BOOK REVIEWS

Law and Society: The Crisis in Legal Ideals, by Eugene Kamenka, Robert Brown and Alice Erh-Soon Tay (eds.), London, Edward Arnold Ltd., 1978, x + 130 pp. $7.00.

Human Rights, by Eugene Kamenka and Alice Erh-Soon Tay (eds.), London, Edward Arnold Ltd., 1978, viii + 147 pp. $8.00.

These two titles are the first in what will hopefully be a very long series of original monographs and collections under the general heading of "Ideas and Ideologies". The editor of the series, Professor Eugene Kamenka, states its aim as being that of connecting "the past, the present and the future, the 'material' and the 'intellectual', the social and the personal" with particular reference to those "ideas or concepts that themselves function as ideology, that are history- and theory-laden and embody the striving to change the world by, and while, re-describing it" (*Law and Society*, p. vii).

Both titles, and several of those already foreshadowed, are inter-disciplinary in approach, involving practitioners and theorists of law, philosophers, political and social scientists, and experts in other related fields such as criminology and penology. Happily, both avoid the "sticky tape" putting together which so often passes for interdisciplinary studies and although, as with most collections, there is a variation in the quality and relevance of the contributions, most of the essayists, particularly those contributing to *Human Rights*, show evidence of having read and understood each other.

There is one message which emerges very clearly from almost all of the essays in both collections. It is that those who believe in a pluralist society of free individuals are now very much on the intellectual defensive. Indeed if the intellectual, social, and political trends which most of the writers identify as mainstream continue to prevail there is now real reason to doubt whether any society with such aspirations will retain them throughout the two decades that remain before the twenty-first century. There will have been no age or epoch of individual freedom within pluralist societies.

The contemporary assaults on the socio-political values underpinning pluralist liberal democracies are seen as deriving as much from theoreticians and purveyors of theory as from any other source, and both books constitute a salutory corrective to the conventional anti-intellectualism which causes Australians, including Australian intellectuals, to constantly under-estimate the *power* of ideas over men. Public education

is the shambles it is today because of the published nonsense which those responsible for designing and maintaining our educational systems have read and sincerely believe. The growth of "no-fault" (and therewith perceived "no responsibility") legislation, administered by mock courts such as the Australian family law courts, represents a monumental change in social structure, generally initiated by a lobby wishing to put some *theory* into practice. The word which the contributors repeatedly fall back on to describe that family of distinct theory-based trends which have pointed up "the crisis in legal ideals" (as *Law and Society* is subtitled) is *collectivism*.

In the first essay in *Law and Society* Professor Alice Erh-Soon Tay identifies the general crisis (of which the crisis in legal ideals is a part) with depressing accuracy (p. 2):

> We live in an age no longer of real individualism, if only for some, but of pseudo-individualism for all. Never in public life have people been more willing to talk about themselves, to see their own egos as the centre of the universe and the true end of civilization; never have they been less perceptive, and less honest, about themselves and their problems. They want to touch others, to have encounters, because they cannot bear to live with themselves. It is precisely this emotional and intellectual dishonesty that forms the real content of the attack on objectivity and the demand for "commitment" or "communication" — the demand that the facts not be allowed to stand in the way, that the medium itself become the message, that content take second, third and ultimately no place.

Professor Tay argues that the survival of individualism is contingent upon recognition and acceptance of three quite general principles which have been embodied in our inherited "habit" of law, but which are even now being put aside by governments who do not realise their importance, in response to the demands of those who only too often do. The first is that the law and its courts must be independent, comparitively predictable, rule governed in operation, and embody formal, procedural impartiality. This is under attack from those who see the law as an obstacle to "social planning", as hindering the rapid implementation of government policy, or as "unscientific". Its abandonment would mean a Soviet system where judges themselves become the agents for implementing government policy, committed to so interpreting the law that it reflects current government thinking.

The second is the principle of "the abstract equality, equivalence and imputed moral freedom and responsibility of the parties" (p. 9) repudiated by those who, like the increasingly influential criminologists who regard crime as a manifestation of the class war (and whose views are seized upon with eagerness by the new army of "progressive" social work students) believe that the whole system of justice is viciously and irredeemably loaded against the poor and members of minority groups. It is important to realise that such critics often go further than affirming

the sad and important truth that equality is not always recognized by our legal system, urging instead that equality is structurally meaningless in a capitalist or mixed economy social system.

