

BOOK REVIEWS

REVUE DES LIVRES

Wright and Linden, Canadian Tort Law: Cases, Notes and Materials. Edited by A. LINDEN. Sixth Edition. Toronto: Butterworths. 1975. Pp. xxx, 768. (\$39.50)

The sixth edition of *Wright and Linden* is a worthy successor to its esteemed predecessors. Physically more attractive (and less intimidating) than former editions, it retains the general structure of the fifth edition, published in 1970, which was the first under the editorship of Professor Linden.

The years since 1970 have witnessed a formidable volume of significant decisions, especially in regard to affirmative obligations,¹ economic loss,² occupiers' liability,³ products liability⁴ and the "frontiers" of tort law.⁵

Professor Linden has coped admirably with these developments, capitalizing on his very wide knowledge of tort law throughout the Commonwealth and the United States of America. The comments and questions retain their great capacity to stimulate class discussion.⁶ Of particular interest in my opinion is

¹ *E.g.*, *Horsley v. McLaren*, [1972] S.C.R. 441; *Jordan House Ltd v. Menow et al.* (1974), 38 D.L.R. (3d) 105 (S.C.C.); *O'Rourke v. Schacht* (1974), 55 D.L.R. (3d) 96 (S.C.C.); *Teno v. Arnold* (1974), 55 D.L.R. (3d) 57 (Ont. H.C.).

² *E.g.*, *Rivtow Marine Ltd v. Washington Iron Works and Walkem Machinery and Equipment Ltd*, [1973] 6 W.W.R. 692 (S.C.C.); *McCrea v. City of White Rock et al.* (1974), 56 D.L.R. (3d) 525 (B.C.C.A.).

³ *E.g.*, *Veinot v. Kerr — Addison Mines Ltd* (1974), 51 D.L.R. (3d) 533 (S.C.C.); *Mitchell v. Canadian National Railway* (1974), 46 D.L.R. (3d) 363 (S.C.C.).

⁴ *E.g.*, *Phillips v. Ford Motor Co.*, [1971] 2 O.R. 637 (C.A.); *Rivtow Marine Ltd v. Washington Iron Works and Walkem Machinery and Equipment Ltd*, *supra*, footnote 2.

⁵ *E.g.*, *Duval v. Seguin* (1974), 1 O.R. (3d) 482 (C.A.), *aff'g*, [1972] 2 O.R. 689 (H.C.); *Marshall v. Lionel Enterprises Ltd*, [1972] 2 O.R. 177 (H.C.); *Brown v. Hubar* (1974), 45 D.L.R. (3d) 664 (Ont. H.C.).

⁶ On one or two occasions, it must be admitted, the questions loose their fire, see *e.g.*, p. 150, q. 3.

Professor Linden's treatment of automobile accidents⁷ and medical malpractice.⁸

In one major respect, however, the present edition involves a retrograde development. The section on occupiers' liability,⁹ severely curtailed from previous editions,¹⁰ appears to contain a number of serious misstatements of law.

After *Mitchell v. Canadian National Railway*,¹¹ is it correct to describe an occupier's duty to a licensee as being "to prevent damage from concealed dangers or traps of which he has actual knowledge"?¹² It does not appear that "[t]he problems associated with the effect of the invitee's knowledge of the danger [which] led to some strange and draconian results"¹³ have "now been overruled"¹⁴ by that decision. Furthermore, is it not somewhat strange, when referring to "legislation in the United Kingdom . . ."¹⁵ to cite only the 1957¹⁶ statute, which applied to England and Wales, and to fail to refer to the Scottish Act of 1960¹⁷ which, in extending the common duty of care to trespassers, went considerably beyond the legislation of 1957?

The treatment of the issue of *volenti non fit injuria* by the Supreme Court of Canada in *Menow*¹⁸ would appear to have been worthy of analysis.¹⁹ The issue of underage consent in regard to

⁷ Ch. 15.

⁸ Ch. 4, pp. 181-190.

⁹ Ch. 10, pp. 497-501.

¹⁰ Cf. the 4th ed. (1970), which devoted a chapter to the subject.

¹¹ *Supra*, footnote 3.

¹² P. 498. See *Bartlett v. Weiche Apartments Ltd* (1974), 55 D.L.R. (3d) 44 (Ont. C.A.); *Alaica v. City of Toronto* (1974), 55 D.L.R. (3d) 656 (Ont. H.C.); *Lynch v. Brewers Warehousing Co. Ltd* (1974), 44 D.L.R. (3d) 677 (Ont. Cy Ct).

¹³ P. 499.

¹⁴ *Ibid*. The text continues: "(See *Mitchell v. C.N.R.* (1974), 6 N.S.R. (2d) 440 (S.C.C.) per Laskin J., 50-50 split)."

¹⁵ P. 497.

¹⁶ Occupiers' Liability Act, 1957, 5 & 6 Eliz. 2, c. 31.

¹⁷ Occupiers' Liability (Scotland) Act, 1960, 8 & 9 Eliz. 2, c. 30. It is true that reference is made to the Scottish reform, but it is not explained there whether this was a legislative or judicial development. P. 500.

¹⁸ *Supra*, footnote 1, at p. 113.

¹⁹ See *Binchy* (1975), 53 Can. Bar Rev. 344, at pp. 356-358.

birth control²⁰ (assuming that it is considered appropriate to be dealt with in the context of a textbook on tort law) might perhaps have merited a somewhat fuller treatment than that afforded in the text.²¹

The references to recent English development tend to ignore many matters²² of general comparative interest.²³ In a detailed analysis of the problems raised by "Good Samaritanism", the recommendation of the Manitoba Law Reform Commission²⁴ *not* to introduce legislation on the subject would appear to have merited at least a footnote reference. *Teno v. Arnold*²⁵ might have been discussed in more detail, being of greater importance than the references to it in the text might indicate.

These minor differences of emphasis apart, the sixth edition is to be welcomed as a major contribution to our understanding of the norms and practical realities of Canadian tort law.

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Trusts, Trustees and Executors. By W.A. WILSON and A.G.M. DUNCAN. Edinburgh: W. Green & Son Ltd. 1975. Pp. ix, 465, 35. (£14.50)

This is a book on the law of trusts and of personal representatives, as the common lawyer would say, in Scotland. It is made up of thirty-two chapters divided into three parts; the first one the creation, proof, variation and termination of trusts, the second on the office of trustee and the duties and liabilities of the office,

²⁰ See Anon., Parental Consent Requirements and Privacy Rights of Minors: The Contraceptive Controversy (1975), 88 Harv. L. Rev. 981.

²¹ P. 96.

²² *E.g.*, the Report of the Committee on Privacy (the "Younger" Committee) Cmnd 5012 (1972); the Law Commission's Report on Injuries to Unborn Children, Law Comm. No. 56 (1974); the Animals Act, 1971, c. 22.

²³ P. vii: "It is impossible . . . to provide a complete understanding of tort principles without a detailed study of the English "cases".

²⁴ The Advisability of a Good Samaritan Law (1973).

²⁵ *Supra*, footnote 1. See Cohen, The Liability of Ice-Cream Vendors for Injuries of Child-Pedestrian Customers (1975), 26 Syracuse L. Rev. 927.

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and the third constitutes a short account of the law concerning the office of executors, both nominate and dative. It is written under the auspices of the Scottish Universities Law Institute by two members of the Faculty of Law of the University of Edinburgh, the greater share falling to Professor Wilson, and there is a chapter on the variation of trusts written by a Scottish practitioner.

Being largely a Scottish equivalent of *Lewin on Trusts*¹ in what it aims to achieve, it is primarily as a reference work that the book will have value, and therefore it will have major appeal for practitioners, teachers and students of Scottish law. However, from the point of view of the Canadian lawyer it is such a copiously researched and comprehensive work within its 465 pages of text (the appendix is made up of five Acts, to which the text makes considerable reference) that it is a ready source of information for those practitioners whose clients are the beneficiaries or possibly the creators of Scottish trusts. In Montreal alone it has always intrigued me how many residents there appear to be who have interests in Scottish trusts, and who want to know whether they can transfer those interests here, how they can wind up such trusts, or what is their position vis-à-vis Scottish trustees. The practitioner may not immediately wish to seek an opinion from Scotland, and yet he must not suppose that the Scottish law of trusts is the common law of trusts couched in a less familiar, latinised legal phraseology. This is where *Wilson and Duncan* can be a useful guide.

Indeed, the distinction between English law and Scottish law makes this book of particular interest to the student of comparative trusts law. When Stuart Mackenzie wrote *The Law of Trusts*, a text on the Scottish trust, in 1932, he was not particularly concerned with whether there was a distinctive character to the Scots law, but in 1962 when Professor T. B. Smith wrote the chapter on "Trusts" in the volume on Scotland in the *British Commonwealth : The Development of its Laws and Constitutions* series, the climate had changed, and he was insistent and categorical on the subject. The origins and development of the Scottish trust were quite distinct from those of the English trust, he said, citing Scottish Law Lords as his aids, and he rued the fact that the distinctions had been blurred by the various consequences of the long association with England. And yet there is an air of mystery. Every civilian jurisdiction has had paramount difficulty recon-

¹ (16th ed., 1964).

ciling the fiduciary ownership of the common law trustee with the civil law concept of ownership, which by definition is absolute. Scotland on the other hand, a "mixed" jurisdiction without a doctrine of estates, apparently had no such problem. Why? Scholars can as yet find no clear answer; the trust in Scotland emerged from the country's feudal law in the early seventeenth century, and thereafter its development was influenced both by Roman law and the law of the English Chancery Court. Is it possible that Scottish law slipped unquestioningly into the fiduciary ownership of the trustee, and the personal right of the beneficiary, without realizing that the notion had come from Chancery in the south? Thereafter the treatise writers could debate whether the essence of the Scottish trust was deposit or mandate, an obvious Roman law influence, without being troubled by ownership problems. In practice there was no problem.

Since 1945 the revival of interest among Scottish scholars in the distinctive character of the whole of Scottish law has resulted in a significant number of new works, and students of comparative trusts law have awaited with anticipation a new book on the law of trusts. Stuart Mackenzie's book has long since been out of print and copies are procurable; the time had surely come for a contemporary study of the Scottish trust, where the ownership question and a number of similar issues would be examined in the light of modern scholarship. Professor Wilson and Mr. Duncan have not chosen to write from the comparative law angle, and to the reader, whose interest this is, it will be something of a disappointment that the authors have so singly concerned themselves with stating the law in Scotland to the exclusion almost of considering comparative issues and giving references. But that they were perfectly entitled to do. Their object, which they have achieved, was something else. Nevertheless, until that comparative work is written a reader, who knows well his common law of trusts, will find fascinating contrasts and similarities of doctrine on many pages of this book. If he is also acquainted with the law of trusts in other mixed jurisdictions, also influenced by civil law doctrines, and the reviewer has in mind the French civil traditions of Quebec and Louisiana, together with the Roman Dutch jurisdictions, yet another perspective on the Scottish law of trusts will appear. A Quebec civilian would be inclined to question Professor Smith's whole thesis; he might ask — is there any distinction between the common law and the Scottish doctrines of trust that really justifies the use of the term, distinction?

The margins of my copy of this book are strewn with pencilled comparative notes, many of which it is tempting to discuss here. But suffice it to say that to my mind the chapters concerning the requirement of delivery to constitute a trust, the validity of trust purposes, the revocation of trusts, and premature trust termination are of particular interest. Here, too, are some notes taken at random. Scottish company registers may show that a shareholder is a trustee,² the heir of the last surviving or sole trustee has no power to carry on the trust,³ the Scottish trustee has no duty to be ready with his accounts at all times, but he has a *duty* to insure,⁴ he cannot purchase the interest of the liferenter (the life tenant) because the trustee's personal interest would then conflict with the interest of the feeholder (the remainderman),⁵ the rule in *Cradock v. Piper*⁶ is unknown in Scotland, but as in England there is no statutory right to remuneration,⁷ the discretionary power may be given to the trustees to declare payments from the trust to the beneficiaries to be alimentary, a far-reaching civil law protective device,⁸ and Scotland even has an equivalent of the rule in *Shelley's*⁹ *Case*.

