BOOK REVIEWS

THE COURTS AND CRIMINAL PUNISHMENTS, by Sir John Vincent William Barry, Government Printing Office, Wellington, 1969. 91 pp. $1.50.

This small volume consists of three lectures which were to have been delivered by Sir John Barry in New Zealand in 1968. Unfortunately, illness, which was to prove fatal, intervened and he was unable to deliver them either in 1968 or at the later date in 1969 to which the trip had been postponed. However, before he died in November 1969, Sir John was able to revise the text of the lectures, and it is this final text which has now been published by the Government Printer.

The Honourable Sir John Vincent William Barry was a man of many parts. A Judge of the Supreme Court of Victoria for 22 years he was also Chairman of the Victorian Parole Board since its inception in 1957 and co-author of a textbook on Criminal Law. Apart from, or perhaps in spite of, his judicial duties he was also heavily involved in the study of criminology in Australia and New Zealand. In fact he will probably be best remembered not as a Judge, but as a criminologist of international repute, the author of "Alexander Maconochie of Norfolk Island", leader of the Australian delegate to two international criminological conferences and the founding President of the Australian and New Zealand Society of Criminology. Clearly then, Sir John was, as Dr. Robson points out in his forward to this volume, a man eminently qualified to speak on the subject of punishment. He combined the world of the academic with that of the practising lawyer and brought to both his intense compassion and concern for the individual.

Of the three lectures the first, from which the title of the book is taken, is probably the most important. Throughout this lecture, and, to a lesser extent, in the other two, Sir John is at pains to stress the retributive aspects of criminal punishment. In many ways this essay can be seen as an attempt to rehabilitate this aspect of punishment from the disrespect into which it has fallen among criminologists and social workers in general. It is quite clear that this is no crude emphasis on revenge for, as Sir John points out, retribution and revenge are not, as certain sections of the yellow pages frequently assume, synonymous. Crudely put revenge is essentially a personal reaction to a wrong, retribution is essentially an expression of community disapproval and is not overtly vindictive in nature.

For Sir John retribution basically means two things; "a solemn censure and a condemnation of an unworthiness that has been manifested by the criminal conduct", and a punishment intended "to reinforce the general law-abiding sentiment that is essential if order and social stability are to be maintained". (p. 21) Although this

essay is directed primarily at the more serious offences and at sentences of imprisonment it is clear that this explanation of punishment has wider application and that Sir John sees these factors as present in less serious and less well-publicised offences. This is important since the author argues very strongly that retribution, as he has defined it, is the mainspring of punishment and that the retributive function is the paramount duty and preserve of the courts. Among other things it is this approach which leads Sir John in his second lecture, "Judicial Sentencing or Treatment Tribunals?", to reject any idea of removing the sentencing function from the courts.

In many ways Sir John's analysis of retribution is a more sophisticated version of C. S. Lewis' attack on the "humanitarian" approach to punishment (see Vol. 6 (1953) Res. Judicatae p. 224). Whereas Lewis tackles the problems from the point of view of a theologian concerned with the rights of the individual offender Sir John reaches much the same result from the point of view of the practical lawyer concerned with the rights of society in general. Both affirm that the offender must be treated according to the community's innate sense of justice and that punishment can only be justified as the result of a balancing process between the rights of the individual offender and the retributive interests of the community. This is not to say that Sir John endorses Lewis' instance on what is virtually "tariff" justice for he endorses retribution only as a limiting factor on punishment. However, although he recognises the need for reformation of the offender and indeed demands that the penal system adapt itself more to this end, it is clear that this cannot, in his view, be the paramount aim of any viable system.

It is in this final contention that the reviewer considers Sir John to be just as misguided as Lewis before him. Certainly in these therapeutic times the requirement of justice for the criminal needs to be stressed as does the role of punishment in strengthening anti-criminal attitudes in society. Criminologists too often give the impression that crime can properly be equated with disease and that its "cure" is not only possible but also of little concern to the layman. Nevertheless, this does not mean that the basic philosophical thrust of any penal system that aspires to be called "advanced" or "enlightened" should not be the reformation of the offender. It is surely perfectly compatible with the interests of society to say that the prime object of any such penal system must be the protection of that society through the reformation of the offender? Clearly many external factors will limit our achievement of this aim and it is here that the community's sense of justice and the norm-strengthening role of punishment must be allowed some play. Similarly a realistic assessment of our present skills and knowledge in the treatment field will set limits on our activities. Few people would be so arrogant as to suggest that reformation should be the sole aim of a penal system but to deny that it should be the main aim seems almost as questionable. Experience, particularly in New Zealand, shows quite clearly that, at least for lesser offences, it is

perfectly possible to have a court and penal system that is essentially reform-orientated but which still satisfies the legitimate demands of society for retribution.

