

confused with the presumption of statutory validity espoused and applied by Murphy J. (see the *Tasmanian Dams* case) which has not been applied by any other member of the Court.

However, as we have seen, a finding that the legislation is protective of State trade, is not conclusive. The legislation will not infringe section 92 if the protection is theoretical or remote or insignificant "because it is outweighed by the vindication of some legitimate local interest" (page 304). In this respect Dr Coper says that the "public interest" concept of regulation balances the recognition of a legitimate local interest against the right of an individual to trade interstate, whereas with the proposed test the legitimate local interest is balanced against protectionism. The consequence is, so he suggests, that under the present law the absence of protection may not avoid infringement of section 92, whereas under the new test it would be conclusive of non-infringement. It would perhaps be more correct to say that the "public interest" concept of regulation balances the legitimate local interest against the public interest in freedom of inter-state trade, the right of the individual to trade inter-state being derived from and incidental to this public interest.

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#### FOOTNOTES

- 1 (1980) 54 A.L.J.R. 568.
- 2 (1980) 145 C.L.R. 266.
- 3 (1983) 46 A.L.R. 625.
- 4 (1947) 74 C.L.R. 421.
- 5 (1978) 140 C.L.R. 120.
- 6 Note 2 *supra*.
- 7 Note 1 *supra*.

*Marxism and Law*, by HUGH COLLINS (Oxford University Press, Oxford, 1982), pp.v-viii, 1-159 with Select Bibliography and Index. Recommended retail price \$27.50 (ISBN 0 198760930)

The writings of Karl Marx are among the few profound and monumental contributions which social theory has received. Marx's influence pervades the thought, not simply of those who consider themselves Marxists, but of everyone who thinks seriously about the nature of societies, social change, the role of economy and social classes in society, the nature and dynamics of modernity, and much besides. His contributions to history, economics, political studies, anthropology and to many other humanistic disciplines are no less profound. And though we might detach Marx's "scientific" contributions from his philosophical, moral and political commitments, Marx himself did not. His social theory was harnessed to a diagnosis of present evil and a prophecy of future deliverance which

underlay all that he wrote. These writings make him, without doubt, the intellectually pre-eminent member of the socialist tradition. His epigones have been numerous; his equals rare indeed.

“Marxism”, propagated, amended and at times invented by epigones, has become the most influential, certainly the most invoked, social theory and secular prophecy of the modern world. To those seeking to make sense of the societies in which they live, it purports to offer the key. To those seeking deliverance from loathed forms of social organisation, it explains that such deliverance is not merely possible but inevitable.

As a result of these varied sources of appeal, there has grown a literature of truly phenomenal, probably ecologically unsound, proportions devoted to Marxism. Even apart from the voluminous writings of Marx and other Marxists, vast forests must have been pulped to produce works about them. Hundreds of books and thousands of articles are devoted to exegesis of, and critical commentary on, Marx’s writings. Moreover, though he was the original and remains the best of Marxists, many others have written, and shaken and moved events, in his name and they in turn have been written about.

What is true of works about individuals is equally true of the huge “Marx (or Marxism) and . . .” literature. Virtually any noun can be used to complete the phrase, and extraordinarily many have been. Among the perennials are: alienation, capitalism, class, ideology, philosophy, politics, the proletariat, revolution and socialism. Less common, but far from rare are: aesthetics, bureaucracy, Burke, ethics, literature, Mill, modernisation, peasants, the Third World; even “beyond”.

Given this profusion, one might wonder whether there is much left to say, even in a centenary year. Such wonder has not, however, occurred to Hugh Collins, the author of *Marxism and Law*. On the contrary, he explains that:

The idea of writing a book about Marxist theories of law first came to me when as a student I realized to my surprise that there were no easily comprehensible and thorough studies of the subject. Although a decade has passed since I began to grapple with legal philosophy, the position has hardly altered (page v).

