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Books

“SOME LAWYERS WREAK HAVOC ...”: Jefferson, Marx, Lenin, Gorbachev, and the Self-Limitation of Revolutionary Constitutions
Some observations on Martin Krygier (ed) *“Marxism and Communism”**

The essays, collected, edited and presented by Martin Krygier, are fascinating reading and truly thought-provoking, looking at a dramatic and incisive chapter of “history in the making” through the eyes of participant observers describing what they call the collapse of communism. But, wittingly or unwittingly, the authors have provided much more than historical drama of a time and at locations with which Australian readers have little in common. By invoking the historical dimension, the “posthumous reflections” are not just a historical reminiscence of the socialist Polish past¹ but they provide a wealth of material for the analysis of the present and possible future scenarios of Poland and in fact, the “new world order” at large.

In view of this wider relevance of the Polish experience, the reader is immediately drawn to reflect not only on the wide scope of conclusions and findings which the authors present in view of the Polish experience, but also on what appear to be central issues which the collection of essays left out. While there is wide and multifaceted coverage of the ideological premises for Marxism-Leninism, the stunning gap between theoretical, ideological and moral postulates of Socialist and Communist ideals and the ironic contradictions of the coping with everyday life in a “planned” economy, there is – with a few commendable exceptions to which I’ll return – very little written on the role of law and order in a historical perspective, and more importantly hardly anything reported on the historical and constitutional “beginning” of Marxist-Leninist state society, that is, a verifiable status of the conditions and social structures in Poland, and above all in Russia, before Soviet rule. Without such a “tertium comparationis” of a historical or other base line, it appears to be easy but also slightly irrelevant to report, with sadness or with glee, the story of the “failure” or “demise” or “collapse” of communism in Eastern Europe.

In order to make my point and to touch a comparative base, I digress from the present collection of essays, and draw briefly attention to the constitutional history of the United States of America, that is, another grandiose failure, if not demise or collapse of law and order, namely the experience of American democracy by Afro-Americans. While a thorough analysis is beyond the purpose of the observations here, a quick cross-reference to the “American Creed” can show that Marxist-Leninist concepts are by no means alone in leading to a break-down in social relations when taken as a blue-print

* Krygier, M (ed), *Marxism and Communism: Posthumous Reflections on Politics, Society, and the Law* (Ga: Rodopi 1994) at 237.

1 The book is co-published as Vol 36 of the series “Poznan Studies in the Philosophy of the Sciences and the Humanities” and ten of the eleven articles (written in their majority by Polish authors) focus on Poland, with only Andras Sajo dealing with the case of Hungary.

for the structural design of modern societies. Such a comparative reference can also show that the “collapse of communism” is by no means an appraisal of other surviving constitutional designs as “winners”. Interestingly, we find lawyers at the heart of the deficiencies of constitutional and legal designs of both Communist party rule and the US.²

The current situation of the countries in Central, Eastern and Southeastern Europe after the implosion of Soviet Russian rule is at best difficult and at worst desolate. For many observers, not least legal academics, this is an open and shut case of the failure of socialism, at least in its Marxist state economy version, to deliver on its promises to create a better world or at least a truly humane society. There can hardly be any clearer evidence for this failure than provided by the fizzling out of Communist rule in bankrupt national economies, abominable living conditions for most of the populations concerned and the absence of any civic order in many of the afflicted countries. After seven years into democracy and capitalism, the ratio of the income of the 10 per cent of the population with the highest income in relation to the 10 per cent with the lowest income is 15:1 in Russia, making it “one of the most inegalitarian countries in the world”.³ The situation in Poland cannot be much different. However, post-communist societies are not alone among “developed societies” with such a staggering unequal distribution of life opportunities. The wide, and growing gap between wealth at the top and at bottom ends of the scale in the US is widely known. This gap is especially wide in relation to the life chances of the Afro-American population, and presents – having regard to the historical mission of the American constitutional ideals — a specific “American dilemma”.⁴ Gunnar Myrdal, the outstanding Swedish lawyer and

2 Again, this point cannot be fully elaborated here, but it is certainly not a coincidence that Marx, Lenin and Gorbachev (and Jefferson for the United States) were lawyers and that these lawyers have thought about society and the role of law at the beginning of incisive self-creations of “new societies with a mission”: “Leaving aside the question of the historical causes of [Gorbachev’s] revolution, we can at least say that it was triggered by a repertory of misconceptions typical of a lawyer raised in the culture of the Soviet Union. One of these, due to the projection of legal thinking onto society, led to a gross overestimation of the role of reason in deciding the tenor of relations between society and the state. The misreading fuelled an expectation that social and political change could be steered by a new, benevolent regime; it went hand-in-hand with an underestimation of the strength of social forces ... The same outlook fed the illusion that the transformation of the party-state into a law-based state could be realised through exercise of legislative authority by reformed institutions that nevertheless remained dominated by communists. The elemental mistake, of course, lay in the assumption that communism ... could be salvaged in conjunction with the process of introducing democracy and capitalism ... Was Gorbachev — the lawyer — at all aware of what he was doing? ... Some lawyers wreak havoc. I can think of one who almost single-handedly managed to destroy an empire. He did so in ... pretending to establish a law-based state. The irony of history is that in the end the law-based state was enshrined in the constitution by a construction engineer from Sverdlovsk (Elt’sin)”. Lowenhardt, J, Book Review on Donald D Barry (ed), “Toward the ‘Rule of Law’ in Russia?” in *21 Review of Central and East European Law* 6, 633 at 634, 635, 637. My argument is that this observation, with a change of respective historical variables, applies equally to (in historical order) Jefferson, Marx and Lenin.