As mentioned earlier, Sir John seems to address his arguments mainly to the more serious offences and the more recalcitrant offenders. This is certainly an area where punishment is more overtly retaliatory than elsewhere and in which the courts tend to take a stance reminiscent of Pontius Pilate. This does not mean that reformation can be safely ignored for if it is then we shall shortly be needing more monstrosities along the lines of Paremoremo. Unfortunately, modern penal systems tend to concentrate their limited resources on less serious offenders. This is perfectly natural since these constitute the bulk of offenders and are generally believed to be more susceptible to being "cured". This tendency is further supported on philosophical grounds by an argument similar to Sir John's which purports to be realistic and which recognises that since lengthy sentences can only really be justified on the grounds of retribution or deterrence, attempts at reformation are, if not completely unnecessary, at least misguided.

It can only be hoped that this approach will change. Bearing in mind the enormous material and human cost involved in the feeding, clothing, exercising, entertaining and keeping under constant electronic surveillance of one man every day for ten or so years to no tangible result, it is surely ludicrous to ignore even the limited knowledge we have in this field. Retaliation, expiation and deterrence can never be satisfactorily divorced from reformation which must be the mainspring of our dealings with each and every offender.

In his second lecture Sir John discusses the concept of the "treatment tribunal". In recent years there has been increasing criticism of judicial sentencing on the grounds that it is erratic and uninformed and that the job could be done better by a panel of experts of various hues who would have ready access to the most advanced information and techniques in this area. (For the most recent, and in many ways, most trenchant, contribution to this debate see Nigel Walker's "Sentencing in a Rational Society", 1970.) As one would expect, Sir John is strongly opposed to this idea, attacking the very basis of the argument in stressing the necessity of such a tribunal to be responsive to the desires and needs of society. In his opinion, with which this reviewer respectfully agrees, the court is at present the only institution that can really be expected to fulfil this function satisfactorily.

Sir John is on more shaky ground when he claims that in the light of all the available evidence, individual judges are not so arbitrary in their sentences as is supposed. Information here is certainly lacking but much of the American material points the other way. However, Sir John does receive some support from a study published by David Thomas since this lecture was written. In his book "Principles of Sentencing", which is a long-term study of sentencing decisions in the Criminal Division of the English Court of Appeal, Thomas claims that

the court has, at least in the last decade, developed a fairly consistent body of sentencing principles. How far this has filtered down to the lower courts where the problem really lies is still a matter for conjecture but the signs are certainly hopeful.

Although it covers very little new ground, this is clearly a book which is essential, and above all, easy reading for anyone remotely interested in the field of criminal punishment. As such it cannot be too highly recommended. One may not agree with many of his conclusions but clearly Sir John Barry was an internationally acknowledged expert in this field and he bring all his great skill to bear on some of the thorniest problems facing modern society. It can only be regretted that he was unable to deliver these lectures in person.

Neil Cameron.

INDUSTRIAL LAW IN NEW ZEALAND by D. L. Mathieson, Wellington. Sweet & Maxwell (N.Z.) Ltd. Li and 465 pages (including index), New Zealand price $15.00 (hard cover), $13.00 (soft cover).

One of the considerable merits of the restructuring of the LL.B. degree in the New Zealand law schools has been the opportunity presented for attention to be given to areas of the law which had previously by neglected by academics. This text is the first comprehensive treatment of industrial law in New Zealand and it needs little of the gift of prophecy to assert that it will rapidly become the standard student and practitioner text on this branch of the law.

In his preface Professor Mathieson gives his definition of industrial law as "the law about the relationship of employer and employee, and as including the law of trade unions, the law by which wages and conditions of employment are established, the law of industrial warfare, and a survey of safety and welfare legislation". This text is the first of two volumes to be produced by Professor Mathieson on this widely encompassing subject. The first volume deals with the contract of service and the law relating to trade and industrial unions and the law dealing with wages and the treatment of apprentices. The second volume which is to appear at a later date is to deal with the law of industrial warfare and certain statutory provisions relating to the conditions of employment in the Factories Act 1946 and the Shops and Offices Act 1955. It is to be regretted that Professor Mathieson does not propose to complete his treatment of industrial law by covering the law relating to employers' liability for accidents at work and workers' compensation. It is no doubt true as Professor Mathieson says, that these subjects have been "adequately dealt with in other books", but there is still scope for a comprehensive text for students of industrial law though no doubt this will have to wait until the uncertainty surrounding the outcome of the Woodhouse Report has been resolved.

The present book is, however, far more than a student's text although it will admirably serve the needs of a class in Industrial Law. In his preface Professor Mathieson claims that "this book is designed for lawyers, trade union officials, personnel managers and students studying Industrial Law for the LL.B. degree". In this reviewer's opinion this claim is well made, though the trade union official and personnel manager who consult this book will need to recognise that it is primarily a detailed exposition of the law and not an explanatory handbook. They will, however, receive considerable assistance from the careful definition of legal terms used.