The third principle is that there is an area, difficult to define and concerning the boundaries of which continuing argument is inevitable, of absolute personal inviolability. (Argument about the meaning, existence, and scope of a right to privacy illustrate the peripheral uncertainty.) Enmeshed historically, but of decreasing economic significance, is the inviolability of the personal and real property which is "the reification of my will". However the concept of property has now evolved to such a degree of complexity that in very many cases it no longer has the conceptual capacity to serve as the basis for the assertion or recognition of legal rights. Increasingly status, rather than ownership, is urged and accepted as the basis for "a say", if not a real interest, in the operations of vast corporations; for example, one's status as an employee, or a consumer, would on some current views give one a superior legally recognized interest in the way in which it conducts its affairs than that of one whose status was merely that of shareholder or even sole owner. Professor Tay contends that there is an urgent need to provide adequate theoretical underpinnings to the changes which appear to be taking place so that we can give a proper characterization of the legal basis for such rights as are granted on bases other than property, and cautions against eagerly replacing, dismissing, or under-valuing the concept of property, whose central place as a foundation for claimed rights has made it the single most faithful servant of the freedom of the individual. Could it be that, as Roscoe Pound pointed out fifty years ago in a passage quoted by Professor Tay, the law having moved from status as the basis of rights and obligations in the feudal age to contract in the early industrial era, we are now entering upon a new feudalism in which the state will once again function as the grantor of benefits, and status will provide the basis for claims? Whether this prophecy is correct or not, the central issue which Professor Tay raises and which we must face, particularly in the light of current pleas for no-fault accident law to follow no-fault family law, and what to all intents and purposes functions as no-fault industrial law, is whether we want a system of justice which is predominantly adjudicative or one that is essentially administrative. In very general terms the latter appeals to socialists, collectivists, social planners, and utilitarians; the former to free enterprisers, individualists, pluralists, ethical non-cognitivists. Since the middle 1960's the game has been going to the former. Perhaps in a place and a period in which bureaucracy is seen as being the largest, the most secure, and least demanding and accountable of employers, the bureaucratized vision of society has a certain understandable appeal!

The complexities of the relationship between our conception of what law is and ought to be and what purposes it does or should serve, on the one hand, and our broader social and moral conceptions on the

other, are further explored by Professor W. L. Morison in "Frames of reference for legal ideas". Interestingly, he notes that (p. 22):

> If a particular writer is in general satisfied with the sets of values represented by the law as it stands, it is natural for him to idealize the concept of "law" or "the law" itself as a focus in terms of which he organizes the demands he makes. This is particularly so if he feels that set of values threatened by rising forces in society outside the law. I take this to be the position in which the classical writers found themselves. A reformer, on the other hand, may find some values which he supports embodied in the law but he will want to see these kept under examination and he will therefore want to emphasize the impermanence, from his point of view, of at least some of the values embodied in the law. The frame or focus of his thinking about legal ideals is likely to be some concept of society and the way it develops rather than the law itself. This I take to be Pound's position.

So it is that, as Morison observes, today's teachers of law find that if a judge or author refers to the law as an object directly meriting veneration and respect, the reaction will be one of scornful laughter. Not so if the same reference is made to "society", a metaphysical abstraction from complex and only partially charted data, the reality and history of which have often gone unstudied by today's progressively educated students.

Morison enumerates the correlations in the recent past between the jurisprudential doctrines of influential legal theorists and particular kinds of rival ethical theories. Ethical rationalism, intuitionism, Benthamite ultilitarianism, and evolutionary ethics are in turn criticised in standard but nonetheless usefully compact ways, the important point being that these criticisms infect or cut free and leave without foundation the correlated legal doctrines, insofar as they undermine their broader frame of reference. One moral which may profitably be drawn is that to the extent that contemporary claims regarding the nature and proper expectations of our legal system are based on vague and muddled beliefs about some entity called society, the "understanding" they provide is likely to prove illusory.

Morison's essay is usefully complemented by a joint article on "Socialism, anarchism and law" by Professors Kamenka and Tay, which concludes that "the primary lesson to be learnt from the history of socialism and the concrete examination of revolutionary communist societies is that neither the abolition of economically signficant private property nor the elevation of socialist-communist ideology renders societies homogeneous, conflictless and self-administering" (p. 79). Critical examinations of Marxism are always difficult in the way that examinations of religious teachings are difficult. If one is not totally and sympathetically immersed in the teachings one's criticisms, however well intentioned, are likely to be superficial and irrelevant. The consequence is very little

meaningful communication between believers and non-believers, and at best peaceful intellectual co-existence. The Kamenka-Tay essay is a valuable exception.