3 Brym, R J, “The Ethic of Self-Reliance and the Spirit of Capitalism in Russia” 11 *International Sociology* 4, 409 at 415.

4 Obviously a similar grossly unequal distribution of life opportunities can be found in Australia when comparing the socio-economic status of Aboriginal Australians with that of the Anglo-

winner of the Nobel prize in (political) economy, has addressed the “Negro problem” in the US, in one of the most ambitious and comprehensive studies of American democracy ever undertaken.⁵ His overall findings were, and this is relevant for our argument here, that there is a clear “split-level” operation of political ideals constituted as a pervasive “American Creed” and the unprincipled, “pragmatic” muddling-through of private and public everyday life. This divergence is no coincidence but structurally designed at the inception of the “new” American republic through its foremost constitutional architect Thomas Jefferson (1743-1826). Myrdal observes:

The American Creed is a humanistic liberalism developing out of the epoch of enlightenment when America received its national consciousness and its political structure ... centred in the belief in equality and the rights to liberty as formulated earliest by Jefferson in the Virginia Bill of Rights that ‘all men are created equal and from that equal creation they derive rights inherent and unalienable, among which are the preservation of life and liberty and the pursuit of happiness’.⁶

This moralistic reference to natural law as a revolutionary vehicle to independence from Britain sets the later constitution apart from any other law, and puts it, as it were, “above the law”.⁷ So Myrdal can observe, in 1938, both a “nearly fetishistic cult of the Constitution”⁸ and that “Americans have kept to [this] custom of inscribing their ideals in law”⁹, while there is generally a “low degree of respect for law and order”.¹⁰ This is not a contradiction but the two sides of the same coin:

We must observe ... the moralistic attitude toward law in America, expressed in the common belief that there is a “higher law” behind and above the specific law contained in constitutions, statutes and other regulations ... The role given to the Supreme Court and the tradition of this tribunal not to “legislate”, which as a court it could hardly have the right to do, but to refer to the higher principles back of the Constitution strengthened still more the

Celtic population. Without wishing to detract from this Australian problem, the argument here is related to specific constitutional promises which are internalised in American politics and everyday life but not found in Australian history. See for further details below.

5 Myrdal, G, *An American Dilemma, The Negro Problem and Modern Democracy* (1944). The study was commissioned in 1937 by the Carnegie Corporation with the specific condition that it should be undertaken by a scholar from a country with a clean record on racism such as Sweden or Switzerland, and it was conducted with the help of American researchers, notably Richard Sterner and Arnold Rose (see above n3), between 1938 and 1943. Professor Myrdal was at the time economic advisor to the Swedish Government and a member of the Swedish Senate.

6 *Id* at 8, 9.

7 See Luhmann, N, *Daas Recht der Gesellschaft* (1993) at 108, with the observation that the Constitution contains only references to the unity of the people and the instrument of government but not to individual rights. Therefore, it must be seen as “founded on itself”, that is, not referring to positive law to which individual rights are subject. Myrdal has explained this peculiarity as a “plot of the Constitutional Convention against the common people” supported by historical research. “So by the logic of the unique American history it has developed that the rich and secure, out of pride and conservatism, and the poor and insecure, out of dire needs, have to come to profess the identical social ideals”. Myrdal, above n5 at 13.

8 *Id* at 14.

9 *Ibid*.

10 *Ibid*.

grip of this old idea on the mind of Americans ... The citizen decides whether it is 'just' or 'unjust' and has the dangerous attitude that, if it is unjust, he may feel free to disobey it. The strong stress on individual rights and the almost complete silence on the citizen's duties in the American creed make this reaction the more natural. The Jeffersonian distrust of government — "that government is best which governs least" — soon took the form, particularly on the Western frontier, of a distrust and disrespect for the enacted laws. The doctrine of a 'higher law' fosters an 'extra-legal' disposition towards the state and excuses illegal acts ... America has become a country where exceedingly much is permitted in practice but at the same time exceedingly much is forbidden in law ... So this idealistic America also became the country of legalistic formalism.¹¹

