

Law and Class

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Respectable Rebels.

Edited by Roger King and Neill Nugent.
Hodder, 200 pp., £10.95 and £5.95,
8 October 1979, 0 340 23164 5

The Judge by Patrick Devlin.

Oxford, 207 pp., £7.50,
20 September 1979, 0 19 215949 6

Human Rights.

Edited by F.E. Dowrick.
Saxon House, 223 pp., £9.70,
26 July 1979 0 566 00281 7

In on the Act.

by Sir Harold Kent
Macmillan, 273 pp., £8.95,
13 September 1979, 0 333 27120 3

Law, Justice and Social Policy.

by Rosalind Brooke.
Croom Helm, 136 pp., £7.95 and £3.95,
27 October 1979, 0 85664 636 9

Inequality, Crime and Public Policy.

by John Braithwaite.
Routledge, 332 pp., £10.75,
29 November 1979, 0 7100 0323 4

Roger King and Neill Nugent assemble material by which they seek to persuade us that there is such a thing as the middle class, and that in the 1970s, by use of legal process, it staged a revolt. For example entrepreneurs and high tax payers fought under the banner of NAFF (later changed to the Freedom Association to avoid confusion with the National Front). Middle-class evangelists used law to close the eyes of the citizenry, and block their ears.

With some success, in the latter instance. The Whitehouse and Co. judicial roll-call of the 1970s runs: *Council of Love*, *Little Red Schoolbook*, *International Times*, *Schoolkids Oz*, *Growing Up*, *Last Tango in Paris*, *Gay News* and many more. In all these, the legal weapon was brandished by middle class agitators. So, too, when NAFF struck against the unions in *Gouriet v. Union of Postal Workers* and other lawsuits. Does all that make law an engine of middle-class oppression? Hardly. *Respectable Rebels* is a spurious attempt to cobble disparate elements into a pattern. It ignores campaigns which do not fit the pattern - for example, Freedom Under Law, which mobilised the law-abiding against lawless 'direct action', or the Professional Association of Teachers, which sought to remind those with a vocation of what the word means, and which already has over 18,000 members. The truth is that, if there is a middle class, just as many of its members can be found opposing the NAFFs and Whitehouses as marching under their banner. Have King and Nugent not heard of CASE, or the Defence of Literature and the Arts Society?

The idea that there may perhaps be such a thing as a middle class gains strength when one considers lawyers. So does the idea that law is an engine of class oppression. An effective way to make it so would for one class to run the legal system, which the middle class do. Lord Devlin reminds us that in America lawyers run the political system also: 'The Supreme Court has almost from its inception been an organ of government, Professor Cox endorses as up to date De Tocqueville's observation that hardly a political question arises in the United States that is not converted into a legal question and taken to the courts for decision. A timely warning for ardent souls who still do not understand that the clamour for a British Bill of Rights represents a flight from democracy.

Lord Devlin's *The Judge* is somewhat spurious too. From its title, one might take it to be a measured account of the judicial function and character. It is no more than a random collection of lectures. Being a retired judge, Devlin lectures on topics appropriate to retired judges. He displays, even if discreetly, the arrogance of his kind. Nevertheless, within its limitations the book is valuable. It has touches of felicity: for example, where the author describes Home Secretaries as wielders of the royal prerogative of pardon, 'assisted by a number of cadis sitting under the palm trees in Whitehall'. The author parades no illusions about his colleagues on the bench. For most of the history of law, he reminds us, 'the public has looked upon it as a protection against corrupt or stupid judges'. He sees the judge as 'the jurymen writ large' and not (*pace* Lord Denning) as a social reformer. But judges should be zealous for reform where it is their function. Devlin distinguishes judicial activism (legitimate, because it operates within the consensus) from Denning-type creativity or dynamism. The latter is undemocratic and trenches on the legislative function of Parliament. Those who live under the rule of law have the right to look first to the law for their protection 'and, to the discretion of a judge only supplementarily'. As Gibbon said, the discretion of the judge is the first engine of tyranny.

Yet, perversely, Devlin supports: the Bill of Rights, which raises the discretion of the judge to its highest power. He sees it as 'a rock that administrators could not squeeze past nor judges unaided roll aside', but it is more likely to be a rock over which democrats stumble. Those wishing to examine this question may refer to the Dowrick collection, where the texts are more useful than the discussion of problems and perspectives (another set of reprinted lectures). There is in these no treatment of the essential questions. A concoction like the Universal Declaration of Human Rights has some value in declaring norms, but it suffers from unavoidable defects. To get agreement, positive statements must be diluted. The basic division between religious and secular values is papered over. How easily we could secure world agreement on humanist ethics if not encumbered by the ethical systems of warring religions.

