BOOK REVIEWS

Law and Social Change in Contemporary Great Britain, by W. FRIEDMANN, LL.D. (London), Dr. Jur. (Berlin), LL.M. (Melbourne); Foreword by the Rt. Hon. SIR ALFRED DENNING. (London, Stevens & Sons, 1951) pp. 1-xxiv (Tables of Statutes and Cases etc, 12 pages); pp. 1-322, Suggested Readings and Index, 12 pages. (Law Book Co., Melbourne, price £2 12s. 6d.).

Professor Friedmann, who was Professor of Public Law at the University of Melbourne from 1947 to 1950, has dedicated this volume to the University. It is a graceful compliment that will be appreciated by those who had the privilege of knowing him during the time he was with us, for it can be taken both as evidence of the regard he has for our University as an institution of learning and as an indication that the warmth of attachments then made still exists.

Professor Friedmann has the inestimable advantage of mastery in the learning of the two great rival schools of juristic thought, the civilian and the common law. Recently, Lord Cooper, Lord Justice General and Lord President of the Court of Session of Scotland, has observed, "An important question for every lawyer today is, which of the two contrasted methods of legal thinking should dominate the future? My belief is that the world of the future will be ruled to an increasing extent by codes administered on the civilian rationalistic principle, and that our successors will some day look back upon the great experiment of the common law as a brilliant improvisation, which served its day and generation and was then assigned an honoured niche in the Valhalla of governmental expedients. . . . We shall need both the civilian and the common lawyer to tide us over the great transition; but if we are to preserve an even keel in the storms which are breaking, we shall need above all the ballast which only the civilian method of legal thinking can offer." ((1949-50) 63 Harvard Law Review 468 at pp. 474-5).

Professor Friedmann supplies an interesting contrast to that point of view. "In a roundabout and unsystematic fashion", he considers, "English law has been better able to give effect to social change than countries dominated by written constitutions with fundamental rights, or generally by the habit of theoretical definitions of rights and duties." (p. 12).

The learned author presents a great deal of material that gives a comfortable feeling that in a tentative and cautious manner the judges who apply the concepts of the common law are seeking to grapple with the complex problems of a transitionary period. At any given time, and in any judiciary, there is usually at least one judge more venturesome than his brethren. McCardie J. during the 1920's, and now Denning L.J., come to mind in that connection, but sometimes attempts to extend and apply well-worn concepts to juristic problems emerging in a social democracy are met with

raised eyebrows in appellate tribunals. Professor Friedmann seems, nevertheless, to be satisfied that the spirit of judicial pioneering is still alive and vigorous.

Chapter 2, which concerns itself with the functions of property in modern English law, should be read by politicians as well as lawyers. The method of achieving socialism and the classless society was thought by its advocates, until very recent times, to lie in the nationalisation of the means of production, distribution and exchange. It has become fairly evident, however, that it is control and not ownership of property that is important, and the significant shift in the last fifteen years has lain in the explicit departure from the conception that ownership necessarily carried with it the right to control the thing owned. Had the Chifley Government realised this, the banking legislation considered by the Privy Council and the High Court in the *Banking* case, (1949) 79 C.L.R. 497, 76 C.L.R. 1 would, most likely, have taken a different shape.

The thoughtful and reasonably dispassionate reader will recognise the soundness of Professor Friedmann's conclusion (p. 33) that serious dangers lie in the belief that law can be used as an agent of social change without regard to economic matters; he will also acknowledge the validity of the warning against the excessive concentration of power, "which threatens to transcend the differences between Capitalism and Socialism, Fascism and Communism, and which creates a 'band of brothers' of generals, politicians and scientists, establishing a new aristocracy of power." In Australia at the present point of development the membership of the "band of brothers" perhaps is limited to politicians and bureaucrats, but in the atomic age room will have to be made, even here, at least for the scientists.

The lawyer who seeks a discussion of contract, tort, trusts, corporate bodies and public welfare offences against a sociological background will find them dealt with in separate chapters in Part I. The reading of them will broaden his understanding of the factors that operate to produce legal rules and give him a comprehension, not usually to be gained from legal text books, of the social purposes which those rules are devised to achieve.

Whilst he is insistent upon the importance of the judicial role under the common law, Professor Friedmann rightly stresses the limited extent to which the judges can now bring about an improvement in the content of justice within the changing legal structure. The reflective and informed citizen in Australia must be impressed, and perhaps appalled, by the flood of statutes and by-laws and regulations that pours forth from the various law-making agencies. The spate has lessened with the shrinking of the Commonwealth's defence power, but the technique is so familiar to the controllers of political power that we may expect it to be the common method of social control. Indeed, the future seems to hold in the Western

democracies a prospect of increasingly intensified pressures towards conformity, and those pressures will express themselves legally through prohibitory and restrictive enactments of governmental agencies.