In dismissing the institutional infrastructure of modern law as "unnecessary" or even "dangerous", the Jeffersonian design has failed American society, or at least large parts of the American society. In a later review of his study¹² Myrdal observed that little had changed in relation to the gross inequality of life opportunities for the underprivileged, now no longer only the Afro-American citizens, in the face of "a new wave of exclusionary economic restructuring ..., and a white unwillingness seriously to deal with the question of racial disadvantage".¹³ The repeated promises to deal with this question by Democrat presidents Kennedy and Johnson in the sixties, and most recently Clinton at the inauguration to his second term of office, only support Myrdal's observations of an intractable structural problem — which he dubbed euphemistically "dilemma" — and the fact that it has not been dealt with decisively yet. And there is little to suggest that it is not the legacy of Jefferson's blueprint (or lack of it) for a legal system which is at the core of this structural problem.

With these observations on US American history in mind, I'll argue that the story of communism in Poland, on which the authors of the present book reflect "posthumously", has striking parallels to the American Revolution in that it begins with a revolutionary idealist blue-print by a lawyer (Karl Marx) who has good reasons to mistrust an oppressive state and its law and who wishes both away, and that the failure of communism was "programmed" by a similar bifurcated constellation of a "moralist law"¹⁴ which operated simultaneously and disparately both with an idealist normative order "above

11 Id at 15-8.

12 As an indication for the reception of Myrdal's study in the US, it is worth noting that an American co-researcher of the study, Arnold Rose, had to defend himself against accusations that he, Myrdal and other authors of the study were part of an "anti-American" conspiracy together with Presidents Kennedy and Johnson. He died prematurely at 49 before his appeal at the US Supreme Court could be heard. See Davies, L, "The 'public figures' defence — a subversion of democracy" (1991) *Law Institute Journal* 1195-7.

13 Myrdal, G, "1974-1975, An American Dilemma Revisited", unpublished research papers, Stockholm, Arbetarrörelsens Arkiv, quoted in Schierup, C U, "A European Dilemma: Myrdal, the American Creed and EU Europe"(1995) 10 *International Sociology* 4, 347 at 351.

14 This constellation was evident long before its implosion and commented on as a structural deficiency. See Ziegert, K A, "Nach der Emanzipation des Rechts von der Moral: die Wirkungschancen der Moral am Beispiel der kommunistischen Moral [After the emancipation of law from morals: the societal effects of morals in the light of communist morality]" (1978) in Luhmann, N and Pfuertner, S H (eds), *Theorietechnik und Moral* 146.

the law” — here the “Communist Creed” instead of an American Creed — and with a “low degree of respect for law and order”¹⁵. Further, the low respect for law and the “fetishistic” treatment of the removed (and unmovable) idealist principles “above the law” are deliberate and self-made. The authors of the book reviewed here are our witnesses for the outcomes of this constellation of both underestimating and overestimating law in the process of “creating a new society”.

Andrzej Flis examines this dilemma as a conceptual inconsistency between two concepts of socialism¹⁶. On the one hand socialism is conceptionally prepared as an ethical ideal by thinkers such as Owen, Fourier and Saint-Simon, on the other hand, a new scientific understanding of history lets thinkers like Proudhon and Marx see socialism as a real historical tendency and the “natural” result of human evolution. Flis correctly points the finger to Lenin and his Russian autocratic understanding of history to have hijacked the second concept for a specific Russian application:

Lenin, in accordance with Russian tradition, resorted to force ... socialism understood as a real historical tendency legitimised socialism as a totalitarian *design*. In just this way, the gigantic bolshevik experiment, sundering natural social links and fostering anarchy in the state and economy, was presented as the inevitable result of human revolution.¹⁷

Developing the specific bolshevik “Communist Creed”, references to it were immunised from reality and couldn’t be used for socio-technical decision-making, let alone legal decision-making, but were treated in a “fetishistic” fashion:

Marxian socialism, socialism as an organic social order, existed in the Soviet Union and eastern Europe only in ritual acts that were state-managed from above, while the sphere of everyday social life comprised the domain of the effects of the unsuccessful experiment. It is therefore hardly surprising that the rejection of political ritual ... boiled down to the immediate collapse of the socialist formation. Nor should it be surprising that its legacy consists of nothing but wide domains of internally disintegrated social bonds as well as relations incapable even of simple reproduction — institutions and relations called into being by socialism precisely as a design.¹⁸

Ritualisation, then, constituted “the structural mode of existence of the communist system”¹⁹ because it allowed “to pass quite smoothly from socialism as a design that made up an actual domain of everyday life, to socialism as a “historical necessity” in the public-state sphere”²⁰ and helped to conserve the mission of the Communist Creed without changing anything.