A serious defect of the Dowrick collection is its failure to mention - let alone discuss - the democratic crux. Even Professor Fawcett drawing on his experience as President of the European Commission omits it in his discussion of the applicability of international instruments. The nearest he gets is a sideswipe at those who say human rights propositions are vague and woolly. He stigmatises such critics as 'absurd' on the sole ground that, given time, judges will fill out the detail. Yet as Professor Griffith remarked in his 1979 Chorley lecture (not reprinted here), law is no substitute for politics and the precise delimitation of legal rules should not be settled by 'the imprecisions of Bills of Rights or the illiberal instincts of judges'. You do not rob a political decision of its political nature by entrusting it to appointed judges instead of elected politicians. All you do is convert the judges into politicians.

If anyone doubts the seriousness of this objection let him consider just one example out of hundreds. Article 10 of the European Convention says we all have the right to freedom of expression, with exceptions where these are 'necessary' on specified grounds. One ground is the protection of the reputation or rights of others. Under a democratic system Parliament works out the minutiae of a Defamation Bill or a Privacy Bill. If the European Convention were made part of our law, this working-out would be done instead by judges not elected by the people, not answerable to the people, and virtually irremovable. Would this be using law

as an instrument of class oppression? The fact is that if human rights are not law they are ineffective; and if they are law their detail should be democratically enacted.

Devlin the law-dispenser shows glimpses upper-middle-class hubris; Sir Harold Kent the law-maker revels in it. One aspect is his disdain for what another lawmaker (otherwise draftsman) known to me used to call 'tinted gentlemen'. Devlin says it is even-handed justice rather than law that has been the gift of British lawyers to the Commonwealth. He adds: 'Those who brought the gift to these countries were the second-best, for naturally the best stayed at home.' Kent tells a story about Sir Granville Ram, first Parliamentary Counsel and as English as Cornwall. A young Hindu on secondment to the London Office ingenuously inquired if Ram had Indian ancestry. 'I'm pretty sure it was a joke,' says Kent, 'but he perceived from our shocked looks that it was in bad taste and should not be pursued.'

Kent the law-maker wallows in his own public-school background and that of his learned colleagues. Describing how an old school chum described the Labour MP Geoffrey Bing as 'quite revolting', he adds; 'This piece of class prejudice garnished with the old school tie made me feel better.' He delights in belonging to a closed *corps d'elite* of high-flying eccentrics. Complaints about the obscurity of the product interested him scarcely at all. The fact that in 1968 exasperated users of Acts of parliament set up the Statute Law Society to engineer reforms gets no mention. Yet Kent, like his colleagues, worked hard and conscientiously on political Bills which were anathema to him. Sabotage does not cross his mind as he successively nationalises the health service, electricity, gas and steel. Like Devlin, he is a product of that obsolescent concept, the tradition of service.

If law is indeed an engine of class oppression, its use as such is indirect and mostly unconscious. Sociologists do not seem to see it as oppressive. Rosalind Brooke's rapid account 'for students of social policy' says nothing of this aspect, though something of virtually every other. Despite the voluminous references students will learn little of law from it unless they already know a great deal. The so-called conclusions are brief and incoherent; indeed the book shows signs of being flung together in a hurry by an author who has not digested her considerable researches.

John Braithwaite on the other hand, presents a thorough and deeply-considered criminologist's view of law and society. Sensibly, he treats the terms 'lower class' and 'middle class' as denoting nothing more precise than persons relatively low or high in wealth and power. His inquiry is limited to crimes involving physical injury or loss of property. Although a socialist, he rejects the idea that there is an all-pervasive bias against the lower-class offender in the criminal justice system. But he wants us 'to get inside the heads of people to make them have less stigmatising attitudes, and choose less stigmatising means for dealing with the lower class'.

Middle-class people are cleverer at staying out of criminal records because 'techniques of smooth relations are the bread and butter of the middle classes.' Yet white-collar crime is far more serious in economic terms than lower-class crime. As early as 1895, A.R. Barrett showed that banks lost more from fraud and embezzlement than from robbery. Asked about the education of his sons, John D. Rockefeller said: 'I cheat my boys every chance I get; I want them sharp.' No, says the socialist Braithwaite, law does not serve ruling-class interests. It has most protection to offer to the lower class: 'a Negro male (in Chicago) runs the risk of being a victim six times as often as a white male in crimes against the person. A Negro woman is likely to be a victim eight times as often as a white woman.'