This is a work, not only of prodigious research, but of considerable learning, and the authors, including Mr. Elliott whose chapter on the judicial variation of trusts is extremely useful, are to be congratulated on their accomplishment.

DONOVAN WATERS*

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Canadian Conflict of Laws. Vol. One. By J.-G. CASTEL. Toronto: Butterworth & Co. (Canada) Ltd. 1975. Pp. xxv, 800. (\$65.00)

Those who concern themselves with serious study of "The Conflict of Laws" soon discover that, much more than in other subjects, students, practicing lawyers and judges depend on major system-

² Ch. 16.

³ Cf. Quebec. Ch. 19.

⁴ Ch. 20.

⁵ P. 365.

⁶ (1850), 1 Mac. & G. 664, 41 E.R. 1422.

⁷ Ch. 23.

⁸ Cf. Quebec. Ch. 24.

⁹ (1581) 1 Co. Rep. 88b. Ch. 5.

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atic treatises published by scholars in the field. This has certainly been true in Canada, and our debt to leading jurists of Britain, France and the United States for the principal reference works available to date has been and is a great one. But this dependance on others has been too great for too long. Dr. Jean Castel, a distinguished Canadian scholar, seeks to remedy this situation by his recently published *Canadian Conflict of Laws*, and he has indeed succeeded.

The nature and purpose of the book is best expressed in the words of the author himself from his preface.¹

Canadian developments in the field of conflict of laws over the last thirty years have reached the point where it may no longer be wise for the legal profession only to rely on British textbooks such as *Dicey & Morris* or *Cheshire* as it has been the practice in the past on a number of occasions. The recent wealth of legislative enactments and case law dealing with conflict of laws, the special problems of a federal system such as the one existing in Canada, as well as the habits of the people of a country which is in large part made up of immigrants require solutions that are truly Canadian.

For these reasons, I have decided to draw upon my more than twenty years of teaching and practice in the field of conflicts and present this volume of *Conflict of Laws* to the legal profession of Canada in the hope that its contents will afford my confrères and colleagues a clearer understanding of the traditional and new approaches to conflicts problems and also help in the further development of a *Canadian* doctrine and jurisprudence.

This volume contains a general introduction to conflict of laws with chapters dealing with topics such as characterization, renvoi and domicile. Other parts cover the jurisdiction *in personam* of Canadian common law courts, the recognition and enforcement of foreign judgments *in rem* and *in personam* as well as arbitration awards and procedure.

I am planning to publish two more volumes, one dealing with choice of law in the common law provinces and one, written in the French language, devoted to conflict of laws in the civil law province of Quebec.

While there is more to come in two further volumes, presumably concentrating on detailed choice-of-law jurisprudence, one finds that, in this first volume, the main theoretical framework of choice-of-law systems is described and analysed in the Introduction, and in Part One (General Principles). This is logical enough, because the choice-of-law rules do set the tone and nature of our private international law, to give the subject its alternative name. Part Two of the published volume then deals with the detailed jurisprudence concerning "Jurisdiction of Canadian

¹ P. vii.

Courts", and Part Three, the same concerning "Foreign Judgments".

In the Introduction and Part One, Dr. Castel establishes the proper theoretical foundation for the whole subject from the point of view of our inherited legal systems, taking full account also of the federal and parliamentary constitution of Canada. Not only does he relate the subject carefully to the unique Canadian federal system, also he takes account of the extent to which there is theoretical and practical common ground with other countries. His book is both genuinely Canadian, and genuinely comparative and international, in the full scholarly sense. The areas of overlap of conflict of laws with our federal constitutional law and with public international law are carefully delineated, analysed and documented with extensive footnotes. As the author puts it, "... conflict of laws is private law, but with international and federal orientation and objectives".² He then describes and discusses the alternative policy objectives — the choice-influencing considerations — of this branch of the law, and admonishes us that "It must never be forgotten that rules of conflict of laws, like any other rules of law, must facilitate the adjustment of practical human situations".³ He also notes new developments in other countries and considers their applicability to Canada.

An example in this latter respect is the American comparative governmental interest approach to choice-of-law issues — an analysis the principal proponent of which was the late Professor B. Currie. This theory has much influence in the United States, but Dr. Castel seems to have serious doubts about its validity. I agree, and would add for my own part, that I suspect some of the irrelevance of Currie's views to Canada is a product of differences between the constitutions of Canada and the United States. In the United States, the expectation is very strong that the courts should implement law reform from case to case on the basis of rather wide-ranging judicial policy choices. I suspect this is one reason for Professor Currie's emphasis on judicial judgments about comparative state governmental interests concerning inter-state situations. In Canada, by contrast, we do not expect so much of the courts. Our inheritance of the modern British parliamentary system leads us to look to the respective provincial legislatures and the federal Parliament for major policy-oriented reform, in private international law as in other areas.

² P. 5.

³ P. 15.

In any event, whatever the reason, we do seem to be going the legislative reform route to an increasing extent for changes in the Canadian conflict of laws. Guidance for some of these changes for many years has come from model statutes approved by the Uniform Law Conference of Canada, and more recently has come also from conventions of the Hague Conference on Private International Law. The commissioners of the former body are representatives and officials of the provincial and federal governments, and so are the delegates from Canada to the Hague Conference. On the whole, the model statutes and conventions of these two bodies modify the historic judge-made common law with more working classification categories for the issues, attached to very specific connecting factors easily established as a matter of evidence. This promotes predictability of results, and takes development of the subject in quite a different direction from that advocated by Professor Currie in the United States.

I pointed out earlier that the author has carefully analysed the areas of overlapping between conflict of laws on the one hand, and Canadian federal constitutional law and public international law on the other. While it is not the function of a review to rehearse the content of the book in detail, one example of this may be given. In considering taxation laws and judgments for taxes due, Dr. Castel gives the common law rule that no Canadian courts will enforce the tax laws of another province or country, directly or indirectly. He notes that the Supreme Court of Canada has recently confirmed that this is still the position. Yet he also tells us that in 1963, Quebec passed a statute that in effect, offered to the other provinces reciprocal enforcement of provincial taxation laws, though as yet no other province has responded. Also, in the provincial income tax statutes of the other nine provinces, which have tax collector agreements with the federal government, respecting a taxpayer who has moved from one province to another, there is provision for the federal revenue authority to sue the taxpayer in the second province for income tax liability incurred in the first province. This is indeed a modification of the common law conflict of laws rules, in the context of our federal system, that one should know about. Also, in 1965, the Uniform Law Conference of Canada adopted a model Reciprocal Enforcement of Tax Judgments Act to operate between the provinces and territories of Canada. The model has not yet been followed, but the time may not be far off when it will get support. Finally, as between Canada and foreign countries, there are many treaties to avoid double-taxation, and the terms of these treaties are important to those with tax problems

at the international level. The avoidance of double taxation on the basis of tests like habitual residence or situs, means that the tax treaties use choice-of-law techniques the same as those found in the conflict of laws proper. Dr. Castel gives the reference for all Canadian tax treaties.

As the exhaustive treatment of the subject of taxation indicates, this book is very practical and complete in developing detail, as well as high theory. This makes it a valuable reference book in the same sense that *Dicey* and *Cheshire* are valuable for students and practitioners alike. Just two further illustrations of this completeness might be mentioned.

In Part Two, on the jurisdiction *in personam* of Canadian courts, in addition to all the standard materials one would expect, there are also careful directions for the service of procedural documents emanating from Canadian courts on defendants in other countries, in part through the good offices of the Canadian Department of External Affairs. With some countries there are bilateral treaties about this, and with others, general conventions of international comity are followed. Then also, in Part Three on "Foreign Judgments", again in addition to all the expected materials, one finds very full treatment of the reciprocal enforcement of maintenance and alimony orders. For some time now, the common law position in the Canadian provinces has been radically changed by statutes, on the model of proposals of the Uniform Law Conference of Canada. The reciprocity is operating widely, and there is now a substantial body of interpretative case law. Dr. Castel reviews the precedents and the statutory procedures thoroughly.

In conclusion, I say again what I said to start with. This book is a work of thorough and distinguished scholarship in which the author succeeds with the task he set himself, namely, to provide a treatise on the conflict of laws that is based on Canada, and which reaches out from this base to take proper account of the wider considerations of relevant international and comparative jurisprudence. Let us hope that the author and his publishers, Butterworth of Canada, make haste to bring us the next two volumes.

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The Environmental Impact Handbook. By ROBERT W. BURCHELL and DAVID LISTOKIN. New Brunswick, New Jersey: Center for Urban Policy Research, Rutgers University. 1975. Pp. iii, 234. (No price given)

Environmental impact assessment is the planner's answer to increasing ecological awareness and concern. Perhaps Rachel Carson struck deepest into our collective conscience when, in *Silent Spring*, she pulled back the curtain on the long-term effects of a technological miracle. Her strident message: "Look before you leap!" In 1969, the United States Congress responded with the National Environmental Policy Act,¹ which required the filing of an acceptable Environmental Impact Statement² for all federal activities which may significantly affect the quality of the human environment. By 1975, in the United States, thirty-two states had enacted legislation establishing environmental impact assessment procedures. In Canada, the Ontario legislature has inaugurated our entry into the new era with The Environmental Assessment Act, 1975.³ When it comes into force, many activities carried out by a public or governmental body, or by major commercial or business enterprises, will be prohibited unless and until an environmental assessment of the activity has been accepted and approved by the Minister of the Environment. To aid him in this task, the Minister will have a newly established Environmental Assessment Board to review the statements generated by the Act.

The *Handbook* is a guide for the preparation of an environmental impact statement. Its key contribution is a detailed discussion of the items to be dealt with and the sources of information on each item. The 1969 NEPA required coverage of five points:

1. The probable environmental impact of the proposed action;
2. Any adverse environmental effects which cannot be avoided should the proposal be implemented;
3. Alternatives to the proposed action;
4. The relationship between local short term uses of man's environment and the maintenance and enhancement of long term productivity; and
5. Any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

¹ Pub. L. 91-190, 42 U.S.C.A., § 4321 *et seq.* (1962). Hereinafter cited as NEPA.

² Hereinafter cited as EIS.

³ S.O., 1975, c. 69.

The authors have sub-divided the format into sections and sub-sections, setting out in clear and specific language the matters to be covered under each heading.

The usefulness of an EIS depends upon two basic factors: what is in it and who reviews it. Unless sufficient particularity is required, both in the preparation and in the review of the EIS, the procedure will serve little effective purpose. The process is costly. The authors suggest that even a routine statement in the United States costs \$2,500.00 to prepare. Major projects will call for an expenditure of hundreds of thousands of dollars for the EIS. The review procedure will then add several thousand dollars. One cannot help asking whether, in spite of *Silent Spring*, we are not creating an administrative monster with environmental impact assessment. Some "old hands" in the United States refer to the warehouses full of unread, unusable EIS.

I suggest that we need the impact assessment process. Environmental harm is often irremediable and overwhelming. Traditional reliance on legal responsibility and compensation for harm are not suitable for many cases of environmental loss. The damage is just too great for satisfactory remedial action through monetary compensation. We must establish adequate administrative procedures to avoid or minimize the harm in the first place. The *Handbook* is an indispensable guide for all Canadians involved in the process of environmental impact assessment. With it, and a critical attempt to establish a workable and effective procedure, we may just walk the narrow line between untold environmental damage and bureaucratic chaos.