15 Also here the ideology provided justification for mistrusting law which in turn reinforced traditionally poor relations between an authoritarian and oppressive law and the citizens, like in Tsarist Russia (see Yakovlev, A M, “The rule-of-law ideal and Russian reality” (1995) in Frankenberg, S and Stephan, P (eds), *Legal Reform in Post-Communist Europe, The View from Within*) or in occupied and divided Poland (see below).

16 See Flis, A, “From Marx to Real Socialism: The History of a Real Utopia” in Krygier, above n1 at 19.

17 Ibid.

18 Id at 20.

19 Id at 29.

20 Id at 30.

Piotr Marciniak moves the discussion to the level of social theory²¹ and argues, not at all “posthumously”, that the implosion of the Soviet model of communism too easily overshadows significant gains in social and economic theory which have been made by Marx:

It's [Marxism's] great asset remains its ability to perceive the many-sided connections between various levels of social life ... an ability which results from the holism and historiosophical ambitions of that school of thought. A revived Marxism in eastern Europe will try to understand the processes occurring here as a phenomenon made up of complicated social arrangements. A great asset of Marxism might be precisely its ability to create a theory of a dynamic social order.²²

It is, of course, this analytical power of Marxism which has enabled the social-democrat thinkers of western Europe, Scandinavia and central Europe to move away from the Communist Creed and towards a humanist pragmatism, perhaps best expressed in Alva and Gunnar Myrdals' work in Sweden and internationally.²³ Marciniak, therefore, is optimistic and concludes, with a long-term view and against the evidence which is currently available in post-communist societies, that Marxism remains an inspiration for the social sciences, that its ideological success is social democracy, and that the “social democratic vision of social order — rooted in Marxism — can in a short time achieve significant popularity in the societies of eastern Europe”.²⁴

The view provided by the only American authors in the collection of essays, John Clark and Aaron Wildavsky is — perhaps typically — a moralist one, and, for them, quite amusing: they hold that what happened in eastern Europe is what Marx predicted for capitalism but what, according to them, has never happened to capitalism.²⁵ This is certainly an ironic reading of the events with a wide view on political theory but it is, of course, not a historical analysis but a dressing down of Marx for getting it wrong. And the authors don't disguise where their ideological preferences lie:

Marx's *Lumpenproletariat* is in many ways a terrifying vision of what can happen to individuals when they are deprived of meaningful work ... It was the deprivation of meaningful work, perhaps more than anything else, that was responsible for the social problems that continue to plague post-communist societies ... It is largely responsible for the “Moral Collapse of Communism”.²⁶

21 Marciniak, P, “The Collapse of Communism: Defeat or Opportunity for Marxism in Eastern Europe” in Krygier, above n1 at 31.

22 Id at 35.

23 On this work and its impact on Swedish society, see for instance Nilsson, J O, *Iva Myrdal — en virvel i den moderna strömmen* [Alva Myrdal — an eddy in the modern current] (1994).

24 Marciniak, above n22 at 46.

25 See Clark, J and Wildavsky, A, in Krygier, above n1 at 48: “The close fit between Marx's predictions for capitalism and the actual experience of communism is much more than coincidental. Marx's analyses of the anticipated collapse of capitalism do in fact go far in explaining both the long term decay and the more recent collapse of Soviet-style communist political economies”.

26 Id at 63-4.

This is a ridiculous and cynical statement, for even if one acknowledges the poor economic performance of the Soviet organisation of state enterprise and public services on the one side, and the class divide between nomenklatura and other groups in society on the other side, this economy never produced a "Lumpenproletariat" and it gave work at all levels, through the Communist Creed, a pervasive meaning and an egalitarian interpretation, even if not a competitive edge. The deprivation of meaningful work remains the trademark of a rampant individualism and underprivileged classes without equal access to life opportunities under capitalism which post-communist societies experience only now without an intricate and institutionalised network of nomenklatura patronage.

Edmund Mokrzycki, in contrast, provides a convincing and serious explanation as to the issue of the reasons for the collapse of communism²⁷ when he refers to the historical early closure of the Marxist-Leninist catechism which removed the texts from any further theoretical or scientific disposition and it deprived decision-making of any relevant reference to Marxist and Socialist theory. This "crisis of the theory" — which is hidden under "layers of recently still obligatory interpretations"²⁸ — results in an ad-hoc treatment of political realities and it is this position which is prevailing in post-communist societies and the cause for "social problems that continue to plague post-communist societies".

Also Roman Bäcker argues that the collapse of communism is a more complex process than implied by the imagery of a "Moral Collapse". He would like to put this process under the conceptual heading of revolution,²⁹ as indeed the democratic movements in Poland, Czechoslovakia and East Germany have interpreted their participation in the process which led to a transformation of collective social consciousness.³⁰ Again and for the stated reasons, Marxist categories do not fit this process but also historical models of the overthrow of despotic or autocratic regimes do not apply. The answer may be, as Bäcker seems to suggest and as I would endorse emphatically, that the processes in question do not amount to a revolution but a process of transformation.³¹ Indeed, the catalyst for the acceleration of transformation, notably starting in the Soviet Union, was not a revolt of the people but the decision from the top, that is by the Party Secretary Gorbachev, to "reform" society and move towards transparency ("glasnost") in the political process and a law-state.³² Gorbachev's overestimation of reason and the underestimation of social forces destabilised the social structure without providing a "democratic" substitute for the party rule. It is only in the process of this destabilisation in the Soviet Union that political actors of all sorts scrambled for control with, not surprisingly, a clear advantage for those who had political and economic control all along.

