force. Instead, they have appealed to the community's sense of justice, often successfully.

The rejection of the idea of objectivity rules out good faith appeals to the sense of justice of those who have power. There may be appeals, but they are likely to be appeals to emotions such as a sense of guilt rather than to a sense of justice. There cannot be appeals to a sense of justice because the attack on objectivity is an attack on all notions of justice. Justice requires that the positions of the claimants be regarded dispassionately, that is without regard to prejudice and self-interest, and assessed against some objective standard. The attack on objectivity rejects the possibility of a dispassionate assessment against rational standards by arguing that all assessment is necessarily from a particular standpoint, either that of the assessor or that which is privileged in that society. Whatever the standpoint, it will reflect the interests and biases of the assessor or the privileged group. Therefore, it will not be objective nor will it be just.

If the claims of feminists are from their point of view and are not an appeal to objective justice, there is no reason for granting their validity. As the claims are made from the point of view of women, they reflect the interests of women, who are a disadvantaged group. There is no reason why those who have the power, men, should surrender any of it merely because, from the point of view of women, it is desirable. If men are asked to give up something, power over women, it may be undesirable from their standpoint. In fact, the attack on objectivity suggests that men should make no concessions to women. If there is no objectivity, there is no justice by which the behaviour of men can be criticised. Instead, feminists' claims merely reflect the standpoint of women and are made in their interests. Men should react from their own standpoint and in their own interests. If it is in their interests to deny the claims, they could not be criticised for so doing. And if the feminists are right, women, as an oppressed group, are unlikely to have the power to take them by force.

Davies assures us that the postmodern analysis of the contingent nature of concepts such as that of objectivity is not intended to destroy their usefulness but to enable us to increase our understanding of them. However, if we accept that such concepts are contingent rather than necessary, are merely one way of looking at the world, our understanding of them is altered fundamentally. We will not be able to use them in good faith as the basis for philosophical theories of law and justice which have some claim to universality. Nor will we be able to find rationally acceptable foundations for arguments about what law and justice ought to be. We will be thrown back on intuitive assessments of

individual claims based on the standpoint of the claimant rather than theories about the nature of justice.

Although such an approach will undermine traditional aproaches to the moral problems of law and justice, it is the inevitable consequence of a philosophy which believes that concepts are developed by the drawing of boundaries so as to include some cases within the concept and to exclude others and which claims that there are no objective criteria for drawing the boundaries. Such a philosophy invites us to consider other possible conceptual schemes by redrawing the boundaries, but does not give us any criteria for evaluating the different schemes. This may be a liberating process but it also has the potential to lead to nihilism. If value cannot be determined rationally, the only way to avoid nihilism is to impose it by a leap of faith. It is no accident that the legal philosophy of Derrida, who is the high priest of postmodernism, and who is not a nihilist, is as aphoristic and as mystifying as Zen Buddhist koans. It is as if the truth about the nature of the law can only come after wrestling with paradoxes which are suggestive rather than from carefully reasoned arguments. These paradoxes are a poor substitute for the assumption underlying traditional legal and political thought that social and legal problems can be solved by reasoned argument from rationally acceptable first principles of justice. After all law is the most important way of justifying the use of force in our society. It cannot carry out that function if we do not have legal theories based on rational foundations.

Except for its failure to consider the costs of abandoning the universalist and rationalist tendencies in western legal theory, the book is a good introduction to that theory and in particular to the postmodern and feminist theories of the last twenty years. Its virtues of simplicity and lucidity recommend it for use as a text book in an introductory jurisprudence course concentrating on feminism and postmodernism. However, I would like to see more emphasis placed on the virtues as well as the vices of the earlier universalist and rationalist theories especially in comparison with postmodern relativism, so that students are made aware that the earlier approaches provide as good, if not a better basis for criticism of existing institutions and practices than do their postmodern rivals.