J. W. SAMUELS*

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Droit et pauvreté au Québec: documents, notes et problèmes. By JEAN HÉTU and HERBERT MARX. Montreal: Les Editions Thémis. 1974. Pp. xviii, 568. (\$14.50)

Poverty law is one of the newest of legal specialities. Indeed some jurists still question its *right to exist* as a separate legal subject matter. Thus Mr. Emile Colas (former president of the Montreal Bar Legal Assistance Programme) has stated:¹

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¹ Quoted in paraphrase, p. 475.

...droit des pauvres? Irréaliste... les pauvres veulent les mêmes droits que tout le monde.

However, as Anatole France has pointed out, the law in its majestic equality forbids the rich as well as the poor from sleeping under bridges, begging in the streets and stealing bread.

Those who represent the poor must have a knowledge of the rules against sleeping under bridges as well as a specialized knowledge of the rules and regulations of welfare law, public housing law, unemployment insurance law, and a knowledge of the men and administrative practices involved in the enforcement and application of such laws. They must also have an intimate knowledge of the attitudes and practices of the merchants, money lenders, landlords, and bureaucrats who deal with the poor, and an intimate understanding of the psychological and institutional *milieu* in which the poor live; just as a maritime lawyer must understand the world of ships and a banking lawyer the world of banks.

Herbert Marx's and Jean Héту's book, *Droit et pauvreté au Québec* is a valuable contribution towards our understanding the legal world of the poor.

The book consists of a compilation of case law, statutes, regulations, and excerpts from review articles and books, interspersed with author comments and a series of questions and problems designed to place the materials in context and to stimulate thought. About seventy-five percent of the materials are in French.

In the first part of their book, Professors Marx and Héту describe the changing attitudes in Quebec towards the poor, beginning with the eighteenth century concept of the poor as an unfortunate and generally idle charge on the State to be given sustenance by the Church, to the modern view of poverty as an eradicable social disease.

However, most important to the lawyer helping the poor is their discussion of the psychological and institutional *milieu* in which lawyers must operate.

They describe Oscar Lewis' concept of the "culture of poverty" which afflicts some poor, an attitude of passivity, a mistrust of outsiders, and a desire for instant gratification coupled with a lack of initiative to struggle against adversity. However, Marx and Héту demonstrate this is only a partial picture² and

² Pp. 78 *et seq.*

describe the resourcefulness and courage of many afflicted with poverty, particularly abandoned mothers, immigrants, and the working poor, who must daily cope in a world in which most of us could not function.³ They also chronicle the growth of citizen groups, namely groups of poor citizens who seek to analyse the social conditions of poverty, educate their fellow citizens and bring about changes in legislation, administrative practices, and in the quality of life.⁴ Such groups more and more seek to obtain a voice in the institutions which affect poor communities. They vary in effectiveness and responsibility.

As Marx and Héту point out, lawyers who help the poor must know this *milieu*, be able to relate to and understand the different types of clients and groups and be able to understand the process of legal education, community self-help and reform taking place in poor communities. Even the private lawyer who receives only an occasional mandate from Legal Aid or Judicare should understand the special problems, attitudes and needs of his clients, and the necessity of relating to them and their problems differently than he would in the case of a middle class client.

The second part contains a series of chapters on those legal matters which most affect the poor, namely welfare law, minimum wage law, housing law, (including a discussion of municipal by-law enforcement) urban renewal law, consumer law, and family law (including the law affecting juvenile offenders).

In collecting the relevant statutes, regulations, and case law, Professors Marx and Héту have preformed an invaluable service to the Quebec practitioner who would not normally deal with such matters. However, they have done more than merely collect the relevant statutes and jurisprudence; through their own suggestions and comments, and through a judicious use of materials from other jurisdictions they illuminate the social conditions in which the law exists and suggest ideas for imaginative legal action on behalf of the poor.

From an intellectual and social point of view the materials quoted and questions posed by Marx and Héту lead to a number of questions as to the relationship between law and poverty.

It is often stated that there is one law for the rich and another for the poor. In practical terms this means that in the

³ See especially the story of Mrs. Wald, pp. 69 *et seq.*

⁴ See the testimony of various members of such groups before the Canadian Senate Committee on Poverty, quoted pp. 90 *et seq.*

drafting of legislation the needs, views, and voices of the poor are often insufficiently represented; that some judges are insufficiently informed, sympathetic or imaginative to render justice to the poor, and that the poor when wronged cannot obtain proper redress. Marx and Héту's work seems to indicate there is much in such an indictment.

What emerges from the book is the fact that family law legislation, including juvenile delinquency legislation is not written with the needs of the poor in mind; that many poor in their most important economic relationships are subject to arbitrariness and injustice at the hands of bureaucracies such as the welfare, public housing, and public utility agencies; that many laws such as minimum wage laws, consumer laws, and municipal housing laws do not work or are not enforced. For jurists it is also shameful to note that of all the judgments reproduced by Professors Marx and Héту, only two, those of McIntyre J. in *Chastain v. British Columbia Hydro and Power Authority*,⁵ and Gregory J. in *White Spot No. 4 Ltd v. MacLeod*⁶ stand out for their understanding, and innovation in applying the law to the realities of poverty.

The third part of the book deals with the type of legal services governments should supply to the poor, and with the role of the lawyer in helping the poor.

Most provincial governments today, accept an obligation to provide legal services to the poor. Still at issue is the type of legal service to be provided. Ontario has created a system which enables the poor to hire a lawyer engaged in private practise who is then paid by the government for the juridical service performed. Quebec's system is structurally superior. An independent Legal Services Commission has been created which permits the citizen eligible for legal aid either to hire a lawyer in private practise whose fee is then paid by the Commission, or to choose a salaried Commission lawyer who works full time in a local legal aid office.⁷ In this way competition results between the private bar and the local government legal aid office; this lessens the danger of government bureaucracy, yet provides full time specialists in poverty law.⁸

⁵ (1973), 32 D.L.R. (3d) 443.

⁶ P. 366. (1967), unreported, B.C.S.C., no 2179/67.

⁷ In fact full time lawyers are not hired by the Commission but by various regional corporations under the aegis of the Commission. However, for simplification purposes, I have referred to the lawyers as being salaried Commission lawyers.

⁸ Actually, a main determinant in the government's decision to create this dual system was cost. The total cost to the government of a juridical

Moreover the structure of the governmental legal aid office envisaged by the Quebec law is most progressive: legal services are defined as including education, lawyers are permitted to give aid to groups interested in fighting poverty, and citizens are given a voice in the running of the office.⁹ Clearly such offices were designed not only to provide the poverty specialist whose necessity is demonstrated in Marx and Héту's book, but to enable such lawyers in conjunction with local citizens to play a role in educating people as to their rights and from knowledge gained, to encourage reform.

In fact the system has not to date lived up to its structure. Citizen participation is at a minimum, so that the offices' roots in the community and their responsiveness and accountability to their clientele and community problems are limited; legal aid lawyers are given neither the funds nor the time to work on education or reform; the problems of the recruitment and retention of motivated, capable lawyers whose work is rewarding and imaginative remains high.¹⁰ If bureaucracy and mediocrity are to be avoided and the conditions of poverty attacked, imaginative governmental, citizen and lawyer initiative will have to be forthcoming.

In their work Professors Marx and Héту chronicle the debates which took place prior to the creation of the Quebec Legal Aid Act, with emphasis on the discussions as to whether the system should contain neighbourhood legal offices or only a system of government payment of juridical acts performed by the private Bar. The actual functioning of the system in Quebec demonstrates there is more to the creation of neighbourhood law offices responsive to the community and engaged in reform, than their creation on paper.

DANIEL N. METTARLIN*

service performed by a full time salaried lawyer is much less than the fee charged the government by the private bar for the same service; see the Third Annual Report of the Commission des services juridiques (1975), p. 21.

⁹ See the Legal Aid Act, S.Q., 1972, c. 14 and the regulations thereunder.

¹⁰ With over 270 full time salaried legal aid lawyers in Quebec this remains a serious continuing problem.

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The Law of Civil Remedies in Scotland. By D. M. WALKER. Edinburgh: Green and Sons Ltd. 1974. Pp. clix, 1312. (No price given)

There are unkind critics who have suggested that Professor Walker writes books and articles faster than they can read them. His output has made him particularly vulnerable to that scurrilous jibe. Beginning with *The Faculty Digest*¹ in 1953, he has published in succession *The Law of Damages in Scotland*,² *The Scottish Legal System*,³ *The Law of Delict in Scotland*,⁴ *Scottish Courts and Tribunals*,⁵ *Principles of Scottish Private Law*,⁶ *The Law of Prescription and Limitations in Scotland*⁷ and now *The Law of Civil Remedies in Scotland*.⁸

Throughout this quarter century of publishing he has contributed to many of the leading learned journals and the initials D.M.W. have come to stand as a firm guarantee of the soundness of the advice offered weekly in the *Scots Law Times*.

The volume in hand has been published under the auspices of the Scottish Universities Law Institute whose contribution to Scots legal publishing has been outlined in a prior review.⁹ At this early point it is proper to state that the work is a magnificent achievement which joins the fine survey of the field by F. H. Lawson¹⁰ and Dan Dobb's superlative treatise.¹¹ It must be said that while the volumes on the private law remedies are few in number their quality is of the highest.

Professor Walker's book is organized in twelve parts which are subdivided into some seventy-five chapters of varying lengths.¹² The approach is by way of statement of general principle followed up by examples of specific applications and criticisms.

¹ (1953).

² (1955).

³ (1959), (4th ed., 1976).

⁴ (1966).

⁵ (1969), (3rd ed., 1975).

⁶ (1970), (2nd ed., 1975).

⁷ (1973), (2nd ed., 1976).

⁸ (1974). This volume has been worked from the earlier book on damages.

⁹ (1975), 53 Can. Bar Rev. 428.

¹⁰ Remedies of English Law (1972).

¹¹ Remedies (1973).

¹² Ch. 52, Limitations on Claims of Damages for Delict is nearly sixty pages, while Ch. 70, Ranking and Sale, is but one page long.

The opening chapter on the scope and nature of civil remedies clearly separates out remedies from substantive law, adjective law and procedure. The writer states his position:¹³

Remedies, in short, can, and should be, studied separately both from the obligations, breaches of which call for remedies, and from the rules of procedure whereby rights and duties are stated and declared, and remedies awarded for infringement of rights and non-implementation of duties.

In the body of the book the reader unfamiliar with the Scots law will discover more Latin than is usual in common law texts but this serves to underline the Roman tradition which marks Scotland out as a "mixed" jurisdiction.¹⁴ And again Scotland's independent legal history is reflected in the individual terminology. But the uninformed should not be discouraged by the language. He should steel himself and applying the comparative method scour his own system for the notions contained in the phrases — purgation of irritancy,¹⁵ infeftment of vassals,¹⁶ letters of horning,¹⁷ poinding of the ground,¹⁸ maills and duties,¹⁹ violent profits,²⁰ spuilzie²¹ and applications for lawburrows.²²

The efficacy of Roman law concepts in a modern system is also worth studying. Professor Walker lays out the workings of the principle *chirographum apud debitorem repertum prae-sumitur solutum*,²³ the decree *cognitionis causa tantum*,²⁴ the contracts *locatio operis faciendi*,²⁵ *commodatum*,²⁶ *mutuum*²⁷ and *locatio custodiae*.²⁸ The present day impact of the Praetorian Edicts,²⁹ the *actio quanti minoris*,³⁰ the *actio legis Aquiliae*³¹ and the *actio injuriarum*³² are also explained.

¹³ P. 4.

¹⁴ See Smith, *Studies Critical and Comparative* (1962), pp. 46 *et seq.*

¹⁵ P. 89.

