Extradition To and From Canada. Second Edition. By G.V. LaForest with the assistance of Sharon A. Williams. 
Toronto: Canada Law Book Ltd. Pp. xxv, 289. ($20.00)

When Dr LaForest published the first edition of his Extradition To and From Canada some twenty years ago there was comparatively little true Canadian law on which to base his conclusions. For the main part, Canada’s treaty law in this field was solely that of the British Empire extended to Canada as part of that “entity” or which had become applicable to her by accession. The Canadian content of the law on extradition primarily depended on the jurisprudence of Canadian courts and the administrative practice of governmental departments, both operating within the terms of the Extradition Act of 1877 as amended in 1882. Since then, however, not only has Canada a new Extradition Act, but it has also entered into its own bilateral treaties and is increasingly developing its own law of extradition not dependent on British treaties or practice, although the precedents set thereby have not been discarded and, as such cases as Re State of Wisconsin and Armstrong and Re Commonwealth of Puerto Rico and Hernandez show, in such matters as the definition of political offences at least there is no breach with the earlier English conception.

The new volume is easy to read and answers pretty well every problem the reader, be he student or practitioner, may have on Canadian law and practice in the field of extradition. Dr LaForest is to be congratulated on his good fortune in having selected Dr Sharon Williams as his assistant in the preparation of this volume, for she “was very helpful to me in compiling most of the new material and

1 S.C., 1877, c. 25.
2 S.C., 1882, c. 20.
5 (1972), 8 C.C.C. (2d) 443 (Ont. Co. Ct).
preparing an initial draft of some of the chapters"; and it is at her suggestion that matters akin to extradition, such as wrongful arrest, waiver and deportation have been dealt with in rather more detail, thus making the work rather more comprehensive in scope. It is perhaps unfortunate that neither she nor Dr LaForest thought it necessary to include specific discussion of the problem of extradition in the case of war criminals, although full reference is made to the liability of those charged with genocide and offences against diplomats, none of which is within the political offence exemption, while it is suggested that draft-dodgers are within this exemption as an offence "closely integrated with political acts or events". Traditionally, however, it is submitted that draft-dodgers would have enjoyed exemption, not as political offenders, but as those guilty of military offences, an exemption which appears in the treaties with Austria and the Federal German Republic.

As has been indicated, this new edition gives a comprehensive survey of the law of extradition to and from Canada. Broadly speaking, there is little deviation from the law as it operates in the United Kingdom, even to the question of inter-Commonwealth rendition under the Fugitive Offenders Act, including non-recognition of the political offence exception. Perhaps the main difference between the Canadian and English law of extradition lies in the provision in the Canadian Extradition Act that extradition may be granted even in the absence of a treaty, provided that the Act is extended to the foreign state in question by proclamation, and this was done in the case of the Federal Republic of Germany in 1974. Again, unlike Great Britain, the Act comes into force automatically on the ratification of an extradition treaty, whereas in the United Kingdom an Order in Council is required. Similarly, in Great Britain extradition crimes are limited to those listed in the Act, whereas in Canada extradition is available for every crime listed in the treaty. There is one practical difference in the judicial practice of the two countries to which the book draws attention. Most of the fugitives in the United Kingdom come from Europe, whereas here the majority are fleeing from the United States, "a country with which Canada shares a common language, civilization and system of laws. Such considerations should and do affect judges. One would,
therefore, think that Canadian judges would view the law on the subject in a somewhat more liberal light than their English brethren. Indeed, some earlier cases reveal that Canadian judges are likely to be more liberal when the fugitive comes from the United States than when he is sought by a foreign country [—is this meant to imply that the United States is not in fact a foreign country?]. Yet, particularly over the past two decades, many of the Canadian courts on balance appear to be more prone to technicality than their English counterparts, a fact that may be a product of their relative inexperience with the subject". Nevertheless, it must not be forgotten that as between the two countries there is in fact "a great deal of informal cooperation... that ensures the speedy and efficient operation of the system".