Now, at first sight this looks very much like special pleading: the sort of thing academics often say to justify a publication which really need not be. This first impression is not altogether misleading. Especially in recent years, a great deal has in fact been written directly on, or relating to, Marxism and law. This is especially so if one includes Marxist writings on the state. The flood is not likely to be stemmed. It is true that not all of this writing is easily comprehensible and some is not comprehensible at all. Collins’ book at least is that. Many of these writings, however, are not obviously less thorough than his.

There is, however, a sense in which Collins’ remark is justified. For what one finds if one seeks a sophisticated theory of law, or politics or bureaucracy in classical Marxist writings is . . . very little. Contemporary Marxist writings on these subjects are, and have to be, constructions of what Marx or Marxism would or should say about them. The primary materials on these matters, and particularly on bureaucracy and law, are often inconsistent, never systematic and rarely especially profound. If one compares the depth of Marx’s analysis of economic matters in his mature writings, with the perfunctory character of his analysis of law, the contrast

is striking. In his social theory indeed, the latter vice flows from the former virtue.

As Eugene Kamenka has recently emphasised, most of his life Marx spent under the self-imposed duty of wading through 'economic filth', seeking to prove that the 'secret' of law, of politics, ideology and the State lay, in each case, in something else — in productive forces and relations of production, in the class struggle, in the 'material' life of society. . .

Marx and Engels refused to take law seriously as a specific social institution, having some character and history of its own. It reflected, for them, the mode of production, the economic organization of society, the class struggle, the will of the State and through it the will of the ruling class. It sanctified and protected social arrangements. It did not create them and it was not a fundamental social arrangement itself.<sup>1</sup>

As for Marx's prophecy — a society of total harmony, with no State, bureaucracy or law — one of the grossest deficiencies of classical Marxism was its failure to say anything serious, or much at all, about how this might be possible.

These are substantial gaps in a massively ambitious and purportedly comprehensive social theory. Contemporary Marxists have a responsibility, and Collins makes some attempt, to fill them. His book begins with an attempt to demonstrate what is distinctive about Marxist theories of law (or, as he unfortunately simplifies, *the* Marxist theory of law). There follow three chapters in which Collins seeks to clarify, distinguish and discuss several versions of economic determinism, another in which he examines what a Marxist might say about the future of law, and finally a chapter devoted to the practical implications of a Marxist approach to law, for those involved in radical politics. These issues are important. Moreover, given their significance in some of the most momentous social and political transformations of this century their importance is not merely academic. Collins' book is an adequate, clear if somewhat plodding, guide to what some of the issues are. It is, however, no guide at all to why they are important or to what someone writing in the last quarter of this century might seek to draw on in discussing them.

Untroubled by the numerous, often rival and inconsistent, versions and interpretations of Marxism, Collins opens his book with a sketch of "The Marxist Approach to Law". In one brief chapter, he stipulates "[t]he principal aim of Marxist jurisprudence" — "to criticize the centrepiece of liberal political philosophy, the ideal called the Rule of Law" (page 1) - defines Marxism — focussing on what he regards as a distinctive methodology of historical enquiry coupled with a "belief that the destiny of mankind lies in Communism" (page 8) - and, at greater length, seeks to explain why there has not really been a Marxist theory of law.

This is a lot to do in a few pages, and not all of it is well done. Particularly silly is Collins' relatively extended explanation for the absence of a Marxist theory of law. He recognises that one reason for the gap is that, for the most part, when it came to law Marxists were looking elsewhere. But he goes on to produce, and dwell at some length, on a second reason, from which it results that such an absence is basically a good thing:

To demand a general theory of law from a Marxist is to ask him to run the risk of falling prey to what can be termed the fetishism of law . . . the belief that legal

systems are an essential component of social order and civilization. (page 10) Collins earnestly enumerates the symptoms of this disease, with which, it appears, all liberals are afflicted. They are the belief that a legal order is necessary for social order, that “law is a unique phenomenon which constitutes a discrete focus of study” (page 11) and endorsement of the Rule of Law, the core of which, Collins believes, lies in the doctrine “that political power should be exercised according to rules announced in advance” (page 12). He clearly believes it wise for a Marxist to avoid contamination. Hence, no Marxist theory of law.