¹⁶ P. 127.

¹⁷ P. 190.

¹⁸ P. 323.

¹⁹ P. 332.

²⁰ P. 770.

²¹ P. 1039.

²² Ch. 66.

²³ P. 299.

²⁴ P. 303.

²⁵ P. 597.

²⁶ P. 631.

²⁷ P. 632.

²⁸ P. 633.

²⁹ Pp. 634, 701.

³⁰ P. 749.

³¹ P. 811.

³² *Ibid.*

The influence of the Roman tradition is everywhere apparent as is that of the Institutional writers Stair, Erskine and Bell who compiled the great books of the Scots law between the seventeenth and nineteenth centuries. It would be quite wrong however to emphasize the ancient quality of the Scots law³³ and so dilute the value of this book which sometimes offers us different solutions to problems shared by all legal systems.

As to specific doctrine: in the discussion of rescission of contract one cannot miss the venerability of the Scots judgments on "harsh and unconscionable" transactions³⁴ in comparison with the relatively recent Canadian³⁵ and English³⁶ decisions which extend that idea. On penalty and liquidated damages clauses,³⁷ the powers and attitudes of the Scots courts in modifying amounts which are exorbitant and unconscionable should be read alongside recent dicta of the Supreme Court of Canada.³⁸ The chapter on declarator,³⁹ and particularly the portion on public law, should be considered in the light of recent challenges to legislation in British Columbia.⁴⁰ Likewise the section on interdict against the Crown and queries of the exercise of delegated legislative power⁴¹ demand comparison with some provincial judicial propositions.⁴²

The writer's evaluation of the decision in *White and Carter (Councils) Ltd v. McGregor*⁴³ in the section on specific implement⁴⁴ supports in part the Canadian response to the holding of the House of Lords on that Scots appeal.⁴⁵

³³ Some of the legislation cited derives from the Auld Scots Parliament: the Lawburrows Act, 1429, c. 20, the Hornings Act, 1579, c. 94, the March Dykes Act, 1661, c. 284, and the Winter Herding Act, 1686, c. 21.

³⁴ Pp. 50-51, 156-157.

³⁵ *Mundinger v. Mundinger*, [1969] 1 O.R. 606 (C.A.); *Paris v. Machnik* (1973), 32 D.L.R. (3d) 723 (N.S.); *McKenzie v. Bank of Montreal* (1975), 7 O.R. (2d) 521 (H.C.).

³⁶ *Schroeder v. Macaulay*, [1974] 3 All E.R. 616 (H.L.).

³⁷ Pp. 95-96.

³⁸ *H. F. Clarke Ltd v. Thermidaire Ltd* (1975), 54 D.L.R. (3d) 385, at p. 392, per Laskin C.J.C.

³⁹ Ch. 8.

⁴⁰ *Canex Placer Ltd v. A.-G. of British Columbia* (1976), 58 D.L.R. (3d) 241 (B.C.C.A.); *Can Indemnity Co. v. A.-G. of British Columbia* (1976), 21 C.P.R. (2d) 1 (F.C.).

⁴¹ P. 229.

⁴² *Carlic v. The Queen and Minister of Manpower and Immigration* (1968), 65 D.L.R. (2d) 633 (Man. C.A.).

⁴³ 1962 S.C. (H.L.) 1.

⁴⁴ Pp. 280-281.

⁴⁵ *Finelli v. Dee* (1968), 67 D.L.R. (2d) 393 (Ont. C.A.).

Professor Walker's remarks on the currency of awards⁴⁶ appear to ignore recent decisions of the English Court of Appeal⁴⁷ which have faced up to the problems posed by unstable sterling and the fact of entry into the European Economic Community. Equally one can take issue with his statement that compensatory damages are not a form of punishment.⁴⁸ The exposition of the Scots law on nominal damages reveals differences in practice⁴⁹ and more so in the absence of exemplary damages⁵⁰ whose use is so prevalent in Canada.⁵¹

The House of Lords decision in *British Trade Commissioners v. Gourley*⁵² affirmed an earlier Scots rule. That former decision was, of course, not accepted in Canada⁵³ and its philosophy has been decisively rejected in Ontario.⁵⁴

The paragraphs on the innocent party's obligation to minimize his loss⁵⁵ are as clear as any existing textbook statement and complement recent dicta of the Supreme Court.⁵⁶ However the last words on the position of the financially embarrassed plaintiff do not assist in the clarification of the Canadian dilemma.⁵⁷

Scots awards in delict are explained to be the function of the jury whose use in civil suits is now incomparably greater than in Canada.⁵⁸ In past years the awards were accepted as being lower than English judge-made assessments but parity has been reached in recent time.⁵⁹ Professor Walker writes of the need for

⁴⁶ P. 393.

⁴⁷ *Schorsch Meier v. Hennin*, [1974] 3 W.L.R. 828 (C.A.). Cf. *Canada Life v. Canadian Imperial Bank of Commerce* (1976), 57 D.L.R. (3d) 498 (Ont.).

⁴⁸ Stone, Double Count and Double Talk; The End of Exemplary Damages? (1972), 46 A.L.J. 311, at p. 319.

⁴⁹ P. 402.

⁵⁰ Pp. 403-404.

⁵¹ Hanisch, Law of Torts (1975), pp. 4-5.

⁵² [1956] A.C. 185.

⁵³ *Jennings v. Cronsberry*, [1965] 2 O.R. 285 (C.A.).

⁵⁴ *Teno v. Arnold* (1975), 7 O.R. (2d) 267 (H.C.).

⁵⁵ Pp. 467-479.

⁵⁶ *Red Deer College v. Michaels*, [1975] 5 W.W.R. 575 (S.C.C.).

⁵⁷ *Trans Canada Forest Products v. Heaps*, [1952] 1 D.L.R. 827 (B.C.); *Dawson v. Helicopter Exploration* (1958), 12 D.L.R. (2d) 1 (S.C.C.); *Freedhoff v. Pomalift Industries*, [1970] 3 O.R. 571 (H.C.).

⁵⁸ Report on Administration of Ontario Courts (1973), Ch. 11.

⁵⁹ Pp. 880, 959 and 1261.

moderation in personal injuries awards since total compensation is not possible,⁶⁰ which rationale has clearly persuaded provincial courts of appeal in recent litigation.⁶¹ With regard to the denial of claims for loss of consortium where the injured spouse survives as a helpless but living creature, the writers say: "In such circumstances is his wife not entitled to a substantial sum for the utter ruin of her married life? She would have been better to have been widowed."⁶² That is surely unarguable.

Contrary to the provisions of the Fatal Accidents Acts of the common law jurisdictions the dependants of a deceased under the Scots law can sue for a solatium to compensate them for their injured feelings and grief in addition to their patrimonial loss.⁶³ In his treatment of awards to children for the loss of one or both parents Professor Walker does not consider the financial value of the guidance and counsel so denied. Such arguments have persuaded Canadian courts to make substantial awards.⁶⁴ And again, whilst the illegal earnings of the deceased must be left out of this reckoning in Scotland, that policy is not always followed in Canada.⁶⁵

The author does not miss the reverse discrimination in the effect of the recent ill-considered United Kingdom legislation, which bars the calculation of the remarriage factor of widows but demands that of widowers in wrongful death awards.⁶⁶ His suggestions on the management of the award⁶⁷ when the surviving spouse has difficulties of his own are of special interest in view of recent local solutions.⁶⁸

In the intentional delicts section, the requirements for success in actions for seduction sound of another age: "Any artful

⁶⁰ Pp. 880-881.

⁶¹ *E.g.*, *Andrews v. Grand & Toy* (1975), 54 D.L.R. (3d) 85 (Alta): the sum of \$1,200,000.00 awarded at trial was reduced on appeal to \$387,000.00 (Windsor Star, Dec. 13th, 1975). See Guile, *Actuarial Evidence of the Quantum of Damages in Tort Law* (1976), 10 U.B.C. L. Rev. 251.

⁶² P. 931. The differing provincial approaches can be seen in *Canestraro v. Larade*, [1972] 3 O.R. 382 (H.C.) and *Finney v. Callender* (1971), 20 D.L.R. (3d) 301 (B.C.C.A.).

⁶³ Pp. 939 *et seq.*

⁶⁴ *Franco v. Wolfe* (1975), 6 O.R. (2d) 227 (H.C.).

⁶⁵ *Lepine v. Demeule* (1973), 36 D.L.R. (3d) 388 (Man. C.A.).

⁶⁶ Pp. 978-979 on the Law Reform (Misc. Provs.) Act 1971, c. 43, s. 4(2).

⁶⁷ P. 981.

⁶⁸ *Kolesar v. Jeffries* (1976), 9 O.R. (2d) 41 (H.C.).

practices or false insinuations held out to entrap a resolute chastity; any deliberate plan to corrupt the principles or inflame the passions of an inexperienced female, or even any long and persevering solicitations after repeated repulse and resistance."⁶⁹ In short, nothing short of a siege! In the Scots law any woman may sue a man who has indecently assaulted her and claim for the insult, hurt and damage to her reputation.⁷⁰ In Canada this claim has been met with a punitive award.⁷¹ Provocation may mitigate damages awards for intentional wrongs in Scotland.⁷² And while Canada briefly flirted with this heresy she has recently recanted.⁷³

The material on economic losses caused by unfair industrial practices⁷⁴ has already been overtaken by the effluxion of legislation.⁷⁵ As Weir has observed: "*Vita legum brevis*, too, as is shown by the stiffening limbs herein of the Industrial Relations Act 1971 — just three years from cradle to coffin."⁷⁶

The practice of Scots appellate courts reviewing of awards accords with Canadian approaches — greater latitude is allowed to juries than to judges before a new trial will be ordered.⁷⁷ The test being — is this a verdict which would make people hold up their hands in astonishment?⁷⁸

The volume ends principally with expositions of the consistorial remedies,⁷⁹ admiralty remedies,⁸⁰ and applications to the *nobile officium*.⁸¹ This last is an outline of the extraordinary equitable powers of the Court of Session, the equivalent almost of legislative functions.

⁶⁹ P. 988, quoting Lord Jeffrey in *Stewart v. Menzies* (1937), 15 S. 1198, at p. 1199.

⁷⁰ P. 990.

⁷¹ *S. v. Mundy* (1970), 9 D.L.R. (3d) 446 (Ont.).

⁷² P. 991.

⁷³ *Check v. Andrews Hotel Co.* (1975), 56 D.L.R. (3d) 364 (Man. C.A.).

⁷⁴ Pp. 1017-1019.

⁷⁵ Industrial Relations Act 1971, c. 72, repealed by the Trade Union and Labour Relations Act 1974, c. 52. See now Winfield and Jolowicz on Tort (10th ed., 1975), pp. 467-471.

⁷⁶ A Casebook on Tort (3rd ed., 1974), p. 3.

⁷⁷ P. 1109.

⁷⁸ P. 1112.

⁷⁹ Including the emotive petition of "putting to silence", p. 1128.

⁸⁰ Part X.

⁸¹ Ch. 65.

In this massive work Professor Walker has not limited himself to laying out the law. In many chapters there are passages searchingly critical of the existing law. The confused thinking of the English judges in *Boys v. Chaplin*⁸² is lucidly revealed.⁸³ He mercilessly attacks the tortured reasoning of Scots and English judges in their running together of the questions concerning liability and remoteness of damage.⁸⁴ He concludes of the present Scots law:⁸⁵

*McKillen*⁸⁶ is an important decision and lends no support to the adoption of *The Wagon Mound* in Scotland. On the contrary it reaffirms the distinction between culpability or liability and compensation or remoteness of damage and affirms that while foresight is the test of the former, natural and direct connection is the test of the latter.