A valuable feature of this work is that it diverts the mind from the illusions arising from a concentration on the past, and on day to day legal tasks, and directs attention to what is really happening at this stage of history. It may be almost heretical to suggest that a good deal of the present teaching of legal subjects is rapidly becoming redundant and substantially irrelevant to happenings in the field of social control. Judges who have acquired skills in a particular legal system, and academics learned in that system, will be naturally inclined to treat the system as actually operating effectively long after it has ceased to do so in any but a formal sense. Indeed, one of the obstacles to the understanding of current processes is that we imagine existing institutions to be functioning in accordance with classical concepts. Our parliamentary institution has lost any real resemblance to the House of Commons upon which Burke lavished his eloquent wisdom; the development of party discipline and the taking of decisions in pre-sessional party meetings has removed from the institution even a delusive pretence of being a deliberative body; and the Address on being elected for Bristol in 1774 (with which may be compared, as a matter of interest, the observations of Isaacs J. in *Horne v. Barker* (1927) 20 C.L.R. at 500) may seem curiously and even regrettably remote from present day parliamentary realities. Although it may be said with confidence that in British communities the prestige of the judicial institution stands very high, there are many factors tending to push the institution, *and with it the legal profession,* into the background. The area of administrative control has greatly enlarged, and will go on enlarging; the criticism that forensic methods of investigation are too cumbersome and too expensive is constantly heard; and the depreciation in the value of money and increases in the salaries of the heads of departments and of State administrative agencies emphasize the levelling down process so far as judges are concerned. The concept of judicial independence as a constitutional safeguard is becoming less understood and, in politics, less favoured. Confusion of thought is encouraged, and considerable harm done to the true judicial institution, by ill-advised legislative attempts to clothe with judicial prestige bodies, such as Arbitration and Industrial and Licensing Courts, whose functions are primarily administrative and only incidentally judicial. The not so distant years may see the judiciary regarded, not as one of the three organs of government, but as merely an arm of the executive. Two World Wars and the political demand for social security, operating insistently through universal suffrage, have led to the predominance of the executive, with a consequent shrinking in importance of the parliament and the judiciary.

Where there are written constitutions, the Courts equipped with the judicial veto retain their political importance, but the years since 1914 have seen, in terms of social power, the waning of the judiciary and the waxing of the politicians and the bureaucrats. There are many restraints, devised in other times, that still inhibit the executive, but in the ultimate analysis it may be that the only genuine control (and that a slender one) which the people retain is the right from time to time to vote a political party out of the possession of the instruments of political power and into the impotency of opposition. Parts Two ("The Place of Public Law in Contemporary English Jurisprudence"), Three, ("Statute Law and the Welfare State") and Four ("The Welfare State and the Rule of Law") are therefore of immediate relevance. They represent a stimulating presentation of important legal aspects of the actual social processes by one who recognises both the need and the inevitability of change, but is alive, nonetheless, to the threats to the legitimate happiness of the individual implicit in current developments.

In those not infrequent moments of pessimism provoked by reading the daily press, one is inclined to think that the blue print of the future is to be found in Aldous Huxley's *Brave New World* and George Orwell's *1984*. Professor Friedmann's final chapter (numbered 13) essays to show how freedom may be reconciled with planning, and as it is conceived in hope and nurtured in optimism, it makes comforting, though perhaps not convincing, reading. He proposes that the privileges of the State as sovereign should be reduced to a minimum—"which means above all the abolition of the Crown's privileges and immunities in legal transactions affecting the citizen, and the limitation of the prerogatives, which have sometimes been unduly extended in war" (p. 307); that there should be safeguards to ensure the effective control of administrative discretion; and that the State, as an entrepreneur, should no longer be protected by doctrines formulated in other days and under different social conditions; and he stresses the need to prevent control over parliament by the people from becoming a mere fiction (p. 310). The inevitable comment is of course, that all this is much easier said than done, but that does not excuse us from trying. "The distinguishing part of our constitution is its liberty", said Burke. "To preserve that liberty inviolate, seems to be the particular duty and proper trust of a member of the House of Commons. But the liberty I mean, is a liberty connected with order; that not only exists along with order and virtue, but which cannot exist at all without them. It inheres in good and steady government, as in its substance and vital principle." To preserve that liberty inviolate is also the particular duty and proper trust of those who occupy judicial office. Broadly speaking, the judges do their human best to fulfil the duty and observe the trust. It is rarely given to a judge to make any but interstitial contributions, in Holmes' phrase, and it is probably in the