Whatever one thinks of such “fetishism” — whether one’s friends suffer or would admit to suffering from it — it is nonsense to claim that it is reason to avoid a general theory of law. In particular, Collins ignores the obvious distinction, crucial in Marxism, between phenomena which are necessary at certain stages of human development, and universal constituents of the human, or at least social, condition. Marx did, after all, develop a “general theory” of capital, apparently without “fetishising” it. True, he believed that capitalism was “necessary”, in the sense that it necessarily followed feudalism, and communism could not develop without it; it was a necessary stage in human development. But he did not much like capital, and of course he built Marxism out of the *denial* that capitalism was *universal*. Could he not, should he not, have said more and better about law, on his view also “necessary” hitherto but not forever, or other “superstructural” institutions such as bureaucracy (which he also did not much like) without being felled by fetishism? It is, after all, one thing to understand why classical Marxism lacks a developed legal and political theory; one can look elsewhere or seek, as a number of contemporary Marxists do, to supplement or revise the classics in these respects. It is another thing to justify this significant weakness as being actually a strength.

In any event, according to Collins, Marxists “are not inclined to develop a general theory of law as an end itself” (page 14) (not, incidentally, the same thing as just developing a general theory of law). However there are, fortunately, things they still can say about law. Collins suggests three questions which, it appears, can be non-fetishistically explored: first, what are the functions of law? Secondly, is law necessary for human civilisation? Thirdly, what should be Marxist political practice towards law in modern society?

These are large questions, and Collins attempts with some seriousness to answer them. His discussion is generally clear, fair and easy to follow. He claims too much for his modest achievements, usually of clarification, but for a book intended to be introductory some of these are helpful. Thus, on the functions of law he usefully distinguishes between simple economic determinism (law as the “reflection” of an economic base), which he rejects, and “class instrumentalism” (law as the instrument of the ruling class) which he finds more, but not ultimately, plausible. In place of these views, fairly presented and sensibly criticised, Collins seeks:

Through progressive refinement...to present a sophisticated version of the class instrumentalist theory of law, which is at once internally coherent, consistent with the principles of historical materialism, and a persuasive account of the form and content of laws. (page 34)

Collins believes that what is missing from both “economism” and “class instrumentalism” is “a convincing description of the process by which the goals and

aspirations of individuals and groups are materially determined” (page 35). He seeks to give an account, via “the” Marxist theory of ideology (drawing on Althusser and Gramsci), which answers the question “How...do the ruling class become aware of their class interests and then act as one body in pursuit of them?” (page 35). In Collins’ version, members of a ruling class share common social practices in the relations of production. These spawn a commonly shared “dominant ideology”, pursuant to which laws are enacted. What for Collins passes for “sophistication” and “subtlety” in this version, is that it does away with the need for conspiracy theories. Members of a ruling class are not necessarily aware of their class position, not always consciously out to crush opposition. Rather, given their common view of the world, they just do what comes naturally:

its [a ruling class’s] perceptions of interest will appear to be the natural order of things since they are confirmed by everyday experience. A corollary of this is that laws enacted according to the dictates of a dominant ideology will appear to the members of that society as rules designed to preserve the natural social and economic order. The ruling class will not have the oppression of other classes in mind, but simply the maintenance of social order. (page 43)

Most of the rest of this chapter is devoted to filling out and defending this account of the relationship between class, ideology and law. The defences are not novel and the materialism which comes out of them is familiarly porous and vacuous. As so often in “sophisticated” Marxist ripostes to critics of their “crude” materialist forebears, basic categories become so broad and all-encompassing that they are consistent with any evidence. They so lose the distinctiveness (and importance) of their crude ancestors. To give one example, if law is as “relatively autonomous” from economics or classes as modern Marxist sophisticates insist, are they saying more than that economics or classes influence law? If so, precisely what else they are saying needs to be spelt out more than it has been. If not, then their claim is undeniable, news to no one, and far less than is necessary to support other Marxist claims (for example, about the inevitability and “lawlessness” of Communism) or to distinguish Marxism from much else.