His criticism of the unscientific nature of jury awards is well taken,⁸⁷ as is his opposition to deductions for estate passing on death to dependents in wrongful death awards.⁸⁸ The aggressiveness of Professor Walker's critiques, combined with their essential common sense, make one wish he had seized every opportunity to state his own views, even if only in footnote form. It would have been worth hearing his opinions on the inevitable clash between the rights of individuals to petition for interdicts and the competing interests in freedom of speech.⁸⁹ He makes no comment on the inflation of personal injuries awards due to intangibles such as pain and suffering.⁹⁰ He offers nothing on the possible death of the delict action.

Moreover Professor Walker does not always provide us with answers to the questions which the text provokes. For example, does a penalty clause effectively limit the pursuer's claim for losses in excess of the penalty?⁹¹ What are the outer limits of damages

⁸² [1968] 2 Q.B. 1 (C.A.); [1971] A.C. 356.

⁸³ Pp. 27-28.

⁸⁴ Pp. 835-866. The condemnation of *Wagon Mound* grows space, see Dias, Note (1975), 34 Camb. L.J. 15.

⁸⁵ P. 863.

⁸⁶ *McKillen v. Barclay Curle & Co.*, 1967 S.L.T. 41.

⁸⁷ P. 965.

⁸⁸ Pp. 974-975.

⁸⁹ P. 242. Cf. *Canadian Metal Ltd v. C.B.C.* (1974), 48 D.L.R. (3d) 641 (H.C.).

⁹⁰ P. 398. See O'Connell and Simon, Payment for Pain and Suffering: Who Wants What, When and Why, [1972] U. Ill. L.F. 1.

⁹¹ P. 102. See Gordon, Note (1974), 90 L.Q. Rev. 296, and Hudson, Note (1975), 91 L.Q. Rev. 25.

claims for disappointment and inconvenience in contract actions?⁹² Is there one delictual action encompassing breach of confidence or just a ragbag of unrelated commercial and industrial wrongs?⁹³

There is one surprising omission, that of the House of Lords decision in *McKendrick v. Sinclair*⁹⁴ which retells the story of the old action of assythment and its modern descendent solatium.⁹⁵

These last minor carpings in no way diminish Professor Walker's achievement. He has written a great book on the law of remedies.

EDWARD VEITCH*

* * *

Cultural Rights. By IMRE SZABÓ. Leiden: Sijthoff. 1974. Pp. 116. (D. fls 24)

For a number of years now I have commented with goodwill upon the number of useful monographs in the field of international law coming from the Budapest Academy of Sciences. For the main part these have been published in English by the Academy itself, but it would appear that now, perhaps with the intention of securing a wider readership, the Academy has engaged the services of one of the leading international law publishers, and Messrs Sijthoff are to be thanked and congratulated for having assumed this task. As with the predecessors, Professor Szabó's short essay on *Cultural Rights* is most striking for the generality of its sources and the lack of Marxist jargon.

Dr. Szabó views the right to culture as consisting of three distinct aspects — the right to instruction, the right to institutional formation and right to education, and he looks at the development of these rights from both the constitutional and the international point of view. Rather than adopting an abstract or metaphysical approach based on fundamental or natural rights, he points out that "owing to differences in social systems

⁹² Pp. 534, 570-571. See *Elder v. Koppe* (1975), 53 D.L.R. (3d) 705 (N.S.); *Jackson v. Horizon Holidays Ltd*, [1975] 3 All E.R. 92 (C.A.).

⁹³ Pp. 805, 1013-1015.

⁹⁴ 1972 S.L.T. 110.

⁹⁵ P. 939. See Veitch, *Solatium — A Debt Repaid*, [1972] 7 Ir. Jur. (N.S.) 77. See now, *The Damages (Scotland) Bill*, [1976] S.L.T. (News) 49.

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and socio-historical conditions, differences which are by no means immaterial and must not be ignored, cultural rights exist simultaneously in contemporary societies, and in *different forms* at that, constituting, as it were, *common phenomena* of a *sumultaneously existing, multifarious world*.¹ He points out that the right of instruction appeared first “as a *general social demand* at the dawn of *capitalism*; it was reared by the ideas of the French Revolution as an *inalienable human right* . . . [with] the *industrial revolution* as the most essential, decisive [social force], even if the concomitant social and cultural demand assumed a veiled and oblique form”.² Part of the impetus to learn stemmed from the need to master the technology required by the new processes of production. Recognition of this historic factor does not mean that even earlier, under the pressure of religious struggles, the right was not already being asserted in its relation to freedom of conscience. While modern Europe seems to acknowledge a right of instruction, Dr. Szabó reminds us that this right is by no means unrestricted, so that not everyone has the right to teach. Restrictions were imposed by “the bourgeois State . . . because it was interested in a specific trend of instruction — . . . in a certain ideological monopoly. . . . It is a *rearguard action* by the Roman Catholic Church that is in the background of advocating free instruction following the eclipse of its political power”.³

While the right to institutional formation originally was of a “primary” character intended to provide such rudimentary knowledge as was essential for personal and state purposes, by the end of the first world war there was introduced a constitutional right to formation and instruction — *Schule und Bildung* — in both the Soviet and the Weimar constitutions, showing “the *relative independence of legal institutions* in relation to social systems, their distinct existence as social phenomena”.⁴ In relation to this historical development, Dr. Szabó’s Marxist bias does show through. Thus, he says: “When the demand for institutional formation was raised in the course of the [Russian] October Revolution what mattered most was to bring to an end the monopoly of the privileged classes in instruction and education; to put the demand in a positive manner: *to secure access to opportunities of institutional formation for the widest masses*

¹ P. 7, italics in original.

² P. 11.

³ P. 13.

⁴ P. 28.

of the people.”⁵ In commenting upon the right to education, the learned author reminds us how easy it is in this field to be engulfed in semantics, for he asks how distinct is instruction from education, especially if the French language is employed.⁶ That this fact can be of significance follows from the use in article 2 of the first Protocol of the European Convention on Human Rights of *instruction* in the French text, education in the English and *Bildung* in the German versions. Similar verbal games are possible if one looks at the Preamble to the UNESCO Constitution or the Universal Declaration of Human Rights.⁷ Whereas these differences may appeal to the lawyer, it must be recognized that “Rights on the national plane and those formulated on the international plane have been produced by historical evolution, which means that their purport is developing: the road leads from the simple, primary pattern of instruction, made general and compulsory, to more advanced forms, vocational training, higher instruction, part-time instruction, up to a more general and comprehensive novel right, the right to institutional formation or learning, *i.e.* to a right which is called the right to education in the international system of human rights. This process of evolution has not been terminated: a new stage has been reached, the *right to culture*”.⁸ As to this right, all that can apparently be stated is that its range is expanding at an extremely rapid pace⁹ with a variety of international conventions covering specific aspects of cultural rights, all stemming from the concept that “culture is the complex of tools created by man to secure his existence”,¹⁰ or, as it is put in the Statement on Cultural Rights as Human Rights propounded by the UNESCO Committee of Experts in 1968, “the totality of ways by which men create designs for living . . . everything which enables man to be operative and active in his world”¹¹ — whatever such nebulous terminology may signify from a concrete point of view.

There is a general tendency, particularly among people living in western democracies, to describe human rights as natural or eternal. Dr. Szabó introduces some healthy realism when he points out that “the ‘eternal’ rights are, in effect, not eternal but *perti-*

⁵ P. 29; see, also, p. 21 on private and Church schools.

⁶ P. 34.

⁷ P. 35.

⁸ P. 43.

⁹ P. 50.

¹⁰ P. 53.

¹¹ P. 54.

nacious: they usually run through *several social* systems, developing through these; they seem to be eternal while they are, in effect, only *permanent*".¹² Furthermore, he reminds us that "man in modern society is always a 'zoon politikon', a member of political society, of a state; he has rights — *any kind of rights* — and duties (social-State duties) only in this status of his".¹³ He is also emphatic in pointing out that, unlike civic rights, "human rights express, theoretically, only a general social demand, social requirement: they are not yet rights, but are expected to be raised to the level of, and to be enacted as, rights. Natural-law arguments may lend themselves to obscure the real justification of this demand in a definite way which may be satisfactory for many people. The term 'civic rights' may be applied, on the other hand, to human rights which have assumed a positive legal form in domestic law".¹⁴ While it may be true that it is his Marxist philosophy that leads Professor Szabó to write like this, there is a marked similarity between this type of reasoning and Bentham's view of natural rights as a "bastard brood of monsters" lacking reality without embodiment in the law. Unfortunately, Bentham does not figure in the author's bibliography or index.

Enough has been said to indicate the mental stimulus that is to be derived from this short exposition of the nature of *Cultural Rights*, and the Budapest Academy of Sciences is to be thanked for having made available the writings of some of the leading Hungarian academicians to the English-speaking scholastic world. This book shows that, making allowances for minor ideological reasonings, there is little difference in the legal philosophy of writers of both the eastern and western political spectra at least in a field as esoteric as that of culture.

L. C. GREEN*

* * *

International Law. By J.-G. CASTEL, Third Edition. Toronto: Butterworths. 1976. Pp. xxxi, 1268. (\$40.00)

Publication of the first edition of Professor Castel's *International Law* in 1965 was an important event because, since the appearance of MacKenzie and Laing's *Canada and the Law of Nations* in 1938, there had been no further widely available book of its

¹² P. 93.

¹³ Pp. 93-94.

¹⁴ P. 94.

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kind with a Canadian orientation. During the past decade, Professor Castel's first edition has become an important teaching tool in universities and a handy reference book for the ever increasing number of Canadians who encounter problems in the field of public international law.

What are some of the special features of the third edition of *International Law*? First of all it may be noted that the second edition was not available to the public generally, having been in use only at Osgoode Hall Law School in mimeographed form. Hence, this third edition is really the second as far as the public is concerned. The book is up to date in the fullest sense of the word. Published in January 1976, the volume contains much material which, although it became available only in 1975, is not merely included in an addendum, but is woven into the fabric of the presentation. Professor Castel's work is rich in bibliographical reference with particular attention being paid to writings by Canadians or dealing with Canadian subjects. Moreover, it not only reproduces, in whole or in part, writings of the kind just mentioned, judgments of Canadian courts and Canadian government documents, but fits this Canadian material into the broad context of a wealth of material borrowed from a wide range of non-Canadian sources. There are extensive and thoughtful notes and comments prepared by the author who could not have been faulted for a volume confined to a mere systematic arrangement of cases and materials. Lastly, the book is well arranged under the following six headings: (1) General; (2) International personality; (3) State jurisdiction; (4) International agreements; (5) The international responsibility of states; and (6) The law of peace.

Since the publication of the first edition in 1965, there has been an explosion in the development of international law. The work of the United Nations International Law Commission in the 1950s and 1960s led to the adoption of the Convention on the Law of Treaties, possibly the most remarkable modern convention after the United Nations Charter itself. The United Nations also adopted two important covenants on human rights to say nothing of numerous declarations on a wide variety of subjects including the economic rights of developing states and the environment. Moreover, during the decade 1965-1975 Canadian writers on public international law attained a high-water mark in the production of legal books, articles and notes, while courts and government circles were not idle in producing materials on the subject. Some of the topics in the book may now be examined.

Under the heading of international personality, there are found the United Nations resolution on non-intervention (1965), the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations (1970), and the definition of the term "aggression" (1974) adopted, *mirabile dictu*, after a half-century of work by the League of Nations and the United Nations. Very informative Canadian comments on this definition are reproduced. There are also extracts from the United Nations Declaration on the Establishment of a New International Economic Order (1974) and the Charter of Economic Rights and Duties of States (1974).

