Law and Social Control, eds., Eugene Kamenka and Alice Erh-Soon Tay, London, Edward Arnold (Publishers) Ltd., 1980, 198pp. $15.95.

The latest volume in the Ideas and Ideologies series under the editorship of Professors Eugene Kamenka and Alice E-S Tay contains an interesting series of essays which examine various aspects of the law as it operates in societies, ancient and modern. Most of the essays contributed to this volume originated either in the seminar organised by the Australian National University in 1975 on the theme "A Revolution in Our Age? The Transformation of Law, Justice and Morals" or the later congress in August 1977 of the International Association for Philosophy of Law and Social Philosophy. A few of the chapters were specially written for the work.

A useful explanatory and "mood setting" chapter by the two editors introduces the two parts of this volume ("Law in Society" and "Law 'For' Society"). These introductory sections seek to impose on what follows a degree of intellectual coherency. This is not entirely successful, particularly in the second part where contributions are made by scholars in different disciplines and at different levels of particularity and abstraction. Thus, in Part 2, the text moves from an essay by the historian Professor Oliver MacDonagh on a number of instances of legislative reform in Victorian Britain, to an essay by Professor J. D. Heydon sketching the common law and statutory history of American and British attempts to provide laws on restrictive practices and unfair competition, through to an interesting essay by Robert Simpson of the LSE comparing the past and modern approach to industrial relations in Britain and Australia and a fairly specialised piece by Martin Partington, also of the LSE, on the British experience in landlord and tenant law. As case histories of the operation of the law in society dealing with fairly particular problems, the essays are illuminating and contain much valuable information. However, it is perhaps inevitable in a collection of essays by individual authors of high distinction, idiosyncratic approach and differing personal interests that the valiant attempts of the editors to impose a coherency on their contributions, in a 10-page introduction, is only partly successful. Part 2 of the work is best read as a series of individual essays, each of intrinsic value. In one sense, this is a pity because a coherent, systematic approach to the study of the operation of the law as a means of "steering" society and effecting social changes, would certainly be an effort of considerable modern relevance. Perhaps such an effort may be a task for the future for Professors Tay and Kamenka. Their interests and skills uniquely prepare them for it.

It is Part 1 of this book that most interested me. The part opens with an essay by the editors titled, provocatively, "Social Traditions, Legal Traditions". In this essay, Professors Kamenka and Tay offer an "overview" of what is to follow. Fundamental to their contributions to the text is the concern about the operation of three features which they suggest can be discerned in the law operating in society:

> In what follows . . . we shall be suggesting that the modern developments in law and the modern crisis in legal ideals consist of a

> half-conscious confrontation between three great paradigms of social ideology, social organisation, law and administration — each of them representing a complex but potentially coherent view of man, social institutions and their place in society. These paradigms we call the *Gemeinschaft* or organic communal-familial, the *Gesellschaft* or contractual, commercial-individualistic, and the bureaucratic-administrative paradigms.

The editors, whilst recounting the new enthusiasm today for a kind of secular *Gemeinschaft* as a principle around which the ideology of law and law reform may cluster, leave the reader in little doubt as to their general preference for the persisting importance and relevance of the *Gesellschaft* principle, with its "bias towards freedom and equality and against arbitrary coercion. Only the *Gesellschaft* conception of law has a conception of the specificity of legal procedures, legal institutions and legal values".

With the advantage of this conceptual framework, offered at the outset of the book, the reader is then introduced to a series of chapters dealing with problems of a general character. Martin Krygier offers an essay on anthropological approaches to law. This is specially interesting to me because of the work of the Australian Law Reform Commission on the recognition of Aboriginal customary law in Australia.[1] He points to the impact of the thinking of Bentham (and later Austin) on the rejection of the law "among the savages of New South Wales, whose way of living is so well known to us: no habit of obedience, and thence no government — no government, and thence no laws. . . ." (Bentham cited, p. 29). Whatever else can be said, this approach of Bentham and Austin, in turn following Hobbes, assumes a distinctly ethnocentric approach to the very definition of law. Law, as distinct from rules of custom, morality, etiquette etc. was perceived as the command of a legally unlimited sovereign to his habitually obedient subjects.