27 Mokrzycki, E, "Marxism, Socialism, and 'Real Socialism' " in Krygier, above n1 at 99.

28 Id at 101.

29 Bäcker, R in Krygier, above n1 at 111.

30 Ibid.

31 Id at 118 and Ziegert, K A, *A Theory for the Assessment of Legal Change: the Cultural Differentiation of Post-Communist Societies and Their Law* (1996).

32 See above n3.

This account of a not less dramatic transformation of the east-European communist states and societies rather than that of a revolution is also supported by the analysis of Andrzej Zybertowicz.³³ “Communism was not overthrown. It was in decay. While attempting to recover, it suddenly crumbled, collapsed”.³⁴ So while the collapse could not come as a surprise, its character — “smooth and epidemic”³⁵ — surprised everybody. The smooth collapse was possible because an informal transformation of the modes of thinking of the nomenklatura had taken place. In combination with the call for transparency (glasnost) which exposed the massive character of corruption, the ruling elites could no longer refer to the Communist Creed or resort to violence. The dream of the utopia was over, and this produced an “avalanche-like” effect:³⁶

At the moment the communist rulers decided to embark on a trajectory of real reforms, no Marxist revisionism was viable any more. At the moment they decided to accept a reformist platform condemned for decades, they unintentionally made a revolutionary move — they opened the gate to the complete abolition of the system ... it simply reflects the cunning of historical unreason.³⁷

While the Polish authors focus on the role of the Marxist ideology and the various aspects of its “unrealistic” assumptions and dead-ends of ritualistic incantation, Martin Krygier importantly addresses the central issue of the rule of law³⁸ and draws a direct line from Marx to the communist legal order. Marx’s concept of law allowed Lenin to rephrase his autocratic Russian concept of the revolutionary dictatorship as a “rule won and maintained by the use of violence ... that is unrestricted by any laws”.³⁹ This position, as mentioned earlier, established the Communist Creed “above the law” and claimed that the Socialist rule of law represented a “higher, more perfect level of the development of the rule of law”.⁴⁰ This, again, is a religious claim without references to elaborated theoretical concepts. As Krygier’s brilliant summary of the extensive and at times “over-heated”⁴¹ discussion of the concept of the rule of law in modern democratic societies can make abundantly clear, such a discussion was deflected from Marxist thought right from the beginning by Marx’s thin and vague analysis of law and the lack of his concerns for a (legal) protection of the integrity of individuals. So while ironically, Jefferson and Marx share a “philosophy of freedom, in a profound and pervasive sense”⁴², Jefferson based his constitutional design at least on the English legal tradition⁴³ while Marx harnessed his social

33 Zybertowicz, A in Krygier, above n1 at 121.

34 *Id* at 124.

35 *Id* at 125.

36 *Id* at 132.

37 *Id* at 135.

38 Krygier, M, “Marxism, Communism and the Rule of Law” in Krygier, above n1 at 137.

39 *Id* at 141.

40 *Id* at 142.

41 *Id* at 146.

42 *Id* at 166. Krygier refers only to Marx; in view of the arguments above I would add Jefferson as a not less radical proponent of enlightenment philosophies in which there was no role for law, as he knew it, to play.

43 See Myrdal, above n6 at 12.

theory “to a diagnosis of present exploitation and a prophecy of future deliverance”⁴⁴:

Marx’s disdain for law, and neglect of the rule of law, were theoretically driven ... Lack of concern for the rule of law, in other words, was built into Marxism; it was characteristic, not careless.⁴⁵

I agree with Krygier that here lies the single most decisive factor for the implosion of Communist states and societies.

