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The Colour of Law

by Alice Béja

A new anthology provides French translations of key texts in the field of Critical Race Theory, as it has developed over the past 40 years in the United States. They help us to understand the decisive role played by legal discourse and practice in the social, historical, and cultural construction of race.

Reviewed: Mathias Möschel and Hourya Bentouhami (eds.), *Critical race theory: une introduction aux grands textes fondateurs* (Paris: Dalloz, 2017) 498 p., 45€.

It has become a commonplace to compare and contrast France and the United States on issues such as freedom of speech, religion in public spaces, and racial questions. Just reading or writing the word 'race' in French creates a sense of uneasiness and sometimes even outright and irrevocable hostility. Recent events can testify to this, whether in the shape of the controversy about 'State racism' in 2017, which led to the Minister for Education filing a complaint – eventually dismissed – against a teachers' union, or the deletion of the word 'race' from the first article of the French constitution.

At the other end of the spectrum to such semantic controversies, in the United States race is accepted as a stable category. It features in the census questionnaire, is used as an analytical tool to guide many studies in the social sciences, and functions as a social and cultural category informing how each person shapes his/her public and private identity. Critical Race Theory (CRT)—of which the founding texts (by Derrick A. Bell, Cheryl I. Harris, Richard Delgado, Gary Peller, Mari Matsuda, among others) are presented in this French anthology—recognises the central nature of race as a social, historical, and cultural construct and analyses its impact on legal thought and practice.[1] The legal specialists and law

[1] It is regrettable that a book with such high-quality content should be so poorly edited. The many errors, the absence of the authors' names in the contents table, the unnecessary range of fonts, and the low-quality paper and binding all make for an uncomfortable reading experience.

professors behind this movement, strongly inspired by 'Black Power',[2] sought to re-enrol the political in the universities of the United States and to adapt the methods of Critical Legal Studies in order to include race. The intention was to demand better legal protection for victims of discrimination due to racialised identities, and also to unpack the supposed objectivity of the law and show 'legal discourse as a crucial site for the production of ideology and the perpetuation of social power' (p. 38).[3]

However, the book does not simply provide a French translation of the key CRT texts. It also offers a truly conceptual translation: each text is prefaced with an introduction explaining the relevance in a French context of debates that might, at first glance, seem specific to the USA (on issues such as affirmative action, desegregation of schools, or academic career paths). Without trying to replace 'a social reading of French society' with 'racial analysis' (p. 3), the authors try to convince their readers of the value of turning to CRT for tools that would enable a better understanding of the tensions running through our society.

Race and history

Critical Race Theory emerged in the 1980s, driven by non-white academics seeking to inject the issue of race into the Critical Legal Studies (CLS) approach instigated by left-wing law professors who regarded the law not as a neutral and objective tool but rather as a reflection of power relations and of domination within the social world. Issues of gender and race, however, are rarely broached in and of themselves in CLS, a shortcoming that CRT has sought to address. As Kimberlé W. Crenshaw and the other founders of the movement wrote, their aim was to uncover 'how law was a constitutive element of race itself: in other words, how law constructed race' (p. 40).[4] Their perspective was radically anti-essentialist: race is not a given but a social fact, and its consideration within the legal order serves not as simple reparation for the colonial or segregationist past but as a tool for fighting current discrimination.

[2] The expression 'Black Power' was popularised by Stokely Carmichael, the leader of the Student Nonviolent Coordinating Committee (SNCC) in 1966. It does not relate to a specific political movement as such, but rather to a way of fighting segregation and of claiming a 'Black Power' that refuses integration and makes non-violence a tactic rather than a principle, contrary to the principles advocated, for example, by Martin Luther King.

[3] Throughout this article, in-text page numbers refer to the French-language volume under review. Where appropriate, references to the original English-language text are provided in a footnote. For this citation: Kimberlé W. Crenshaw et al., *Critical Race Theory: The Key Writings that Formed the Movement* (New York: The New Press, 1995), 'Introduction', p. xxiv.

[4] Ibid., p. xxv.

In her text 'Whiteness as Property', published in 1993, Cheryl Harris builds on the work of W.E.B. Du Bois, David Roediger, and Andrew Hacker,[5] demonstrating how, in American history, whiteness evolved into a form of property: being white brings the same advantages as owning property. The owner alone can decide what is done with his or her property (and therefore decide who is white and who is not), enjoy that property, and exclude others from its enjoyment. Du Bois speaks of whiteness as a 'public and psychological wage' for white workers, a social advantage allowing them to feel closer to other white people, whatever their social class, than to black people. Racial domination therefore goes hand-in-hand with a reduction in class conflict.

From the first Slave Codes in the 18th century to 19th-century legal decisions determining who could claim to be white, 'the law has recognized and codified racial group identity as an instrumentality of exclusion and exploitation' (p. 109).[6] And yet, according to Cheryl Harris, the legal order refuses to recognise these same groups when it comes to reinforcing the rights of the most vulnerable in society by affirmative action which 'implicitly challenges the sanctity of the original and derivative present distribution of property, resources, and entitlements' (p. 115).[7]

Affirmative action is a way of reversing a state of affairs presented as natural and unchanging but which is, in reality, a product of history: in this context, the history of racial domination. In this way, reflections on race shed new light on the 'colour blindness' that governs many public policies in the United States and is also a founding principle of French Republican universalism. Critiques of this perspective can take us a very long way, as Gary Peller shows in 'Race — Consciousness'. He traces the opposition of Black American nationalists to 'integrationist ideology' (p. 274);[8] in their view, the desegregation of the school system that began in the 1950s and with the Supreme Court ruling in Brown v. Board of Education was undesirable insofar as it amounted to asking Black people to adapt to White norms. Peller argues that it would have been possible to 'imagine a form of school integration that would have entailed consideration of the integrity of African American culture and recognition of the cultural assumptions of dominant public school practices' (p. 295).[9]

