Review of Geoffrey de Q Walker, *The Rule of Law: Foundation of Constitutional Democracy*, Melbourne: Melbourne University Press 1988. pp i-xxv; 1-475. $62.95

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With this rather rambling book there are two closely related problems. One concerns the arguments themselves and the other concerns the mode of their exposition. I will attempt to separate them, dealing with them in that order.

1. The arguments

Walker takes as his overarching theme a theory articulated by Harvard's foundation sociology Professor, later director of the Centre for Creative Altruism, Pitirim Sorokin. Two socio-cultural systems have cyclically dominated western civilisation since the Pharaohs, according to Sorokin, overlapping as one declines and the other ascends. One he calls "sensate", the other "ideational". The first corresponds roughly with one aspect of Enlightenment notions of reason and empirical inquiry, and is sceptical of tradition, authority and mysticism, whilst the other, more or less the antithesis of the first, is infused with faith and with respect for tradition and authority to the point of mistrusting intellectual inquiry.

The predominance of either is to be avoided, Walker tells us. Sorokin has the centuries between the Renaissance and the fall of the Bastille as an ideational/sensate overlap period, and the modern era as characterised by sensate features. Walker points to the mechanical conceptions of the universe, the virtual assimilation of science, until recently, to positivism and to the eclipse of humane

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values, spirituality and community. He criticises social science for its complicity in elitist, positivist designs for social engineering, and identifies as the crucial agents in the process the celebrants of legislative supremacy, lawyers, bureaucrats and intellectuals whom he sees burning with zeal to accomplish reconstruction without regard for the social eco-system.

The Rule of Law, whilst politically conservative, is more specifically dedicated to the conservation of established social forms or "social conservationism". A modern day Burke — though alas without the richly contoured prose — Walker condemns rapid legislative change. Trying to do too much, too quickly and too centrally, heedless of the damage to the social environment and unmindful of the need to respect established principles and permit the participatory effect of customary expectations as an ingredient of reform, the "clerisy", as Walker terms them, will in the end produce chaos. Certainty is disappearing, reverence for law is eroding and community is evaporating, he believes.

His solution is, as Burke would have said, something of a tessellated pavement, appealing as it does to the traditions of Coke and Hale, Von Hayek and Lord Devlin, on the one hand, and to the idea of democracy on the other. Jeanne Kirkpatrick, too, receives an honourable mention, which is odd, given her government's approach to the rule of law when it was caught illegally mining Nicaraguan harbours and repudiated the jurisdiction of the International Court.

What Walker advocates is the winding back of the state, as he sees it, a reduction in the corpus of law and the corps of the judiciary and the bureaucracy, and a return to the limpid enunciation of common law principles as an index of gentle evolution in the pages of the law reports. Judges much more than politicians, he says, are in touch with ordinary people, but in case some of them are not, their initial appointment ought to be subject to popular endorsement or rejection.

Walker's perception of the strong state, the corrupt state, or the technicians' state, depending upon one's perspective, suffers from his unfamiliarity with the literature. Judges may intuit the meaning of life for ordinary people from affidavits read in first class seats, but law teachers cannot intuit historical geography, development economics, political economy and all the rest of social science, in-

cluding its epistemological controversies, without opening the relevant texts.

Let us look at "the clerisy", a group identified frequently in *The Rule of Law* as "it" and which seems to include all the intellectuals with whom Walker disagrees, the public service, the majority of the High Court and perhaps the Family Court judiciary. According to Walker, legal positivism, and apparently since the mid-seventies "neo-Marxist Critical Legal Studies", has been the dominant intellectual influence upon this united band of social crusaders.

For all I know, since I am not a law teacher, High Court judgments may indeed be redolent with the insights of Duncan Kennedy and Mary Jo Frug, but a glance at the Critical Legal Studies ("CLS") literature in the United States does not reveal a unified intellectual position. It is oppositional, some of it is Marxist, but a good deal of it draws on Foucault (whose neo-Marxist credentials some may, and some may not urge), Derrida, Rorty and a large selection of post-structuralist and post-modern scholarship. Can Walker not distinguish this from Marxism?

Critical Legal Studies in the United Kingdom and in Europe differs yet again, as a glance at the literature, or attendance at their conferences would indicate. In Australia there is a healthy stirring of socio-legal studies, but not much sign of CLS, let alone of its dominance. How the virus has been able to infect the public service remains unexplained. The undemonstrated assumption that everyone who disagrees profoundly with one's views is part of a worldwide conspiracy is surely the stuff of caricature, not scholarship.