Tragically, the “legacy of anti-legalism” does not end with the end of Communism. Adam Czarnota⁴⁶ and Grazyna Skapska⁴⁷ analyse in their contributions the effects of the Marxist design of the “Socialist rule of law” on the attempts of post-communist Poland to cope with the “avalanche-like” breakdown of law and order. Once more, the specific circumstances of a “smooth collapse” are apparent which left legal systems in eastern Europe largely intact but demanded a self-reform under a chaotic constitutional control. Characteristically, the analysis of legal structures reveals a much more differentiated cultural speciality of law in post-communist societies than the veneer of a monolithic Communist Creed suggests.⁴⁸ Czarnota shows how the Round Table discussions in Poland allowed for a resumption of Polish constitutional and legal traditions which, while not overcoming the structural problems of an incapacitated legal system at short notice, provide at least a constitutional basis for the rule of law in the long term.⁴⁹ Skapska analyses the structural problems of the Polish post-communist legal system in great depth and as a “troublesome awakening after the first euphoria”:⁵⁰

The institutional legacy of the communist system exists in the shape of ‘bad law’: a dual system of formally valid but often not enforceable norms, norms valid but perceived as unjust, norms incompatible with the emerging reality, norms having only declaratory but no binding force — [that is, quality of production] — and the really binding informal orders based on power structures, mutual networks and interconnections, informal relations.⁵¹

The institutional legacy of the communist system exists also in the shape of the destruction of the public sphere which would be necessary as a conduit for cultural change. In view of these nearly insurmountable difficulties Skapska’s conclusions are not optimistic:

The rule of law is more than simply laws and legal procedures; it is also a culture of legalism rooted in the society’s expectations, standards and values ... The inherited anti-legalism repeats itself ... high penalties, purges and educational efforts, political show trials ... pose impediments on the road of the formation of that culture.⁵²

44 Krygier, above n1 at 166.

45 Id at 171.

46 Czarnota, A, “Marxism, Ideology and Law” in Krygier, above n1 at 173.

47 Skapska, G, “The Legacy of Anti-Legalism” in Krygier, above n1 at 199.

48 See Ziegert, above n32.

49 Czarnota in Krygier, above n1 at 196.

50 Skapska, above n1 at 200.

51 Id at 203.

52 Id at 217-8.

This brings us back to our observations of puzzling parallels between Myrdal's analysis of the high degree of inequality in American society and the accounts in the reviewed collection of essays of the failure of Communism in Poland to create an egalitarian society. They all point to the dualism of an "extra-legal" ideal creed or belief system and the dismissal of legalism as a main operative from the public sphere. Both the "American Dilemma" and Communist rule reach their crisis points when well-meaning reforms – the civil rights movements and the legislative push of presidents Kennedy and Johnson in the sixties, Gorbachev's perestroika in the eighties — try to bridge institutionally, and that is through law, the gap between promise and deliverance. As the impressive array of eyewitness-accounts in this collection of essays shows, this gap is structurally unbridgeable: it could only be overcome with law, but the ideological design has dismantled the legal infrastructure: a culture of legalism.

Such is the paradox of law:

Solidarity [the Polish movement] created capitalism which was then captured and colonised by the former nomenklatura. Solidarity's real failure was its inability to translate victories into law. It is a profound paradox that the legitimacy of the postcommunist leadership is directly linked to the missing element of the anticommunist revolution — the constitution. It will be even more paradoxical if the postcommunist majority manages to *impose constitutional limitations on itself* [my emphasis], something that Solidarity's champions of freedom and democracy notably failed to do.⁵³

The lawyers Jefferson, Marx, Lenin and Gorbachev attempted to exempt their visions of a better society from the self-imposed constitutional limitations of a legal order and wreaked havoc.

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53 Osiatynski, W, "After Walesa. The causes and consequences of Walesa's defeat" *East European Constitutional Review* 35 at 43-4.

DISSONANCE AND DISTRUST: WOMEN IN THE LEGAL PROFESSION by Margaret Thornton, Melbourne, Oxford University Press, 1996, ISBN 0 195 536614.

Margaret Thornton's book "Dissonance and Distrust: Women in the Legal Profession" examines the position of and perceptions of women in the various arms of the profession, from the legal academy as students and academics, to all potential areas of employment. The text is particularly valuable because its broad scope in terms of consideration of these areas is combined with detailed analysis of the actual processes (in thought and in practice) involved in the treatment of women, and with the personal experiences of women in the law. Thus the book constitutes a development from Thornton's earlier work in *The Liberal Promise*, not only through its focus on one particular area of discrimination, but also by its presentation of the true subtext wherein social and consequently legal professional structures, both formal and informal, are controlled and bolstered by men who wish to retain their power.

The structure of the book is particularly interesting in that it mirrors the nature of the opposition which women find within all facets of the legal profession, moving from opposition in terms of the theoretical construction of the feminine to practical difficulties such as pregnancy and childcare. In this way, the author reinforces a major theme: simply admitting more women to the academy and thence to the profession will generate no substantive change as long as the culture of the profession and legal education, as well as the societal structures, preferences and biases remain the same.

Seven chapters address the primary elements of discrimination against women in the legal profession. The book's first chapter entitled *The Fictive Feminine* examines society's construction of women and the "feminine". The female evokes corporeality, emotion, and affectivity while the male represents logic, reason and neutrality. This means that it is not possible for women to be identified as "knowers". In the context of the legal profession, therefore, the participation of women is perceived as incongruous. That is, as the masculine is rational and connected with thought rather than impulse, with logic rather than emotion, its supposed neutrality lends it the quality of the universal. Furthermore, women represent disorder and chaos and thus have no place in a regime which is based on legal concepts such as *stare decisis* and the rule of law, presumptions which suggest that there is a correct decision, a rational and universal solution which will be applied to elicit a predictable result.