In the part on the territory of states, there is much material on the Arctic regions including lengthy extracts from Professor Ivan Head's pioneering article published in the *McGill Law Journal* in 1963 under the title "Canadian Claims to Territorial Sovereignty in the Arctic Regions".¹ There is also a long bibliography on the subject up to and including the year 1974.

Air space and outer space come in for considerable attention with a description of the international public law of aviation. This part of the volume examines the questions of offences and certain other acts committed on board aircraft, unlawful seizure of aircraft and unlawful acts against the safety of civil aviation. Conventions on these items have been adopted at conferences held under the auspices of the International Civil Aviation Organization which has its headquarters in Montreal.

The great activity of the late 1950s and 1960s in the exploration of outer space was accompanied by steady and co-operative work in the United Nations and this is reflected, as indicated in the book, in the adoption of the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies (1967), the Agreement on the Rescue of Astronauts, the Return of Astronauts and the Return of Objects Launched into Outer Space (1968) and the Convention on International Liability for Damage Caused by Space Objects (1971). As indicated by Professor Castel, the United Nations is also working on such other outer space topics as the preparation of a moon treaty, remote sensing satellite surveys of earth resources and direct broadcast satellites.

In dealing with the question of maritime frontiers, the book considers the territorial sea and fishing zones and reproduces

¹ (1963), 9 *McGill L.J.* 200.

statements emanating from Canadian government sources as well as the relevant portions of the Single Negotiating Text published at the end of the session of the Third Conference on the Law of the Sea held at Geneva in April-May 1975. The author makes very effective use of the Single Negotiating Text as he covers other items on the law of the sea such as straits, archipelagos, the patrimonial sea or economic zone, the continental shelf and the seabed. The volume includes Canadian government statements on the Arctic archipelago, the territorial sea and fishing zones.

There is a detailed coverage of the history and developments pertaining to the continental shelf starting with the Truman Proclamation of 1945 running through the Geneva Convention of 1958 on the subject, the *North Sea Continental Shelf Cases*,² the very interesting report of the British Branch Committee of the International Law Association (1970), the *Reference Re Ownership of Off-Shore Mineral Rights*³ and the agreement on the delimitation of the continental shelf between Greenland and Canada (1974). Professor Castel also includes a discussion of future trends in the delimitation of the outer limits of the continental shelf, one of the big problems at the current United Nations Conference on the Law of the Sea. At pages 296-297 there is a map of Canada showing the continental shelf, slope, margin and a hypothetical 200 mile line, while at page 308 there is a map showing the delimitation of the continental shelf between Greenland and Canada.

There is a rich bibliography on the seabed. The Canadian contribution to the development of this subject at the United Nations is given ample attention and some fourteen pages are devoted to a Canadian commentary on the 1970 United Nations declaration of principles governing the seabed and the ocean floor, and the subsoil thereof, beyond the limits of national jurisdiction. There are also statements of the Canadian position on the legal status of the area and the resources of the area beyond the limits of national jurisdiction reflected in the interventions of Canadian officials at United Nations meetings. These important matters are further dealt with in a twenty-five page reproduction of the Single Negotiating Text.

As in the first edition, Professor Castel devotes much space to problems relating to the Great Lakes, the Chicago diversion

² I.C.J. Rep. 1969, p. 3.

³ [1967] S.C.R. 792, (1968), 65 D.L.R. (2d) 353.

and boundary waters, all questions of perennial interest in Canadian-United States relations. The International Law Association's Helsinki Rules (1966) on the equitable utilization of the waters of an international drainage basin are given along with the related commentary on the various articles of the rules. The work of the International Joint Commission established pursuant to the Boundary Waters Treaty of 1909 is explored and the author's extensive notes on the International Joint Commission's work are detailed and useful. Reference is made to the arbitration and settlement of Lake Ontario (Gut Dam) claims in the late 1960s.

Under the heading of servitudes, recent developments with respect to land-locked states are surveyed and relevant articles from the Single Negotiating Text are given.

The subject of nationality and individuals gives rise to a discussion of the Canadian Citizenship Act (1947), much of which is reproduced, and Bill C-20, introduced on October 10th, 1974, and intended to replace the 1947 Act as amended. The case of *Lazarov v. Secretary of State of Canada*⁴ gives interesting material for classroom debate with its examination of the *audi alteram partem* rule in the context of an application for citizenship. The book has much material on the admission of aliens and the searchlight is placed on Canada's immigration policy during the period 1947-1975. In particular, there are extracts from the *White Paper on Immigration* (1966), the Department of Manpower and Immigration *Annual Report* 1967-1968, and the *Green Paper on Immigration* (1975). Pertinent extracts are given from the Immigration Act and a list of immigration regulations is set out. The current debate over the holding of land in Canada by aliens is reflected in a comment on the topic.

After studying the questions of extradition and rendition, Professor Castel then proceeds to draw attention to human rights and fundamental freedoms where a long list of international declarations and conventions is given. Among the extracts which follow the list are some from the International Covenant on Civil and Political Rights (1966) and the International Convention on the Elimination of all Forms of Racial Discrimination (1966).

The topic of the extent of state jurisdiction, besides covering pre-1965 material, examines in detail the question of innocent passage in the territorial sea currently under discussion at the Third Conference on the Law of the Sea. Here, again, relevant

⁴ [1973] F.C. 927, 39 D.L.R. (3d) 738.

articles of the Single Negotiating Text are given. Also, the Single Negotiation Text articles on piracy are included.

The matter of acts of state is given detailed treatment in terms of the distinction between acts *jure imperii* and acts *jure gestionis*. In the case of *Flota Maritima Browning de Cuba S.A. v. The Republic of Cuba*,⁵ says Professor Castel, the Canadian Supreme Court hinted that it might no longer consider the doctrine of sovereign immunity to be absolute. But the court expressed no opinion as to whether sovereign immunity could apply to the commercial activities of a state. The author then points out that the Quebec courts were able to make use of the silence of the Supreme Court of Canada in the *Flota Maritima* case and decided to adopt in the Expo '67 cases, the doctrine of limited sovereign immunity. But in the case of *Le Gouvernement de la République du Congo v. Venne*,⁶ the Supreme Court of Canada found that, in respect of the contract under litigation, the Republic of the Congo could not be impleaded in Canadian courts. However, Professor Castel questions whether the effect of the majority decision in the *Venne* case was to reject the distinction between acts *jure imperii* and *jure gestionis* and to reaffirm the doctrine of absolute immunity, and feels that the question is still open. It may be observed that a Privy Council case, which canvasses the subject in detail, became available too late for inclusion in the book.⁷

The substantive articles of the Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents (1974) are included along with a short bibliography. Implementation of this Convention by Canada will be enabled when Bill C-71 becomes law.

The portion of the book on the international protection of the environment merits a volume by itself and runs to 128 pages. It begins with a long bibliography which, by virtue of the post-1965 dates of the publications noted therein, indicates how new the subject is. If outer space was the target of legal writers in the 1950s and early 1960s, the environment has taken pride of place among the authors in the late 1960s and early 1970s. The Stockholm principles and recommendations of 1972 are extensively quoted. The multinational approach to the marine environment is considered and the Canadian position on this important matter is indicated in various statements from government sources.

⁵ [1962] S.C.R. 598.

⁶ [1971] S.C.R. 997, (1972), 22 D.L.R. (3d) 669.

⁷ See *Philippine Admiral (Owners) v. Wallem Shipping (Hong Kong) Ltd.*, [1976] 1 All E.R. 78 (P.C.).

Appropriate articles of the Single Negotiating Text on the marine environment are given.

The heated debate about Canada's attitude to Arctic waters is illustrated in all its ramifications. Six years have passed since the introduction of the Arctic waters bill in Parliament and the debate has now been transferred to the Third Conference on the Law of the Sea where Canada continues the fight for special status of Arctic waters. There is a long bibliography followed by a description of the Arctic Waters Pollution Prevention Act, 1970. There are statements of the Canadian and United States positions on the subject of Arctic waters. The text of Canada's reservation to the jurisdiction of the International Court of Justice filed with the United Nations in 1970 is reproduced.

The volume also deals with the question of transboundary air and water pollution between Canada and the United States and refers to the Helsinki Rules (1966) with respect to the pollution of international drainage basins. The role of the International Joint Commission in the solution of pollution problems is covered.

Tensions arising out of the battle for the conservation of the living resources of the sea are mirrored in the extension of the Canadian territorial sea to twelve miles and the controls set out in the Coastal Fisheries Protection Act and the Fisheries Act as well as in numerous bilateral and multilateral fisheries treaties to which Canada is party. Relevant legislation and conventions are noted. The book includes a long paper on the living resources of the sea presented in 1972 by the Canadian delegation to the United Nations Committee on the Peaceful Uses of the Seabed and the Ocean Floor Beyond the Limits of National Jurisdiction. Reference is made to the preservation of the living resources of the air, endangered species of animals and plants as well as the conservation of polar bears, international conventions having been adopted on these subjects.

The law of treaties occupies 159 pages of the book. This is not surprising given the Canadian pre-occupation with the constitutional problems inherent in treaty implementation and the impact of the Vienna Convention on the Law of Treaties (1969) on many aspects of treaty-making.

Over the past half-century, there has been a steady output of writing on the treaty-making power in Canada arising out of Canada's emergence as a treaty-making power, the disappointment over the curbs imposed by the *Labour Conventions* case⁸

⁸ *A.-G. for Canada v. A.-G. for Ontario*, [1937] A.C. 326, [1937] 1 D.L.R. 673 (P.C.).

on the implementation of treaties, and the differences of opinion between the federal and Quebec governments in the 1960s about the power of provinces to negotiate and enter into treaties. Hence, the part of the volume on treaties begins with a rich bibliography. As the part unfolds, and the various topics are discussed through extracts from government publications and the writings of commentators as well as through notes of Professor Castel, skilful use is made of the provisions of the Vienna Convention which are included in the part at appropriate places. That there is no lack of variety in the types of treaties is evidenced by a statement of A. E. Gotlieb to the effect that between 1907 and 1967 Canada used no less than thirty-seven types of agreements in entering into treaty relationships, although, since the Second World War, the greater percentage of Canadian bilateral treaties has been in the form of exchange of notes.

The Federal-Quebec conflict over the power to make agreements is reflected in extracts from the publication *Federalism and International Relations* (1968). A more recent development is found in the Quebec Intergovernmental Affairs Department Act, (1974) which contemplates the ratification by Quebec of international treaties or agreements in fields within the constitutional jurisdiction of that province.

The process of treaty-making is given full treatment and even includes examples of a resolution of the House of Commons approving a treaty prior to ratification by Canada, and an order-in-council authorizing the issuance of an instrument of ratification.

The language and authenticity of treaties is of more than passing interest to a country that has two official languages. This topic is examined through the writings of A. E. Gotlieb, whose definitive work on treaty-making by Canada⁹ is liberally used by Professor Castel, and the relevant provisions of the Vienna Convention.

The familiar subject of the implementation of treaties in Canada is given extended treatment along with summaries of the *Aeronautics*,¹⁰ *Radio*,¹¹ *Labour Conventions*¹² and *Johan-*

⁹ Canadian Treaty-Making (1968).

¹⁰ *In re the Regulation and Control of Aeronautics in Canada*, [1932] A.C. 54, [1932] 1 D.L.R. 58 (P.C.).

¹¹ *In re The Regulation and Control of Radio Communication in Canada*, [1932] A.C. 304, [1932] 2 D.L.R. 81 (P.C.).

¹² *Supra*, footnote 8.

*nesson*¹³ cases on which several generations of law students have cut their constitutional teeth. Professor Castel points out that, generally speaking, international agreements signed and ratified by Canada which are not self-executory cannot have the force of law until their provisions are implemented by federal or provincial legislation or by executive or administrative action.