Such criticisms suggest themselves as one reads Collins’ elaborations of “The Marxist Theory of Ideology”, defences of Marxism against charges of reductionism, discussions of the “relative autonomy” of law, of “Intra-class Conflict and Survivals”, of the alleged “Autonomy of Legal Thought”. However, Collins has a surprise in store for those, like this reader, who took his exposition and defence of an increasingly loose and flabby economico-ideological determinism as an endorsement of it. For rather late in his manoeuvres, at the very end of the chapter, after pages of identification and evasion of “dangers” (pages 55 and 56) “risks” (pages 68 and 69) and “threats” (page 69) to Marxist positions, of which Marxists should be “wary” (page 68), the weary, wary troops are suddenly caught off guard. Collins abandons them. The account so laboriously constructed and fortified is “ultimately unconvincing”, partly because of its “elusiveness when it is tested against empirical evidence”, partly because it ultimately is a “disguised form of conspiracy theory”. I agree with Collins, but then I find it difficult to understand what is left of the edifice so carefully built up. Here and elsewhere in this curiously frustrating book, Collins builds a position, scores some debating points and moves

on, without informing us what he believes he has left behind, or where he is going.

This indeterminacy of purpose is characteristic of much of the book. Thus, after a chapter on Marx's base/superstructure metaphor, Collins moves to "The Prognosis for Law". He counterposes the Marxist conviction that communist society will have no need for law, with the liberal "fetishistic" belief that "laws make social order possible" (page 95). He distinguishes a number of different ways in which the Marxist prophecy might be interpreted, discussing them intelligently, critically, but in a characteristically abstract manner, eschewing consideration of historical experience which might bear on them. He concludes that

If we could be more confident that relations of production could be devised which avoided conflicts and abuse of advantageous positions, then a defence of the Marxist claim that law and state will wither away would be more convincing. As it is, Marxism provides only a few foggy notions about the organization of a Community society. . . .

There is serious doubt whether legal rules of some kind could be excluded altogether from a Communist set of relations of production. If it is true that men require rules of behaviour in order to co-operate in productive activities and to establish peaceful communities, then to argue that legal regulation will disappear in a Communist society may be overly hasty. (pages 121-22)

And so it may! But does this suggest something deeply flawed in Marxist social theory? What are its implications for Marxist attitudes to, and practice in relation to, law and legal systems, past, present and future? Can anything be learnt from attempts during this century to abolish law (usually unsuccessful), liquidate lawyers (often very successful) and overthrow both the ideology and the reality of legal restraint on power (also successful)? Of any of this, scarcely a word.

This strange detachment from the real problems his analysis touches on is nowhere more apparent than in the last chapter of Collins' book — "Class Struggle and the Rule of Law". Here "we turn finally from theory to practice" (page 124), and, as Collins rightly stresses, this turn has special importance for Marxists, since . . . For Marxists, it is insufficient to identify the general form of the transition process and to specify the ultimate goal of a Communist society. Because of the unity of theory and practice, they insist that the revolutionary activities have to be the correct ones or else they will fail to lead to the proletariat becoming aware of their class position.

It is therefore essential for Marxism to develop a precise understanding of the correct response to the legal system as part of the strategy of revolutionary politics. (page 125)

The measure of "correctness" invoked by Collins is simple to state though apparently more difficult to attain: "the standard of correct practice defined by Marxism. . . is to raise class consciousness" (page 128). Throughout the chapter, Collins measures various radical strategies and attitudes to law against this standard. Thus the importance to radicals of "demystifying" the purported neutrality of the law:

the ideology of the Rule of Law is a central target for Marxist political practice. What is needed is a programme for the demystification of the neutrality of the liberal political order, and its replacement by an appreciation of the class structure of government. (page 141)