Legal decision making takes place within the public sphere, traditionally identified with the masculine. Again, the concept of the feminine being disorderly arises here. Such chaos is deemed inappropriate to a sphere which is based upon images of order and reason. It is therefore essential that women be confined to the private sphere, so as to maintain a regime assembled by and for the masculine. Such opinions assemble the framework for examination of discrimination. Of course, male neutrality is exposed as a myth which allows male controlled systems to function without scrutiny and which enhances judicial mystique.

Chapter 2, *The Maiden Bachelor of Law*, examines the historical position of women wishing to gain admission to law school and to practice. Traditional opinion considered women who wished to enter law school not to be real

women. Discussion of female intellectual capacity adopted the now familiar patterns (which, as Thornton points out, occur whenever the “other” poses a threat to the established order) of evaluation as inferior. The author charts the legislation and practical occurrences, including wartime underemployment, which enabled women to enter the academy and subsequently to find a place in the profession. Entry, however, is demonstrated to be only an introductory step towards equality, as its inevitable consequence was either criticism (especially for taking jobs away from men who had families to support), marginalisation, or treatment as a novelty.

This chapter has an interesting connection with the books’ final chapter, *Body Politics*. The fear of the intrusion of female sexuality and the natural into the calm and masculine profession could only be countermanded either by moving in the one direction, to oppose the presence of women, hence attempting to excise them either literally or psychologically, or by the opposite tactic, treating their role as merely decorative. Sexual harassment and the failure to address pregnancy and child related issues in the employment context are current examples of these early opinions and behaviour patterns. The stories which Thornton recounts in this section have a common theme whereby the pregnant women becomes sexualised, and thus somehow offensive to her colleagues. She is exposed to questions about her marital status and family life to which a male whose partner is expecting a child is not. Indeed the unwillingness of women to identify their marital status, or failure to use a married name is considered a sign of separation from the masculine, and opposition to all that it represents. Choice of dress also intersects with sexuality. Thus women must attempt to disguise their femaleness, as, because of their identification as the erotic, they pose a threat to order.

In the current economic climate, Chapter 3, *Education for Corporatisation*, is of particular interest. Thornton finds that law schools, rather than modernising their perspectives and curricula, are attempting to win favour for their graduates, and thus to obtain more or better enrolments, by functioning as conservatively and conventionally as possible, thus appealing to “the market”. In this way, a mutual reinforcement occurs between the profession and legal education, and as explored in a discussion on Foucault, power and knowledge are interconnected. The training in law school limits the perception of students, thus equipping them for the limited scope of practice. “Thinking like lawyers”, they become primarily occupied with the need to satisfy a myriad of rules with suspect and diverse aetiologies, while neglecting to analyse the result in terms of its contribution to justice.

Thornton details the alienation and loss of confidence women law students experience, and links this to issues of race and class, which are, like the issue of gender, often absent from the curriculum, especially in the “hard” or corporate subjects, as opposed to the “soft” subjects. Students from lower socio-economic backgrounds are forced to face their lack of assumed “knowledge”. It is also important to note that the enforcement of “otherness” in the context of legal education is identified by Thornton as being performed by students as well as academics. That is, those who profit from the maintenance of the system adopt early a role in safeguarding its boundaries.

Academic Affairs examines the connection between the bureaucracy of organisational structures and masculine modes of operation. This chapter analyses the opposition to female and feminist scholars in terms of their perceived disruption

of the academy. Such opposition may stem not only from men, but from other women who perceive successful females as competition for their tenuous connection with authority in a structure where authority is designated as male. Chapter five, *The Neutral Woman of Law*, examines the role of the female solicitor within the firm. Organisationally speaking, operations are heterosexualised, in that it is normal for males in authority to be assisted by women, in this situation being typists, receptionists and secretaries. This complicates the relationship between female solicitors and their non-legal female subordinates. The two groupings are not differentiated by male solicitors, while female solicitors are hesitant to exercise authority over subordinates by giving directions rather than making requests.

The difficulty which women face in obtaining articles is compared with the practical legal training courses, which the author believes are effective in breaking a link between privilege (in terms of class, gender, sexuality or race) and entry to the profession. Given the cost of practical legal training, however, it would seem that some barriers still remain. Similarly, disillusionment with the profit imperative of the law firm is discussed as a factor in female choices to leave the profession. On the other hand, Thornton correctly describes the situation where junior solicitors are overworked and under-remunerated because of the oversupply of labour and non-unionisation: there are many ready to take the place of a dissatisfied solicitor. The consequent predominance of women in public sector legal work is presented as an interesting reversal of the traditional public/private distinction mentioned earlier. The result is a devaluation of private sector work and a reinforcement of the masculine nature and thus greater value of the private legal organisation.