[5] See W.E.B. Dubois, *Black Reconstruction in America* (New York: Transaction Publishers, 2013 [1935]); D. Roediger, *The Wages of Whiteness: Race and the Making of the American Working Class* (New York: Verso Press, 1991); A. Hacker, *Two Nations. Black and White, Separate, Hostile, Unequal* (New York: Scribner, 2003 [1992]).
[6] Cheryl I. Harris, 'Whiteness as Property', *Harvard Law Review 106* (1993): 1761.
[7] Ibid.: 1788-1789.
[8] Gary Peller, 'Race—Consciousness', *Duke Law Journal* 1990 (1990): 775.
[9] Ibid.: 799.

Critiquing the universal

In France, such a focus on the cultures and trajectories of marginalised groups would quickly lead to accusations of '*communautarisme*' [community sectarianism]. However, although it is obviously difficult to compare the histories of different communities on either side of the Atlantic, Peller and the other CRT thinkers encourage us more generally to question neutrality and universality, considered as 'culturally embedded axiological criteria that embody the solipsistic world view of the dominant majority' (S.-L. Bada, p. 262).

Law is broadly based on these two notions and CRT, beyond its objects of study (affirmative action, hate speech, discrimination, etc.) aims to call them into question so as to recontextualise legal thinking and practice, in particular by drawing on history and sociology. The texts focus less on what one might call 'obvious' expressions of racism and more on unconscious or systemic racism, often perpetuated even by so called 'liberal' (in the US sense of centre-left) policies. In this way, Richard Delgado writes:

> treating unequals as though they were equal is just as much a violation of equality as treating equals unequally (p. 171)[10]

Building out from this observation, he engages in a harsh critique of the notion of merit both in education and in professional life. As Emilia Roig writes in her introduction to Delgado's text:

> in a racialised society, white people define the conditions for success and failure, then in turn consider their success as the fruit of their own merit and individual efforts rather than as the result of systemic privilege (p. 162).

Thus it is that policies such as the one guaranteeing admission to a public university to the top 10% of students, passed in Texas in 1997 (which can be compared to the places reserved in France on selective higher education programmes for the top *baccalauréat* holders) end up favouring white students. And:

> if those with the most merit are mainly white men, assuming that merit and competition are fair, equitable, and impartial, what must one think of the aptitude, intelligence, and motivation of racialised persons and of women, as groups? (E. Roig, p. 167).

The starting point for the texts presented in this volume – the question of race – is in reality a way of introducing politics into law, to show that decisions perceived – especially in law schools – as neutral and deriving from the application of legal texts, also understood outside of all context, are in fact political acts and should be understood as such if we wish to progress towards greater rights and to reduce historically entrenched inequalities.

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[10] Richard Delgado, 'Rodrigo's Tenth Chronicle: Merit and Affirmative Action', *Georgetown Law Journal* 83 (1995): 1711-1748. Cited here from Richard Delgado, *The Coming Race War and other Apocalyptic Tales of America after Affirmation Action and Welfare* (New York: New York University Press, 1996), p. 67.

Reinstating the importance of the 'anecdotal'

It would nevertheless be reductive to see these texts as nothing more than a call for African-Americans to be taken into consideration as a group by United States law. The issue at stake is rather changing how the law treats victims and how it listens to what they have to say. In her article on racist speech, Mari Matsuda focuses on the victim's story and the – sometimes physical – consequences that racist insults have on those who are subjected to them. Analysing the 2004 French law prohibiting 'ostentatious' religious symbols in public schools, Katherine Adrien Wing and Monica Nigh Smith express surprise at just how few Muslim females voices were heard in the debate. In their article, they try to reflect these women's diverse points of view on the ban, challenging any fixed and stable image of 'women' or 'Muslims' and showing the different meanings that can be given to wearing or refusing to wear a headscarf.

Making victims' voices heard is a way of pursuing this critical analysis of neutrality and universality; reinstating the importance of the 'anecdotal' offers a way of showing the marks that the grand narratives of History leave on the present day. What, then, is the role of academics, of experts, in collecting and analysing these testimonies? They cannot take a neutral and overarching stance, as this would directly contradict the very principles of CRT. On the contrary, the texts in this anthology foreground subjectivity and types of writing that fall beyond the scope of the traditional research article. Charles R. Lawrence III begins his text on unconscious racism with a personal anecdote, Cheryl Harris recounts the story of her grandmother who for years 'passed' for white, and Richard Delgado presents his ideas in the form of a dialogue with Rodrigo Crenshaw, a young African-American professor who has spent some of his life in Italy.

What might seem like artifice, or stylistic vanity, especially to a French reader, is in fact profoundly linked to the aims of CRT: rejecting the external stance of the scholar and expert, without renouncing intellectual rigour, goes hand in hand with the desire to unpack the sanctity of the law and challenge its supposed neutrality. The ideas presented in this volume are sometimes provocative – particularly in a French context, where the very term 'race' remains highly problematic in the social sciences and in public debate alike – but we can only hope that thanks to the invaluable contextual translation provided by the authors of the volume, these texts will give rise to debate and will change how we conceive of the law and its relationship to domination.

First published in *laviedesidees.fr*, 29 August 2018.
Translated from the French by Lucy Garnier with the support of the Florence Gould Foundation.
Published in booksandideas.net, 26 November 2018.