Thus, too, Collins suggests that radicals need not choose *a priori* between “reformism” — working within the system — and revolution. Rather, radical tactics should merely be judged against “the standard of correct practice”; “the general dilemma faced by many radicals with regard to law must be approached pragmatically” (page 141). Civil and political liberties should also be tested against this “guiding principle”: “At bottom the contrast is between legal rights which merely serve to obscure the structure of class domination, and those which also remove obstructions from the path of a revolutionary movement” (pages 142-43). Collins is aware that such pragmatism is not universally applauded, even among Marxists. In particular, some people have felt “a degree of uneasiness” over “the reduction of concern for bourgeois political liberties” (page 144). Indeed even some Marxists, notably E.P. Thompson, have made a lot of the difference between governments with unrestrained arbitrary power and governments restrained by law. Thompson goes so far in the direction of what Collins would deride as “fetishism”, as to insist upon:

the obvious point, which some modern Marxists have overlooked, that there is a difference between arbitrary power and the rule of law... the rule of law itself, the imposing of effective inhibitions upon power and the defence of the citizen from power’s all-intrusive claims, seems to me to be an unqualified human good. To deny or belittle this good is, in this dangerous century when the resources and pretensions of power continue to enlarge, a desperate error of intellectual abstraction.<sup>2</sup>

Collins, with a fine eye for a closet class enemy and none for the awesome human tragedies which inspire Thompson’s argument, dismisses such neo-liberalism for what it is:

E.P. Thompson even goes so far as to ascribe an intrinsic value to the goal of ensuring the legality of government action. This last position threatens, of course, to slide into a wholesale acceptance of the Rule of Law. (page 144)

Not himself a bourgeois sentimentalist of Thompson’s sort, Collins ends his book by stressing that:

There is an unresolved contradiction in the Marxist position in so far as it includes a blanket concern for legality and liberty as well as an attack on the Rule of Law. Support for fundamental political liberties through legal mechanisms *may be permitted because of the possible instrumental gains to the working-class movement*. But any wider belief in the intrinsic merit of preserving the legality of government action and defending individual rights *makes the mistake* of taking the ideology of the Rule of Law at face value. The ideological function of the modern legal system in obscuring class domination renders an indiscriminating pursuit of the principle of legality inconsistent with Marxism. (page 146 emphasis added)

There are two things which make it bizarre that this book should end in this way. First, given Collins’ reservations about the adequacy of Marxist social theory and prophecy, it is puzzling that this chapter on political practice should appear to echo none of these doubts at all. For if even his own sophisticated version of class determination fails to satisfy Collins, then it no longer follows immediately that the Rule of Law is just an ideological mask for ruling class interests. Thompson, let alone Hayek or Oakeshott, might have a point about laws and liberty. And if the

future might not turn out as Marx predicted it inevitably would, then perhaps Collins' blithe "pragmatism" about political liberties warrants more than a small "degree of uneasiness". This is all the more so in the light of the deliberate ignorance which underlies this book, together with much other Western writing on Marx and Marxism.

It is worth remembering that Collins' book comes, not at Marx's death, but a year before its centenary. Meanwhile, a good deal has occurred. In particular, much of the world is governed by regimes which profess to be inspired by Marx. Moreover, there is no reason to doubt either the intelligence or the sincerity at least of the founders of such regimes. Now Collins is aware that such regimes have done little to enhance the public image of Marxism. However he sees no need to devote any more than the most perfunctory and ill-informed attention to them. As he explains at the very beginning of his book, but does nothing to defend:

It will . . . become apparent in later chapters that I believe it is erroneous to associate the values of Communist states closely with Marxist social theory. The links between the two are problematic, and certainly weaker than is commonly supposed. Accordingly I will not pay special attention to the laws found in those Communist states. Nor will I be especially interested in the jurisprudence emanating from those countries, for despite its great bulk, that literature fails to make a significant contribution to the Marxist analysis of law. (page 2)

This paragraph is beyond parody. It is certainly possible to *argue* that "the values of Communist states" are not related to "Marxist social theory", though I believe it to be false and, for different reasons, most Western Marxists until recently have denied it. It is, however, also arguable, and has been argued at length in a magisterial work by the Polish philosopher Leszek Kolakowski, that:

It would be absurd to maintain that Marxism was, so to speak, the efficient cause of present-day Communism; on the other hand, Communism is not a mere 'degeneration' of Marxism but a possible interpretation of it, and even a well-founded one, though primitive and partial in some respects.<sup>3</sup>

The relationships between Marx's writings, Marxism and Communism are complex. They cannot be summarised or denied in an offhand sentence. They are, moreover, no less important than, say, the purported relationship between the ideology of the Rule of Law and capitalism, about which Collins is prepared to expatiate at length. However convenient it might be for Western Marxists to brush these issues aside, it is not serious, intellectually, politically, or morally to do so. When Marx dismissed legality and "bourgeois liberty", as he certainly did,<sup>4</sup> he at least did not have to explain away the experience of high order "pragmatism" about liberty and life, exercised in his name for some sixty-five years at the cost of millions of lives. People who have suffered or observed such pragmatism tend to be rather less dismissive than Collins about its relevance to law and to Marxism. As a lawyer, Collins might have sought to "distinguish" this carnage from the practice of Marxism. It is unforgivable, and also unlike Marx, to ignore it.

In Eastern Europe, it must be said, there are no longer many Marxists. However, three disciples of the great Hungarian Marxist philosopher Georg Lukacs — Ferenc Feher, Agnes Heller and Gyorgy Markus — now living in Australia, and still Marxists, have recently published an absorbing analysis of the social, economic and political systems of what is called in Eastern Europe "really existing socialism".<sup>5</sup>



Like Collins, they insist that this “real socialism” is not the socialism to which they remain committed. Unlike Collins, they refuse to be “pragmatic” about “bourgeois liberties”, whose “transcendence” in Eastern Europe has “concluded in a new and abominable system of dependency”.<sup>6</sup> Unlike Collins and many other Western Marxists, too, they do not shy away from the “problem” that the contemporary despotisms of “really existing socialism” cause for Marxists. On the contrary,

the attempt to treat it [‘really existing’ socialism] exclusively or basically in terms of a backward national history seems to us, especially when undertaken by radicals in either East or West, to be a form of escapism — escapism from the fact that these societies, however tragic this may be, do belong to the international history of that social and intellectual movement which bears the name of socialism. Not only did they originate in a historical attempt to transcend capitalism, but they have also resulted in a social formation of a new and non-capitalist type which represents a new form of oppression and domination...the lessons that may be learned from them integrally and necessarily belong to contemporary socialism...Faced with Eastern European societies, Western socialism cannot adopt the attitude of assuring everyone that the practical social project it represents has nothing to do with the realities of these societies. However sincere and resolute the goodwill expressed in these assurances, it remains an act of bad faith so long as the idea of socialism does not incorporate into itself an equally clear and unequivocal criticism and negation of Eastern European social conditions and practices. And the first step towards this is undoubtedly an understanding of them which is both adequate and radical.<sup>7</sup>

Until they are prepared to take up this challenge, works like Collins’, however earnest, will remain essentially frivolous.

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#### FOOTNOTES

- 1 “A Marxist Theory of Law?” (1983) 1 *Law in Context* 49-50.
- 2 E.P. Thompson, *Whigs and Hunters. The Origin of the Black Act* (1977) 266.
- 3 *Main Currents of Marxism: Its Origin, Growth, and Dissolution* vol.III (1978), 526.
- 4 See, for example, Marx’s essay ‘On the Jewish Question’, in Marx and Engels, *Collected Works* vol. 3 (1975), 146-74. For an illuminating discussion of the relationship and incompatibility between Marx’s goal of collective human emancipation and individual liberties safeguarded by law, see Andrzej Walicki, “Marx and Freedom” *New York Review of Books*, November 24, 1983, 50-55.
- 5 *Dictatorship Over Needs* (1983).
- 6 *Id.*, 231.
- 7 *Id.*, 43-44.