

Largely Hayek

*Suri Ratnapala and G. A. Moens (eds), Jurisprudence of Liberty,
Butterworths, Sydney, 1995*

Reviewed by Charles Richardson

THIS book promises to examine 'connections between legal theory and liberty'. The editors, both members of the School of Law at the University of Queensland, explain that 'Law has potential to both promote and destroy liberty', but 'Textbooks on jurisprudence tend to focus on the great debates surrounding the various definitions of law' (p. vii). An alternative textbook which used liberty as a theme in the analysis of law might be useful; this, however, is not it. Instead, it is a loose collection of essays whose authors are no doubt inspired by the idea of liberty but who (with rare exceptions) do not discuss it, leaving the reader to draw their implications for the issue of liberty. This makes it harder to claim that there is anything distinctive about the book; precisely because law is so important to liberty, almost any work in jurisprudence could provide similar material.

The editors address this point with a helpful introductory essay. Their discussion of liberty, however, has to stand largely on its own; there is no hiding the fact that the other contributors are mostly concerned with peripheral matters. Only three of the other 14 chapters deal directly with liberty. M. N. S. Sellers gives a historical survey of the relationship between republicanism and liberty; Ian McEwin discusses 'law and economics', concluding that its goal of economic efficiency is inadequate because it fails to appreciate the value of liberty; and Ben Brazil reviews Wesley Hohfeld's analysis of legal concepts, with particular reference to liberty, in an interesting but very technical piece which the unwary will find heavy going.

The most common topic throughout the book is Friedrich Hayek, whose work is directly addressed in five chapters, and is relevant to several others. Hayek's contributions to jurisprudence have not received much attention from legal scholars, so this aspect of the book is most welcome (although the absence of any explicit consideration of Hayek's view of liberty remains puzzling). I found the most interesting contribution to be that by Neil MacCormick, who offers some 'genuinely respectful' criticisms from a broadly social democratic point of view of Hayek's case for the 'spontaneous order' of the market. MacCormick thinks that, while Hayek uses the blindness of the market to argue against claims for 'social justice', this argument is not available to modern-day Hayekians who are consciously (not 'blindly') attempting to (re-)establish a market order. If the result of moving to a market order is known to be, for example, greater inequality of wealth, then this can no longer be passed off as an unintended consequence. This seems entirely correct. However, I suspect that Hayek's attack on social justice is more extreme than is required by the rest of his jurisprudence: his system should be able to accommodate a limited role for social justice without too much difficulty.

MacCormick also claims that it is inconsistent for Hayek, who opposes social planning, to consciously plan the restoration of the market, since such restoration is itself an example of 'constructivist rationalism'. The editors, no doubt wishing to clarify the party line, point out (p. 9) that this criticism has been anticipated by Viktor Vanberg in Chapter 3. Vanberg distinguishes between two versions of constructivism: one referring to deliberate design of a social order (the central planning that Hayek opposes), and the other to deliberate design of the rules governing the social order (which is to some extent unavoidable). This solution works, but MacCormick would say that even if conscious changes to the legal order are acceptable, their scale makes a difference. Hayekians should prefer a gradual tinkering with the system ('piecemeal engineering', in Karl Popper's term) to wholesale social engineering. Instead, it seems, they have allowed themselves to become carried away and have embarked on radical restructuring. MacCormick suggests that more regard should be paid to the immanent criticism that may be embodied in the institutions of social democracy.

This criticism seems both just and important. However, there might be an alternative explanation available for apparent zeal for utopian engineering. MacCormick seems a bit too keen to blame it all on the Hayekians; as he says: '... the Thatcher administration has been the most rigorously centralist in its policies of any British government in the post-war years, presenting the paradox of a program continually increasing the powers of central government in order finally to let them wither away' (p. 76). But what this 'paradox' neglects is that politics is essentially a bipolar game, and there are factional imperatives which cut across intellectual categories. Might it not be that the main impetus for centralism in Thatcher's Britain (and under some conservative governments in Australia) did not come from Hayekians, but that they were driven into the arms of more traditional right-wing elements with a quite different agenda? Factional loyalties may also explain features like the hostility to postmodernism expressed in Ratnapala's essay on 'Law as a Knowledge Process'. Although the substance of his remarks is compatible with much of postmodernist theory (as he later acknowledges), he seems to feel obliged to start off by attacking it; almost as if it were necessary to prove his right-wing credentials.