Other items covered by the part on treaties include interpretation, amendment and modification, invalidity, termination and suspension of operation, state succession, state responsibility and the outbreak of hostilities.

The next topics considered are state responsibility and international claims. As the developing countries fight for their place in the economic sun, United Nations bodies have witnessed the battles of the "Group of Seventy-Seven" (numbering by now well over 100), which have culminated in numerous resolutions on permanent sovereignty over natural resources. This is a subject not without interest to Canada with its huge resources exploited through the use of foreign capital and expertise. On the other side of the coin, Canadian based multinationals are also seen to be present in other countries. Six of the United Nations resolutions on natural resources are reproduced.

As to the subject of international claims, reference is made to the Gut Dam Claims arbitration and settlement, dealt with earlier in the volume under the heading of The Great Lakes.

The Barcelona Traction, Light and Power Limited case,¹⁴ which consumed so much time of the International Court of Justice from 1958 to 1970, is given as one example of international litigation respecting an uncompensated taking of a Canadian interest, Barcelona Traction being a Canadian company with a large number of Belgian shareholders.

The difficult case of *Greenpeace III* which, while in a *zone de sécurité* established for the purpose of nuclear tests, was boarded by French seamen, is traced from 1972 through to September 1974.

There is a lengthy note in which Professor Castel explores the question of the amount of compensation to be paid by a state for the expropriation of property belonging to aliens. He points

¹³ *Johannesson v. The Rural Municipality of West St Paul*, [1952] S.C.R. 292.

¹⁴ I.C.J. Rep. 1970, p. 3.

out that public authorities in Canada have paid full compensation to domestic as well as foreign owners in the case of expropriation or nationalization of their property on the basis of "value to the owner". However, he feels that public international law regarding foreign expropriation will probably best be asserted by treaty commitments of as many countries as possible, on both a bilateral and multilateral basis.

After looking at the act of State doctrine as stated in *Banco Nacional de Cuba v. Sabbatino*,¹⁵ where the United States Supreme Court refused to question the validity of Cuban nationalization decrees, Professor Castel shifts to the Canadian regulation of foreign investment in Canada. He examines this item in the light of such topics as constitutional jurisdiction, the constraints of international law, rules against confiscation, enforcement on the international level in the case of breaches involving injury of a state (through injury to one of its nationals) and enforcement on the municipal level. Professor Castel states that even if legislation for the regulation of foreign investment can be framed in such a way as to be non-discriminatory, care must be taken to meet the minimum international standards relating to compensation. There are some brief comments on the Gray Report, followed by extracts from the Foreign Investment Review Act, 1973.

Other subjects covered under the heading of state responsibility include Canada and multinational enterprises, the protection of Canadian foreign trade and investments, the international protection of trade and commerce, the problem of imputability, the passive subjects of international responsibility, the exhaustion of local remedies, the waiver of diplomatic protection (The Calvo Clause), defences and the duty to make reparation, and the nature and measure of damages.

The last part of the book concentrates on the pacific settlement of international disputes and covers in useful fashion the settlement machinery of the United Nations, as well as other forms of settlement, including the adjudication of international disputes by arbitration and through the International Court of Justice. This part of the book omits the materials on forcible or coercive means of settlement contained in the first edition. It demonstrates that the first edition is still a valuable possession if only because it contains material that had to be sacrificed in the interests of economy in producing the latest edition.

¹⁵ (1964), 376 U.S. 398.

The book contains a selected bibliography of Canadian source material, a table of cases, a good index and an excellent table of contents.

By performing the labour of love evidenced by his *International Law*, Professor Castel has placed in his debt a wide range of judges, academics, government officials, legal practitioners and students for all of whom the book will be an indispensable guide in finding their way through the increasingly complex maze of public international law. The book is a tribute not only to Professor Castel's own talents of organization and scholarship, but also to the state of maturity now reached by Canadians in the field of public international law since, without the extensive writing on the subject by Canadian scholars, judges and government officials in recent years, it would have been impossible to prepare a book on public international law with such a high Canadian content. Acquisition of the book should be a matter of priority by all those interested in having available a sound presentation of cases and materials on international law with a heavy emphasis on Canadian sources.

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The United Nations and Economic Sanctions Against Rhodesia.

By L. T. KAPUNGU. Toronto: D. C. Heath and Co. 1973. Pp. xiv, 155. (No price given)

The United Nations sanctions against Rhodesia have not succeeded. The Smith regime carries on and looks about as secure as any government in the world, albeit behind a growing police network needed to combat nascent guerilla activity in rural areas. All the while, Idi Amin Dada and Angola provide further evidence for those who argue that the white regime in Rhodesia is better than what might replace it if Smith goes away. Will the sanctions wither away, or will someone simply declare the whole charade over?

This book and another recent publication¹ offer a comprehensive legal analysis of the United Nations' first and only real effort at imposing sanction under chapter 7 of the Charter. With much documentary detail, they tell us what we could have known from the beginning — in an imperfect and disunited international

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¹ R. Zacklin, *The United Nations and Rhodesia: A Study in International Law* (1974).

world, any sanctions system is only as strong as its weakest links. In the Rhodesian case, the weakest were very weak indeed. Portugal and South Africa were willing allies; France, the Netherlands, the United States, Switzerland and West Germany, to name only a few of the great trading nations, were indifferent or supportive.

The fundamental question which remains to haunt us is — would the Organization be better off if the sanctions had never been employed? To have stood idle in face of the unilateral declaration of independence in 1965, would have opened the United Nations to a charge of indifference, and uselessness. There at last was the opportunity to act boldly and erase the bitter memory of failure of the League's sanctions against Italy following the invasion of Ethiopia. But now that the sanctions against Rhodesia have failed, we can ask whether or not a more realistic appraisal of the situation would have spared the United Nations the ignominy of futility.

I suggest that the Rhodesian experience is a valuable lesson for us — it is better to develop gradually but meaningfully, than to take the big step only to fall back again to the beginning. The lesson has not been learned — the United Nations and some of the specialized agencies have engaged in far sillier exercises in the last few years. The organizational response to the Middle East crisis has paralyzed the United Nations and United Nations Educational, Scientific and Cultural Organization, and threatens a significant number of the other international institutions. Realism has given way to idealism and brinksmanship, and in the final analysis we will all be the losers.

Kapungu considers the United Nations sanctions as really British sanctions against Rhodesia. Having failed to prevent independence by themselves, the British turned to the United Nations for assistance in quelling the rebellion. This optic misses the central point. In adopting the British cause, the Security Council made it its own. Here was the opening into the world of the 1970's and the North-South confrontation. The United Nations could not pass up the opportunity to test its muscle against this brutal last fling of white imperialism in Africa. The failure of the sanctions reflects on the Organization and must leave us all wondering whether chapter 7 of the Charter (which is the United Nations' mandate to act in the face of a threat to the peace, breach of the peace or act of aggression) has any validity in today's world.

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The Philosophy and Method of the Law. Revised Edition. By EDGAR BODENHEIMER. Cambridge, Mass.: Harvard University Press. 1974. Pp. xii, 463. (\$15.00 U.S.)

Books on jurisprudence fall into many categories, recalling to mind the classification of Polonius in respect of plays, particularly his catch-all hyphenated conjunctions. Some are original works, attempting to put forward the author's, presumably new view of the jurisprudential universe. Others have the intention of inculcating a specific outlook on the law which serves a particular philosophical, or political purpose or system. Still others are books that analyse the writings of different jurists or legal philosophers, perhaps comparing them, or even synthesising their views. Finally, there are those which endeavour to analyse the nature and functioning of the legal system, or the way in which the law operates, concentrating more, even if not exclusively, upon legal concepts pertaining to the creation of law and the way law is applied once it has been created. Professor Bodenheimer's stimulating and interesting book is a work which Polonius would have had to describe with the help of a hyphen. It seeks to do several things. Part I is about legal philosophy and philosophers, treated for the most part historically. Part II is about the real nature and function of law. Part III analyses the sources and techniques of law. All that is missing (though some aspects of this are introduced in the course of the main discussion) is some exposition and consideration of basic legal concepts, such as rights, duties, jural relations, and so on. But this omission is probably justified, given Professor Bodenheimer's concept of "jurisprudence" (a term which, as already suggested, means many different things to many different men and women). Some reviewers take a writer to task for not having written the book they, *the reviewers*, thought ought to have been written, or was within the scope of the author's intentions. Such reviewers are unworthy of any serious reader's, or author's attention. They are not reviewing the book before them, but a phantom book that exists only in their own imaginations (and which perhaps *they* should write, if they think it is a book that ought to be written). Accordingly, I am not going to subject Professor Bodenheimer to what some reviewers fondly regard as "merciless" criticism, because I might take a different view of the nature and function of Jurisprudence (as contrasted with Law). I shall attempt to discuss the book that Professor Bodenheimer *did* write (and, if one may say so, wrote very well).

The first part of this book is devoted to what the late Professor Wolfgang Friedmann expounded in his book *Legal Theory*.¹

¹ (5th ed., 1967).

In 168 pages, Professor Bodenheimer attempts, sometimes in paraphrases, sometimes by quotations, to précis the thoughts of legal philosophers and writers from Plato and Aristotle down to modern natural lawyers such as Stammler, Del Vecchio and Duguit in Europe, and, in America, Lasswell, Hall, Rawls, Ehrenzweig and Northrop (whose views on the interrelation between law and modern science are akin to those of the late Professor Brett, whose last work I discussed recently in the pages of this *Review*).² The earlier chapters, valuable as they are in context, and in respect of their critical analysis, do not contain as much as the pages of Professor Friedmann: it would be foolish to think that they might, given the comparative proportion of Professor Bodenheimer's book devoted to these areas, and the nature of Professor Bodenheimer's book as compared with that of Friedmann. However, they do provide the intelligent student (or "layman") with a fair account of the different ways in which law has been treated and regarded by thinkers, whether lawyers, politicians, philosophers, moralists, theologians or others, since man first began thinking seriously about law and its role in the world: and what is said therein provides the basis for much of the discussions in the rest of the book. For me the last chapter in the part, dealing with the revival of natural law theories, was the most awakening, since it deals with very modern developments, and extremely modern, contemporary writers, who have not always been well-explained elsewhere. It is in the very last section of this chapter, entitled "Concluding Observations",³ that the core of the discussion is to be found. In this Professor Bodenheimer tries to hearten the student, whether lawyer or layman, who might be discouraged by the multiplicity of theories of law, their mutual antagonism, and the resultant uncertainty, indeed perplexity that genuinely and understandably flows from reading, or reading about their ideas. How can man ever hope to come to grips satisfactorily and conclusively with the essential nature, quality, purpose and meaning of law, if so many minds have been incapable of arriving at any concluded, agreed interpretation and comprehension of these matters? He points to the value of all knowledge and truth, and suggests:⁴

As the range of our knowledge increases, we must attempt to construct a synthetic jurisprudence which utilizes all of the numerous contributions of the past, even though we may find in the end that our picture of the institution of law in its totality must necessarily remain incomplete.

² (1976), 54 Can. Bar Rev. 220.

³ Pp. 162-168.

⁴ P. 163.

In other words, while we are not expected to complete the work, and indeed may never do so, we must not desist from attempting to carry it on. Hence, to Professor Bodenheimer, all theories of law have value and may help in describing and explaining the phenomena of law. Some of those theories may have been influenced, perhaps even dictated, by the spirit and problems of the age in which they appeared, witness, for example, Hobbe's views in the light of the English Civil War, some of the modern natural law theories in the light of Fascism on the one hand and the opposition to Fascism on the other. So, not only is law the product of the age: so, too, is thinking about law, or legal theory. Perhaps not a startling, or novel point: but certainly one worth making, and worth making clear. Perhaps what is wrong today, the reason why, maybe, there is a "crisis" in jurisprudence — if one may put it that way — is because we do not have any strong enough spirit of the age capable of producing, or even influencing the nature, scope and direction of legal thinking. There is plenty of legal reform that is mooted, written about, discussed, and even legislated. But not a great deal of solid, fundamental thinking about the basics of law and legality. Yet, as Professor Bodenheimer amply illustrates, there are many men writing today about such matters, in America and Europe. Is our society too diffuse intellectually to result in any underlying trend in legal thought? Have we exhausted ourselves? Is this part of the more widespread malaise in thinking which manifests itself in political and economic theory as well as legal?