Krygier then proceeds to examine the experience of anthropologists, actually studying Aboriginal and other societies. As their knowledge, including their knowledge of problem resolution, advanced, it soon became apparent that when we begin to talk about ways of settling disputes, Western notions of law can only be seen as examples and not the standards against which non-Western approaches to like problems are to be judged. Ethnocentrism about institutions and concepts is, Krygier asserts, a "continual danger in anthropology". When Australian lawyers come to a consideration of what should be done in our legal system about the laws, rules and customs of the indigenous people of this continent, it is hard indeed to escape the snares of ethnocentrism. The very process of asking a group of Australian lawyers to answer the questions smacks of ethnocentrism. On the other hand, if practical progress is to be made and if a coherent approach is to be adopted that is respectful of other customs and rules, there may be no escape from one's own background and perspective.

---

[1] The Law Reform Commission, Discussion Paper No. 17, *Aboriginal Customary Law — Recognition?* 1980.

Krygier's essay in this book does the service of identifying this problem (which is one about which few Australian lawyers will have thought) and illustrating the ways in which it can be approached.

The following essay by Klaus Ziegert, a visiting scholar from Germany, offers a sociologist's view of the law. This is especially interesting because it is written by a person not brought up in the traditions of the common law of England. Ziegert explained, from an historical perspective, the differing development of the English common law and the European common, and later civil, law. Their differing approaches to substantive and procedural law are seen to offer "a good example of the interplay of economic structures, political structures and legal reciprocation of the societal conditions". England, sheltering across the Channel, was able to persist with a highly flexible judge-made law, corrected occasionally by unsystematic legislative acts. Constant political unrest and wars on the Continent favoured a more authoritarian, ordered legal system. Attempts to "sell" our system to civil lawyers usually fall on deaf ears because of an abhorrence of "anarchically free deciding judges". As the Australian Law Reform Commission is finding in its current inquiry into the law of evidence in Federal and Territory courts in Australia, attempts to interest those brought up in the common law traditions of England in the procedures of judicial inquiry followed in Europe, tend to fall on equally deaf ears. We are all of us, in part at least, the captives of the history and sociology of our legal traditions.

Professor P. H. Partridge has written a short, reflective essay on "Law and Internal Peace". These are pessimistic pages. Partridge stresses that the law alone cannot ensure peace. Indeed the law is a fragile instrument of social peace, merely contributing to fashioning the community consensus. He refers with concern to the unstable social movements of the 1960s and (less so) the 1970s. He mentions the highly organised pressure groups which enormously accentuate the pressures within the legal order of the modern Western democratic state. He finishes with Bickel's lamentation that "civil disobedience is both contagious and habit forming".

From a different perspective Shlomo Avineri, Professor of Political Science in the Hebrew University of Jerusalem, discusses violence and political obligation. He reminds readers that the Baader-Meinhoff group in the Federal Republic of Germany saw themselves as the equivalents of the martyrs of 20 July 1944 who stood up against the Third Reich. Anyone familiar with recent British imperial history will know that our "terrorists" were someone else's "freedom fighters". Yesterday's "terrorists" become, in the dynamic of this century, tomorrow's "statesmen". Professor Avineri points to the inconsistency that all too often arises in the thinking of those who resort to political violence. The very people who often call for limits upon State power (as in capital punishment, police activities and punishment of offenders) often claim to themselves an unprecedented individual freedom of action. This is not a tract against political violence. Nor does it endeavour to explain and justify violence in some cases. But it is a reminder to readers in relatively peaceful Western democracies, both of

the fragility of their system and the need to ensure orderly procedures for reform. Locke's traditional invocation of "Crying to Heaven" when imperfections cannot be cured, no longer seems acceptable in today's world. Avineri's essay is a novel and interesting piece which contented lawyers in Australia will do well to read.

Law and Social Control is a worthy contribution to the series on Ideas and Ideologies. It is well produced by Edward Arnold with a good index, useful notes on contributors and a handy, brief introduction by the editors. Bringing together in the one volume distinguished lawyers, a political scientist, an historian, philosophers and others was virtually bound to produce an interesting, provocative result. If there is less interplay between the authors than would have suited my taste, this is something that may be afforded in later volumes to readers of this series.

M. D. KIRBY*

* The Hon. Mr. Justice M. D. Kirby, B.A., LL.M., B.Ec., Chairman of the Australian Law Reform Commission.