Also puzzling is the presence of Douglas Kmiec's chapter. Kmiec is a defender of traditional natural law theory, and here he takes on Hayek's theory of spontaneous order. But what Kmiec shows, in spite of himself, is that it is extremely dangerous to ground claims for Hayekian spontaneity in a theological doctrine. If divine planning comes through with approval, then it seems central planning might be acceptable after all. More important, though, the unsustainable foundations of natural law render the whole structure vulnerable. Ratnapala and Moens remark (p. 7) that 'The utilitarian-positivist case against natural law is that it makes the law uncertain'. This is true, but surely a more serious problem is that the metaphysics of natural law is false or incoherent, and therefore cannot safely be used to support public policy. Claims that 'We have only one end: our reunification with God' (p. 134), or that common law is 'the necessary outgrowth of a divine lawgiver' (p. 136), are today likely to be met with stares of incomprehension. The debate has moved on since the 13th century, and rightly so.

It is clear that natural law envisages a fundamentally different role for the state from that espoused by the Hayekian liberal or libertarian. Kmiec objects to the coercive powers of the state not in themselves, but only when they are exercised improperly (roughly, when they violate the principle of subsidiarity). The real problem is not coercion, but godlessness, and Kmiec would limit the state only to leave the scene free for local coercion: 'the natural obligations between parent and child, husband and wife, neighbour and neighbour and even employer and employee' (p. 132). Kmiec does make a valid point when he says that Hayek's worship of the historical common law translates into a lack of enthusiasm for guarantees such as the US Bill of Rights, which were indeed inspired by a 'natural law' tradition. But, by holding strictly to a theocratic interpretation of natural law and natural rights, Kmiec lets this insight go by; he extols the ninth amendment, which extends the Bill of Rights beyond its listed categories, but he damns its most notable result, the abortion decision of *Roe v Wade*.

The fifth author to address Hayek's work directly is Alan Fogg. I find Fogg's easy identification of legal positivism and legal realism problematic; it is unnecessary for a defence of Hayek, since Hayek was not opposed to moderate positivists like H. L. A. Hart (as Fogg concedes; p. 202, fn. 107). Nonetheless, his essay contains much useful material, despite some polemics; Voltaire, for example, is condemned for advocating 'constructivist rationalism' (p. 185). It was Voltaire, however, who said in his *Philosophical Dictionary* of 1764 that 'law should never conflict with custom; for if the custom is good the law is superfluous'. Francesco Parisi's chapter gives an excellent account of customary law, and why its recognition is vital to a market order. The relevance here to Hayek's concerns is clear, although Hayek himself is cited only briefly. This material is rewarding, although the non-specialist might find some of it hard work.

I have concentrated on the Hayek material because that seems to offer the most common ground for debate. Many of the other essays, although peripheral, are still very interesting. Gabriël Moens reviews the proceedings against former East German border guards; Alice Tay and the late Eugene Kamenka survey some recent Marxist jurisprudence; Igor Grazin, an Estonian member of parliament, offers stimulating thoughts on the fall of the Soviet empire; Geoffrey de Q. Walker has a short but invigorating piece on re-establishing the rule of law in post-socialist societies; and R. C. van Caenegem discusses legal history in Europe.

Each of these would be of interest to particular audiences (as would Brazil's chapter on Hohfeld), though as they are unlikely to buy the book for the sake of one article, it is unclear what sort of a market Butterworths is targeting. Although the book's editing fails to impose much of a common theme on the contributors, the editorial standards of their contributions are high. There is no bibliography, but bibliographic footnotes are plentiful. (A serious flaw, however, is the cursory nature of the index: even proper names cited in the text often fail to appear, while the footnotes are hardly indexed at all.) For the reader who is looking for a range of thought-provoking material, and is not afraid of being led off on tangents, this collection is worth a look.

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