The last third of *Law and Society* is concerned with crime, its analysis, and punishment. Part of the seductiveness of over-arching simple total explanations of diverse phenomena is that, to paraphrase and misappropriate Bertrand Russell, they have all of the advantages of theft over honest toil. You do not have to examine the phenomena in all of their diversity, but simply make adjustments here and there, usually by redescribing the phenomena, when faced with what appear to be counter-examples. The free adjectival use of "true", "genuine" and "real" in qualifying the data makes the task easier. (As Aldous Huxley pointed out, ordinary temperance is just gross refusal to drink but *true* temperance is two whiskies before and a bottle of claret with dinner!)

So it is with "explanations" of crime and punishment as manifestations of the class war. With admirable patience Professor Robert Brown examines the claims of the pretentiously and erroneously styled "new criminologists" who deny that criminal behaviour is primarily linked to identifiable sorts of unfortunate individual antecedents to which members of certain socio-economic sub-groups are more likely to be pre-disposed than others, and that this can be substantiated by case studies and statistical analyses. Crime is seen rather as the product of a stratified exploitative society, with the implication that were society restructured in a non-stratified non-exploitative way, there would be no crimes, only "disputes" which could be settled by reconciliation processes. Thus once again a collectivist society is envisaged as the one aim for (and possibly as the one to which we are inevitably heading) notwithstanding the all too familiar failure, as Brown notes, "to go on to specify in detail the social conditions required by, and sufficient for, the urban folk-society of the future" (p. 107). Professor Gordon Hawkins isolates the new criminologists' claim that the prison in particular is, as Taylor, Walton and Young put it, the product of "a society of social arrangements built around the capitalist mode of production" (p. 109). Hawkins argues that their claims are not only not new (having been anticipated by Kropotkin) but by substituting broad non-empirical critique and (as Brown also noted) a nebulous prospectus for a future society rather than a defensible and implementable social programme, they make no contribution to and divert attention from the real attempts that are actually being made to reform prisons, while their ideological repudiation of rehabilitation as a primary goal of post-conviction criminal management is an abandonment of one of the aspirations of many of the active "radical" prisoners with whose cause they associate themselves.

Law and Society successfully identifies the crisis in legal ideals and its manifestations in social, legal and criminological theory. *Human Rights* is concerned with the key concept used in support of the often incompatible demands of collectivists, liberationists, and libertarians—that of an

extra-legal right. As Kenneth R. Minogue indicates, talk of natural rights flourished vigorously in the seventeenth century, but all but died by the end of the nineteenth, probably due to the influence of utilitarianism which dismissed talk of such rights as, in Bentham's words "nonsense on stilts". It has enjoyed a new vogue during the last two decades. There is a wealth of philosophical problems associated with the very concept of a natural right, not to mention the further problem of identifying what rights there might be.

One persistent problem to which a number of contributors return is what the relationship is between natural rights and moral duties. The first wave of popularity for natural rights flows from John Locke's discussion in his *Second Treatise of Civil Government,* where natural rights are integrated with a variant of the Thomistic doctrine of the natural moral law. If morality is conceived on the model of legal prescripts, it is a relatively small step to introduce correlative rights, ascribed to those who are the potential beneficiaries of the performance of their moral duties by others, or who are potentially harmed by a breach or non-performance of a moral duty by another. My assertion of a moral right would thus be an oblique demand that others act in conformity with the natural moral law.

Of late a number of theorists have attempted to divorce natural rights from the idea of a natural moral law, and in some cases to separate it altogether from any idea of a correlative duty. Two questions commonly confused are whether a natural right implies a correlative duty, and whether natural rights can be defined in terms of moral obligation. The latter view, by which I am tempted, implies that there is just one moral "primitive" (either a right or an obligation; which is taken as primitive is a matter of logical indifference) and that the other notion or notions of moral discourse can be defined in terms of it with the aid of non-moral terminology (including, e.g., logical particles such as "not"). A good example of this is Wesley Hohfeld's definition of those rights which he classifies as liberties as follows: "X has a (moral) right to do act A" is defined as "X is under no (moral) obligation to refrain from performing act A". If I assert that I have a right to think what I like, my assertion is, on this view, equivalent to the denial of the existence of any duty on me to refrain from so doing. It follows that *ceteris paribus* nobody would be justified in forcibly, if that were possible, preventing me from thinking what I wanted to think.

I am inclined to think that Hohfeldian liberties are not a mere species of rights but that, contrary to the prevailing view amongst philosophers, all other rights really can be reduced to them. However this is not the place to argue for that. My point is that the correlativity of the *concepts* of a moral right and a moral duty (the definability of at least some rights in terms which mention duty) does not entail the correlativity *in fact* of rights and duties, for on any view some rights surely consist

in the *non-existence* of obligations excluding the conduct (on its absence) which they specify.