A second flaw in the development of Walker's argument is his espousal of systems theory, as if it too, represented a single strand. He objects to social science's neglect of it, apparently unaware that English language sociology and political science was actually dominated by it until the late sixties. In system theory's benign gaze the military-industrial complex pursued its cost-plus career to power, and in its sanguine theories the reluctance of United States citizens to vote was portrayed as evidence of mature democracy. But structural-functionalism, just like the path through systems theory of a different kind taken with massive erudition by Jurgen Habermas, seems to have escaped Walker's attention, along with the eco-systematic analyses of, say, Bateson or Wilden, or the writers on artificial intelligence.

As for Walker's English history, he might deride whig historiography, but he embraces its hagiography, and he might with profit glance at the work of J G A Pocock, J H Plumb, Howard Nenner, Dickinson, or Kitson Clark, no Marxists they. As an advocate of systems theory, Walker's strictures on the government of peripheral economies might benefit from a look at Wallerstein's World Systems Theory, rich in insight whether or not one agrees with it in the end.

Some of what is implicit in Walker's analysis is incontestable. The Enlightenment (whether or not he has heard of it is impossible to tell from the text) has left an ambiguous legacy. Part of it is challenging, empowering, invigorating and suspicious of elitist claims to authority. Part of it points to technocracy, philistinism and nightmare. But this is not news. Percy Shelley welcomed the French Revolution and Mary Shelley dramatised Reason's other face in *Frankenstein* as Goethe did with *Faust*. The dilemma is ancient: think of Dr Faustus, or even of Pandora. But the political and cultural dangers of its material embodiment in the new social relations of Hegel's civil society, and the capitalism analysed by Marx form the basis of two centuries of critical literature which cannot be ignored by legal theorists any more than anyone else. Think of Steiner's or Arendt's reflections on Nazism if Adorno or Marcuse are unthinkable.

The conclusion is that technocracy is a symptom, not a disease, nor simply an idea, although, as Walker says, ideas do have effects, but an embodied set of social relations we could call late capitalism and recognise as undergoing reconstruction. We might notice, in the regimes where deregulation and privatisation have been pursued (not in Japan, or Sweden, but in the English speaking economies whose trade balances have over the deregulating period moved into chronic deficit), that most of the same functions continue, no longer in the twilight world of public bureaucracy, but in the stygian dark of corporate boardrooms whose executives can pursue profits in fascist dictatorships in demonstration of their commitment to democracy and the rule of law.

2 The articulation of the argument

Walker seems to have trouble sticking to the point. He goes off in pursuit of things or people he does not like rather too self-

indulgently, and we are given anecdote, assertion, titbits of information the author happens to have, and half-digested economic information. The book often reads like a draft, and Melbourne University Press would have done Walker a service if they had asked him to edit it down to perhaps sixty per cent of its current size.

Whether or not one agrees with Walker's politics, there is certainly room for a vigorous and succinct expression of what I take to be his point, in a legal context. The failure to edit reveals him entering debates for which his scholarship has not so far equipped him, and that throws perhaps undeserved doubt upon the remainder. It also leaves in, for example, the chapter on union corruption, which is really a piece of investigative journalism. The details are mostly well enough known not to require repetition.

Finally, Walker cannot seem to leave the late Lionel Murphy alone. Murphy was acquitted of the charges against him and is now dead. Gossip about whom he might have entertained in his chambers whilst a barrister, his friends in politics or elsewhere, and the suggestion that he alone gained Australia a reputation for judicial corruption, are unprofessional jibes that do not belong in scholarly literature. One hopes not to see them repeated.

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PREFACE

IN MEMORY OF ERNEST KINGSTON BRAYBROOKE

In "The Sociological Jurisprudence of Roscoe Pound", Ernest Kingston Braybrooke summed up Pound's approach to law in the following way.

> "Jurisprudence cuts ice." Given that "law" has a purpose to fulfil in society, Pound believes that human effort can be employed to make law more effective in fulfilling that purpose, and the task of jurisprudence or legal philosophy — reflections about law — is to guide human effort in this direction.[1]

The clear exposition and astute questioning of Pound's main ideas that are to be found in this article have made it a classic of its genre. Its author was at home with Pound's work. This summary statement of Pound's approach applies with no less appropriateness to Kingston Braybrooke's own approach.

Educated in New Zealand and in the United States of America, Kingston Braybrooke joined the Faculty of the Law School of the University of Western Australia in 1958 as Reader in Jurisprudence. He became the school's Professor of Jurisprudence before resigning in 1972 to become foundation Professor of the then newly established Department of Legal Studies at La Trobe University, Victoria.

Bray, as he was affectionately known at this University, was a believer in, and an admirer and impenitent critic of, the law. In the first place, the law intrigued him. He had a true scholar's curiosity. It led him into the highways and byways of legal history, into jurisprudence and the history of ideas of law, and into the details of case and statute law. What came out, most richly perhaps in his teaching of torts, were the facts, the dicta, the doctrines and con-

1 (1960-1962) 5 UWAL Rev 288, 288-289