The first section of the book deals with the nature and description of the contract of employment. It is inevitable that in a book of this kind only a broad outline can be given of the general rules of contract as they affect the contract of employment, making this the least satisfactory section of the book. It may be the author's haste to get into the real substance of his text that leads him to dismiss in one sentence the "organisation test" first propounded by Denning L. J. in *Stevenson, Jordan and Harrison Ltd.* v. *Macdonald and Evans* [1952] 1 T.L.R. 101 for determining whether a person is engaged as a servant or as an independent contractor. It seems scarcely adequate to state that the test has received "little judicial attention subsequently" when one considers the impressive list of English and American authority cited in favour of the test by Cook J. in *Market Investigations Ltd.* v. *Ministers of Social Security* [1968] 3 All E.R. 732. Frequently the real issue between the parties in such cases is whether the damage caused by a particular individual is to be compensated by the insurers of some organisation to whose work force that individual belongs. The "organisation test" seems to be the test best capable of determining the question, to whose work force does this individual belong and who therefore is most likely to be carrying the insurable risk?

The strength of this first section of the book lies in its discussion of the effect of the Industrial Conciliation and Arbitration Act 1954 on the contract of service. A detailed and valuable exposition is given of the relationship between the contract of employment and an award or industrial agreement; of the statutory safeguards on dismissal by way of victimisation, and the rules applied by the courts where there is a conflict between the provisions of an award and the terms of an industrial agreement.

In the subsequent chapters dealing with the industrial union and the industrial conciliation and arbitration process in New Zealand, Professor Mathieson puts the legal profession and others concerned in industrial law and relations considerably in his debt. His analysis of the provisions of the statute is careful and systematic with a full discussion of the New Zealand case law and the relevant Australian cases and statutory provisions. He avoids a weakness which characterises many texts for New Zealand practitioners, that of failing to

give any guidance or suggested principle to be followed where the existing authorities are inconclusive or the statute is ambiguous. Professor Mathieson is prepared on several issues on which the present authorities are unclear to offer guidance for the future. In pages 114-117, for example, he presents a number of analogies from company law and the law relating to registered trade unions which may provide rules for dealing with the internal affairs of industrial unions when the Industrial Conciliation and Arbitration Act is silent. Again at page 143 an analogy from the company law is taken to support the submission that the rules of an industrial union creates a contractual relationship between the union and its members as such and between the union members *inter se.*

Although primarily giving an exposition of the existing law Professor Mathieson has looked critically at the provisions of the Act and makes several suggestions for reform. For example, he considers that the discretion given by s. 55 to the Registrar to accept an application by a society to register under the Act should, as in Australia, be subject to the right of any person to object, and a right of appeal to the Arbitration Court should be given from the Registrar's refusal to register. After a detailed consideration of the provisions of the Australian Act the proposal is made at pages 167-168 that s. 70 of the New Zealand Act should be amended after the pattern of the Australian legislation in order to give the Arbitration Court power to declare void any union rule which is oppressive, unreasonable or unjust, or to give directions as to the way in which a rule should be applied. The author considers that s. 174 should be amended to give to a union member a statutory right to remain a member of a union so long as he complies with the rules of the union and is in the words of the present section "not of general bad character". Under the present section, as interpreted in *Armstrong* v. *Kane* [1964] N.Z.L.R. 369, a worker may not be refused admission to a union if not of general bad character but the section is of no assistance to a member who complains that he has been wrongly suspended or dismissed from a union. In the light of the fundamental criticisms which have been directed at the arbitration systems in New Zealand in recent months the proposals for reform made in this book may appear no more than mere "tidying-up". However, it would be unfair to expect what is basically a treatise on the present law to examine questions which fall within the broader compass of industrial relations. The author, as may be expected accepts the present system and works from within it.

Industrial law is a subject which borders on many disciplines and an understanding of the present law is closely bound up with a grasp of the history of the labour movement and the development of industrial relations in New Zealand. Professor Mathieson is conscious of this relationship and his discussion of the development of the present law, although brief, is illuminating. He tempts the reader to explore these areas more fully by providing references (unfortunately

many of these incomplete) to the relevant work of historians and social scientists in this field. This reviewer awaits with interest Professor Mathieson's second volume.

P. D. McKenzie

LAWASIA (Journal of the Law Association for Asia and the Western Pacific). Editor P. E. Nygh, December 1969, Vol. 1, No. 1. Annual subscription $A2.

This journal is a new venture which is primarily intended to publicise the activities of the recently established Law Association for Asia and the Western Pacific (Lawasia) and to provide information on legal developments in this region. If it fulfills its promise it should provide a valuable aid not only to comparative lawyers but also to all those who wish to keep abreast of current legal thinking on a variety of topics in our neighbouring countries. It is intended to publish two or three leading articles of high scholarly standard in each issue as well as notes on judicial decisions of special interest, law reform, new legislation, law curriculum changes and professional matters, and the editor would welcome contributions on these questions.

The first issue contains several interesting contributions of an unpretentious nature. Of particular interest are an article by Dr. Jhong on the settlement of international trade and investment disputes and one by Professor Pascual of the University of the Philippines Law Center. The journal is fortunate to have Mr. P. E. Nygh at is first editor and one can only wish his efforts every success.

W.A.M.