I leave these questions unanswered. They cannot be laid at the feet of Professor Bodenheimer, whose purpose in the remainder of the book is less ambitious. He is concerned, as he makes clear,⁵ not to discuss all the numerous subjects and issues which may properly be said to fall into the domain of jurisprudence, but to adopt a selective approach to the problems of jurisprudence. Hence his concentration on "those aspects and characteristics of the law which seem to warrant special attention and privileged consideration in our own time". There can be no quarrel with that: nor, indeed with the sort of selection he has made.

In Part II, Professor Bodenheimer analyses what are to him the essential ingredients of law: order and justice, a discussion which leads to their synthesis in this form: "law aims at the creation of a *just societal order*."⁶ That statement comes at the

⁵ P. 168.

⁶ P. 247. Author's italics.

beginning of a chapter concerned with the synthesis of order and justice which follows on a more detailed inquiry into the concept of, and need for order, and the various aspects of justice. Justice is contrasted with natural law, freedom, equality, security and the common good. Justice is seen to be, in part at any rate, irrational, or to put it differently, incapable of rational analysis or discussion. But justice, however in the end it is defined or understood, must be an essential part of what is enshrined in the notion of law: else it is not law. This comes out even more clearly in the pages in which the author considers the interrelation of order and justice, the need to combine stability and change, the imperative and societal elements of law (in other words the compatibility of "government", in the general rather than specific sense, and acceptance by society at large of law and laws). This, naturally, leads on to a discussion of how legal forms possess or acquire validity, and the whole question of sanctions. It becomes clear from Professor Bodenheimer's discussion that sanction is not an essential ingredient of law, but that sanctions are an aspect of law. Hence international law is properly deserving the appellation law, even though it may be imperfectly observed in a primitive stage of legal development, because of such lack. In the penultimate chapter of this part, the learned author compares law with other "agencies", as he calls them, of social control. Perhaps the term "agencies" involves some ambiguity. What he means is a reference to other sources of human regulation, such as custom or morality (the section dealing with which is a very illuminating one, which ends with a reasonable compromise statement as to the relative functions of law and morality, and their overlap). Once that possible opening for confusion is closed, the passages which compare law with morality, custom, administration and power, are an excellent survey and description of some important, and perhaps misleading ideas. The summation of this discussion takes the form of a comparison of the benefits and drawbacks of the rule of law.

Throughout these chapters, which are, metaphorically as well as literally the core of the book, the language is clear, down-to-earth, common sensical. The ideas expressed are convincing and lucid. Professor Bodenheimer utilizes earlier writers, both classical and modern, to make and illustrate his points: he shows by suitable quotation and skilful use of their own language and their thoughts, how such writers have expounded their views of law, à propos the particular issues, for instance justice, morality, and order, that are being examined at the time. In this way the author brings into focus and infuses practical meaning into the

summaries of the philosophies which were presented, as already explained, in Part I of the book. In this way the reader is enabled to appreciate how the writings of those who were referred to earlier (as well as others who may not have been expounded in such detail) become relevant to the very practical and important jurisprudential issues of our time, and indeed of all time. Thus the reader is presented fairly and squarely with the critical interplay of different ideas and differing viewpoints on such vital matters. He can understand more readily and clearly where some of the great legal thinkers of the more remote, as well as more immediate past, and those of today, have enunciated opposing, conflicting, qualifying, or otherwise irreconcilable opinions. Professor Bodenheimer does from time to time suggest certain conclusions or views of his own. But he is perhaps more interested in providing a sufficiently clear and informative account of the ideas and concepts which he has drawn out and exposed to examination to enable the reader to obtain guidance from which he can come to some determinations, or at the very least, some tendencies, of his very own. Professor Bodenheimer is neither a polemicist nor a publicist. Although, fairly obviously, he is a rationalist, a humanist, a libertarian and a believer in the fundamental purpose, value and goodness of law, he has no special outlook to promote, beyond the desire to encourage understanding. He is critical where it is necessary, for the purpose of exposing a lack of logic or empirical foundation: he is original, where it is valuable to suggest a particular line of thought or inquiry: he is supportive of other writers, where their words and ideas can be cited or paraphrased to make a particular point or problem clear and instructive. He draws upon many varied sources, legal and non-legal, philosophical and technical, to illuminate and illustrate. There is evidence of much wide reading and deep thought about what is the critical problem of law, at all levels, from the basic to the temporary and ephemeral, from the general to the particular question of the position of an individual litigant, namely, the promotion and support of some generalized, formal, respected and observed rules to govern and regulate society, while at the same time permitting individual justice, and avoiding individual and unnecessary hardship. In some measure this is the legal equivalent of "squaring the circle". Is it also the lawyer's *pons asinorum*?

It is in Part III of the book that we find Professor Bodenheimer's account of the structure and administration of the law. He is concerned to identify and elucidate the formal and non-formal sources of the law, legal reasoning and the judicial tech-

nique. In these chapters he discusses and compares the various ways in which law is created, differentiating legislation, treaties and precedent, for example, on the one hand, from equity, public policy, standards of justice, and custom, for instance, on the other. Some might dispute the sharpness (as well as the contents) of his distinction between formal and nonformal sources: after all, what he is doing is, in effect, defining what *he* means by, or thinks it is appropriate to call, "sources". Irrespective of that, his discussion of these matters is very clear and enlightening. So, too, is his exposition of various methods of legal reasoning, in which he elucidates the differences between formal logical reasoning as applied by the courts, "legal" logic (which is a different thing indeed, as he explains),⁷ and value judgments. He also considers the aims of legal education. Given his views upon the need for the lawyer to be an all-round scholar, it would seem that modern trends towards the shortening of the time for the preparation of lawyers represent a retrograde attitude. We should be doing something in the law schools to foster this breadth of outlook: and if time is of the essence of legal education, then something else must be sacrificed. Would it be too much to suggest that we return to fundamentals, such as contract, tort and property, and avoid such minutiae as tax, estate planning, local government law? Or will this be counter-productive? The comments of Professor Bodenheimer suggest that the debate on legal education is far from settled.

Finally he considers construction of statutes (and separately of constitutions — which should be of interest to the Canadian reader, even if it has no great relevance to the English) and the doctrine of *stare decisis*. In this chapter what is made clear is the importance of the role of the judge in the Anglo-American (and therefore also the Canadian) system. Perhaps it may be stated that some of the comments he makes apply more particularly in the context of the United States of America, with its peculiar constitutional structure and development, than elsewhere. Possibly there are lessons to be learned by the Canadian judiciary from this. Nevertheless, what the author says about the doctrine of precedent, in particular, should remove many misconceptions from the mind of the reader (or if he is a novice in the law, should immunize him from the possibility of being affected injuriously from such misconceptions when they come into contact with his mind). They should also lead to the conclusion that the emphasis on the case-method of teaching law is both

⁷ Pp. 395-396.

unwarranted and misleading. Too much energy has been given over and has gone into the extraction of the *ratio decidendi* of a case. The time has come for a return to the older idea of principles not cases — as Justinian in his time (and Lord Mansfield in his) clearly stated was the vital thing in law!

Summarizing my conclusions, therefore, I found this book, as I did its earlier version, to be a most useful, and well-written account of some of the major issues and problems of jurisprudence. It is informative — and well-informed. It is clearly and attractively written. Something strange occurred, however, in two places,⁸ for which the printers must accept responsibility. It is a pity that this mars the otherwise flawless production of this book. Lines have been omitted thereby rendering the passages in question if not meaningless at least difficult to follow. One very minor point, on which the author can be faulted: when he is referring to “charters of liberty and equality”,⁹ the author mentions Magna Carta, 1215, the Petition of Rights, 1689, and the United States Constitution. It is not too clear whether he is referring to the Petition of Right, of 1628 or the Bill of Rights of 1689. Either would probably have been appropriate in the particular context. For the non-Englishman, no doubt, the confusion is excusable. What is most interesting about this book, however, is that, although the author is an American, and by and large writes from the standpoint of the American lawyer, much of what he says is very applicable to the English legal scene, and *a fortiori*, it may be suggested, the Canadian. Some things do not: as I have indicated earlier. But most do. The universality of jurisprudence or at least the jurisprudence of the common law world, is vindicated.

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Natural Law. By G. W. F. HEGEL. Translated by T. M. KNOX. Introduction by H. B. ACTON. Pittsburgh: University of Pennsylvania Press. 1975. Pp. 137. (\$10.95 U.S.)

In December 1802 and May 1803 Hegel, then in his early thirties, published an essay entitled *The Scientific Ways of Treating*

⁸ Pp. 144, 145.

⁹ P. 237, footnote 3.

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Natural Law, Its Place in Moral Philosophy, and Its Relation to the Positive Sciences of Law. This book is a translation of that essay, effected by Professor Knox, Emeritus Professor at St. Andrews, with an introduction (which at least is slightly more intelligible than the essay itself) by the late Professor Acton of Edinburgh. From the lawyer's point of view it might as well have been left in the relatively decent obscurity of German. Indeed, while no blame in this respect can be attributed to the translator, the English version is as obscure as the German original would be to someone who had no knowledge of that language. Hegel uses words to mean special things (which perhaps are clear to someone familiar with his "system" of philosophy — though not always then, as the late Bertrand Russell, if I am not mistaken, indicated in his *History of Western Philosophy*). Consequently, what he writes is virtually unsusceptible of understanding. Let me cite two examples of this obscurity.

The Absolute is known, according to its Idea, as this identity of differents whose determinate character is to be unity in the one case and multiplicity in the other.¹

Tragedy consists in this, that ethical nature segregates its inorganic nature (in order not to become embroiled in it), as a fate, and places it outside itself; and by acknowledging this fate in the struggle against it, ethical nature is reconciled with the Divine being as the unity of both.²

This essay does not truly seem to be about law at all — at least as anyone understands Law. The nearest it gets to anything remotely connected with law, in my opinion, is when Hegel discusses his somewhat peculiar, feudal, ideas about the structure of society and the various classes which make it up and bear some interrelation.³ Quite possibly, by the use of a "Hegelian" dictionary and much intellectual effort some sense might be derived from what Hegel wrote. But I doubt very much whether, in the long run, the effort would produce anything worthwhile. Even his criticism of Kant's Categorical Imperative (which appears to be a major item in the essay) is effectively destroyed by the writer of the Introduction. And when Hegel does talk directly, or comparatively directly about law, what he says seems incomprehensible and irrelevant to natural law, positive law, jurisprudence, or anything that has something to do with law, laws, legal systems, and so on. For example:

The form of law which is given to the specific *ethos* and which is universality or the negative absolute of identity, lends to the *ethos*

¹ P. 73.

² P. 105.

³ Pp. 35-37, in the Introduction, and pp. 99-104 in the text.

the appearance of something inherently necessary. If the mass of a nation is large, so too is that part of it which is organized in the specific feature of that stage: and the law's consciousness of this large part greatly outweighs the law's unconsciousness of the newly emerging life.⁴

Sic! What is one to make of this and similar sentiments? Some philosophers may have made a contribution by their writings to the understanding of law. It is doubtful whether Hegel ever really did. If so, it was not in this slender essay.

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⁴ P. 129.

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