assessment of facts and the application to them of what is the law at any given time, rather than in the devising of new rules of law, that the judicial opportunities to do justice occur. But judges are controlled not only by their personal limitations (which often result from the fact that they have not participated in the management of public affairs), but also by their conditioning through what Roscoe Pound calls the "taught tradition of the law" ((1939-40) 53 *Harvard Law Review* 365 at p. 366). Perhaps it is better that it should be so, for that conditioning gives some basis for predicting the outcome of legal proceedings. When one reads a decision such as *Jacobs v. L.C.C.* [1950] A.C. 361, (cf. Goodhart, (1950) 66 L.Q.R. 374), however, one wonders if judges do not fetter themselves unnecessarily and whether the "taught tradition" does not at times lead to judicial inertia.

Despite the fact that it bears marks of hasty preparation, and although some of its generalisations are at least dubious, and occasionally the decisions cited may not bear the weight of the propositions they are invoked to support, this book is valuable, because it represents a learned and intelligent attempt to find a pattern in the judicial development, interpretation and application of legal principles in a changing order, and because its author is genuinely attached to the civilized values which he considers can be protected in their proper expression by the medium of a sound legal system.

In a recent Pelican book, *The Greeks,* by H. W. F. Kitto, I came upon a passage which seems not altogether out of place in a review of a work concerned with the legal problems which the present machine age has spawned.

> "Our own conception of Law is so completely Roman that we find it hard to think of Law as a creative, formative agent, but this was the normal Greek conception. The Romans thought of law at first in a purely practical way: it regulated relations between people and their affairs, and was itself a codification of practice. Not until Roman lawyers came under Greek influence did they begin to deduce from their laws general principles of Law, and to extend these in the light of philosophical principles. But the Greek thought of the collective laws, the *nomoi,* of his polis as a moral and creative power. They were designed not only to secure justice in the individual case, but also to inculcate justice: this is one reason why the young Athenian, during his two years with the colours, was instructed in the *nomoi*—which are the basic laws of the state, to be distinguished from specific enactments regulating such things as putting lights on motor-cars: these were only psephismata or 'things voted'. The Greeks had no doctrinal religion or church; they did not even have what we think is a satisfactory substitute, a Minister of Education; the polis instructed the citizens in their moral and social duties through the Laws."

In that society, always provided he was a citizen, there was no question of the dignity and the importance of the individual. In this, as in so many things, we have moved far and downwards from the Greeks.

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The Criminal Law Review is intended by the publishers "to put into the hands of all those intrusted in the practice and administration of the criminal law a monthly periodical which will cover every aspect of the subject in detail."

It is hoped by its sponsors that the journal will follow a middle course between the dullness of the law reports and the ignorant sensationalism of the daily press.

The format is that of the various digests that cater for those to whom the labour of reading an article except in an eviscerated state is insupportable. Initial repugnance is, however, overcome by a perusal of the contents. The editorial pages contain brief notes upon matters of interest, such as the trial of a deaf mute, evidence by a mechanical aid (a tape recorder, in this instance) and the Home Secretary's observations on homosexual crime. As might be expected, the quality and interest of the articles vary. Professor Glanville Williams writes authoritatively and lucidly about the requisites of a valid arrest, upon which subject he permits himself the just observation that "there is perhaps no part of the law in a more confused and difficult state than this, and none that it is more important should be clear and comprehensible".

The note upon *R. v. Roberts,* a deaf mute who was tried at the Cardiff Assizes in March 1953 by Devlin J., affords an instance of judicial ingenuity in escaping from a potentially unjust state of affairs created by the Criminal Lunatics Act 1800, from which Section 426 of the Victorian Crimes Act 1928 is taken. I am by no means persuaded that it is the correct view, legally, that the issue of fitness to plead can be taken with a plea of not guilty which raises the general issue. If, however, the Court requires the issue of the prisoner's fitness to plead to be tried first, and the jury find he is unfit to plead, the Court must order detention during the Governor's pleasure, and this irrespective of whether there is an answer to the presentment. It may be that part of the difficulty arises from the remarkable decision of an English Divisional Court in *McKing v. The Governor of Stafford Prison* [1909] 2 K.B. 81, wherein it was held that a deaf mute, though not in fact insane, was nevertheless insane