The contributors to *Human Rights* vary enormously in their understanding of extra-legal rights, in the importance which they attach to talk of rights, and the social implications which they see as flowing from recognition of rights as they conceive them. At the sceptical end, Christopher Arnold develops an interesting argument to show that, in the case of rights correlative with actual duties, the concept of a right is theoretically redundant and hence logically eliminable, and argues further, and in my view convincingly, that the attempts by Hart and Wasserstrom to demonstrate that this is not so, fail. At the same time Arnold notes that "to take rights *too* seriously" (in an amendment to Ronald Dworkin's famous phrase) may hinder reform and make fictions of interests like social interests (p. 86). There is no doubt that the renewed interest in attempting to repair or replace Locke's derivation of the right to private property, for example, is largely motivated by the belief that this is necessary if there is to be a morally adequate answer to demands for a continuing needs based redistribution of wealth.

Those authors who do "take rights seriously" differ in the extent to which they wed their accounts to their understanding of legal rights. Carl Wellman models his theory of ethical rights quite explicitly on his synoptic generalization of Hohfeld's classification of legal rights, to form a cluster conception of ethical rights as "a system of ethical autonomy" within which human rights are specified as those ethical rights of the individual "as human being vis-à-vis the state" (p. 55). John Kleinig however objects to developing a general theory of rights along the lines of a legal model, together with the increasing tendency to frame social issues starkly in terms of assertions of rights (as in liberationist literature) on the ground that "those who borrowed the vocabulary of rights from legal discourse had in mind rights *stricto sensu*, and not liberties, powers, and immunities" (p. 44). Of course they may not have had these in mind, but whether rights must be so analysed is another matter.

It is impossible to mention, let alone discuss, all of the issues usefully raised in *Human Rights*; Stanley Benn's attempt to relate fundamental rights to the conditions necessary for existence as an autonomous being; Nathan Glazer's important contention that the resolution of the debate between group *versus* individual rights is pivotal to the conception American society forms of itself and the future place of individual rights within that society; J. G. Starke's claim that international law must be viewed as already recognizing group rights; and Alice Tay's reminder of the Marxian ambivalence regarding natural rights, to mention only some.

Although not written explicitly for undergraduate consumption, both books could very usefully be placed on the reading lists for courses in jurisprudence, political theory, sociology, and political philosophy. The organization of both collections into chapters encourages one to read from beginning to end, which of course makes one acutely aware of the

very different styles of each of the contributors, at which point it is necessary to remind oneself that one is reading a *collection*, even if it is one with the advantages of internal cross-reference. At times I felt uneasy about the order of the chapters, particularly in *Human Rights* where criticisms are raised of points made in subsequent chapters. There is a case for restricting references in the body of the text to criticisms of earlier chapters, and relegating criticisms of subsequent chapters to footnotes, in order that the reader is not overcome with the Hegelian anxiety that in order to understand any of it one will have to understand all of it!

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Principles of Company Law (2nd ed.), by H. A. J. Ford, LL.M. (Melb.), S.J.D. (Harvard), Professor of Commercial Law, University of Melbourne.
Australia, Butterworths Pty. Ltd., 1978, lxii + 552 pp. (including index). $17.00 (limp cover), $22.00 (hard cover).

In the preface to the first edition of this work, which was published in 1974, Professor Ford declared that it had been written primarily with the object of providing students of law and commerce with a basic text book in company law; and he modestly expressed the hope that legal practitioners and business men would also find in it ready access to the subject. That there was a real need for such a book and that this work has admirably met that need has been plainly demonstrated by the call for three impressions within its very first year, and now for a second edition after only four years. The author might well have added to the list of his intended beneficiaries those who study, teach or practise company law in other jurisdictions, and researchers all over the world, for his treatment is in no sense parochial and his own source-material is distilled from reading which ranges from Ghana to West Germany. I found it an instructive, accurate and stimulating book, and regret that I was not acquainted with its predecessor.

One of the factors which had by 1974 made it imperative that Australia should have its own text book of company law, and not continue to depend on English works such as Gower's *Modern Company Law*, was the enactment of the "uniform" Companies Acts by the Australian states in 1961 — legislation which made significant advances on the existing United Kingdom law of 1948. The differences have now become even more marked: the pace of change in Australia has, if anything, quickened, while the legislators at Westminster seem to be satisfied with

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