Thornton believes that quotas are ineffective because they impose a change in numbers without a change in thought. This leads her to the suggestion that those women who do manage to enter the profession face difficult choices. Women can opt to remove themselves from the profession altogether or to accept the inequities and a more difficult career path. For example, childcare responsibilities will not be accommodated in a work situation. If these responsibilities are prioritised by women, however, they will doubtless promote an image of not being a "team player", which will affect professional success. Women who choose can try to fit into the male scene, thus becoming "honorary men". But as Thornton points out in Chapter 6, *Contingent Authority*, this strategy can be effective only to a point.

The chapter deals with the concept of male camaraderie and the connection between law firms, team sports and male clubs. It addresses the relationships between professionals and between lawyers and clients which occur at a non-professional or semi-social level. The reason why modification of behaviour, expectations and preferences will not be sufficient to allow a woman to fit into the profession without being identified as woman and therefore "other" is because of the broader context of which the profession is a part. There still exist a number of clubs which women are not eligible to join. Thus women often find themselves excluded from drinks after work, or from firm lunches. Firm sports teams are another way in which the masculine culture of the firm is maintained. This is not to suggest that women have less facility in sports (although they may well not have learnt how to play many of them). Rather, the men tend to feel that it is not appropriate for women to join them, or women legal professionals cannot make playing team sports with work-

mates a priority due to insufficient time, for instance due to family responsibilities. The sexual connotation of social interaction is also addressed. For a woman to take a client to lunch or to join a male colleague or partner for lunch inevitably leads to suspicion about the real nature of the encounter. Thus once again, women are sexualised.

In addition to the exclusion which occurs in the abovementioned transactions, the issue of business power and success arises. Valuable information is more often exchanged in a social context. Professional gossip and opportunities, networking and the making of contacts and forging of alliances with potential clients are all more likely to occur at the bar, in the club or locker room or at the football than at work, in office time. This is especially significant given current commercial values, where legal practitioners who are "rainmakers" and bring in business may be more highly regarded than experienced and competent performers. However, as the author demonstrates, it is no solution for women to take part in as many of these activities as are open to them. One of the more fascinating anecdotes in the book concerns a female solicitor who had been socially acquainted for a number of years with a man who operated a large and successful business enterprise. On one occasion, he happened to meet a young solicitor and play sport with him; he then offered on the spot to bring his legal business to him in future.

A superficial analysis might identify as a possible criticism of the book the fact that the initial premises of the book have been raised in many other writings. However, Thornton's work is a particularly important contribution because it draws together the complex network of connections which constrain the position of women within the profession. Not only does Thornton use structure to reflect the nexus between theoretical presentation of women and their isolation from the legal system which is constructed around the masculinist neutrality myth, but she assembles and identifies a valuable collection of female experiences. Issues of legal education, corporate society, the legal fraternity, pregnancy, childcare, sexuality and sexual harassment, are all interwoven and mutually influential.

The qualitative analysis, consisting of excerpts from the many interviews carried out by the author with legal practitioners, academics, judges, associates, public servants and law students, is a fine addition to the book's theoretical content and the delineation of the actual position and practical problems of women in the workforce, specifically women lawyers. As stated in Thornton's consideration of society's view of women, personal experience is devalued in both the legal and academic spheres. Thus, the use of such excerpts here is interesting in that they add an emotional, experiential dimension to the book. The use of this tactic presents what appears as a paradox. While recognising the way in which the feminine is constructed as "fictive", Thornton nevertheless adopts an academic style which incorporates this delineation. This is certainly valid, however, as the author wishes to address the myth that personal experience and the emotive play no part in the thought or action of rational benchmark man, rather than the functioning of women.

Naturally, the nature of the book's subject matter does point to the concern of essentialism. However, Thornton addresses this at the outset, making it clear that a significant factor in the construction of the feminine is the failure to consider women in terms such as working class, queer or of Non-English Speaking Background. She points out that while the consideration of women as a

homogenous group has been a self-reinforcing behaviour of the legal system and its benchmark man, a focus on difference can also prove paralysing for feminists in this situation. That is, it may be necessary to examine the situation as it applies to all women before it is possible to delve into the complexity of intersectionality and to consider the complex interplay of characteristics which composes a single woman.

Thornton's work is a valuable reminder of the "ideological role of law", whereby the masculine becomes the universal, and legal rules become the only necessary consideration for justice. While increasing numbers of female legal practitioners will not alter this situation, some hope is still held out for change in the long term by action in a variety of areas, in particular by female academics. In the meantime, women legal practitioners continue to face harassment and insulting behaviour, restriction to the softer areas of law, and exclusion; but most importantly, their presence in the profession demonstrates their daily dilemma of compromise.

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