In addition to discussing the substantive law, the learned author has provided a most useful account of the actual procedure that is involved when questions of extradition arise, and this should be of inestimable value to any lawyer called upon to deal with an extradition case. There are also useful appendices giving the texts of the Act and the Fugitive Offenders Act, as well as the British Fugitive Offenders Act together with a list of relevant Commonwealth legislation concerning rendition, and the relevant chapter of the United States Code. Finally, there are lists of the bilateral and multilateral treaties to which Canada is a party, together with the text of the treaty with the United States, and perhaps most interestingly, a table listing all the crimes which appear in the Canadian treaties.

_Extradition To and From Canada_ serves as an example of what can be done to indicate the specifically Canadian approach to particular problems of international law.

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16 P. 184.
17 P. 185.
cultural property, statues, artifacts and documents, that their colonial representatives removed from Burma and India, while it was not until 1978 that the United States restored St. Stephen’s Crown to Hungary. While it is true that in some cases the treasures in question would have perished had they remained in situ, for example, the Elgin Marbles or Cleopatra’s Needle, it nevertheless remains true that the countries to which such items are historically connected now tend to demand them back as part of the national heritage regardless of whether facilities exist for their proper preservation. The problem has now become sufficiently impressive for it to require international recognition with a view to protection of at least those parts of cultural property which may be regarded as belonging to the cultural heritage of mankind.

Professor Williams must be congratulated on having produced the first comprehensive comparative study of the whole problem from the point of view of both international and national law, although she has confined herself to the ravages of war and protection against the clandestine traffic in art. In view of the recent spate of vandalism against works of art, such as the Pieta, as well as portraits by Rembrandt and Van Gogh, and the destruction caused by floods, earthquakes and similar natural disasters, perhaps one may express the hope that at some time she may find it convenient to deal with these aspects of her subject too.

The learned author draws attention to the variety of definitions that have been used in international conventions on the protection of cultural property, some of which appear to be almost wide enough to cover any university library that has a reasonable collection of rare books, or even reproductions thereof, a term which might also include an untold number of private working libraries. She suggests that “‘cultural property’ is that property movable or immovable which possesses a special value due to its prehistoric, historic, archeological, ethnological, artistic or scientific importance. The value is assessed in relation to the property’s importance to the cultural heritage of all peoples”. She goes on to state that “this is the common denominator. From a doctrinal point of view it is submitted that the common heritage of mankind theory constitutes a good foundation for the development of rules of international law in this area. This new trend in thinking which thankfully moves away from the strictly nationalistic approach may well constitute the ground upon which the whole protection system may take root”. In this connection she points out that the Hague Convention of 1954 relating to protection during armed conflict preserves this universalist view, and provides for the establishment of an

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1 P. 2, italics in original.  
2 Ibid.  
3 Pp. 36-37.
international register, while the UNESCO Convention of 1970, since it relates to illicit trading, preserves the traditional concept of national treasures, with each protected item having to satisfy a "connection test" so as to form part of the cultural heritage of the state in question. While one can appreciate the philosophical difference between the two concepts of universal and national heritage, it cannot be ignored that the issue of definition is going to remain highly subjective, as becomes clear from the records of the debates of the Geneva Conference on Humanitarian Law in Armed Conflict, 1974-77, when attempts were made to provide special protection for the cultural heritage of mankind, rendering attacks thereon grave breaches of the Geneva law subject to universal criminal jurisdiction.

From the point of view of the Canadian reader, there are two parts of Dr. Williams' work which are of special interest. In so far as protection under international customary law is concerned, she contends—and the reviewer is not ad idem with her on this point—that in so far as national cultural property is in question, "states are duty bound to protect property and to apply the same minimum standards as they have to apply to foreign property situated in their territory. States are responsible, therefore, in normal circumstances, to the international community for the preservation of cultural property situated on their territories and they have a duty to take appropriate steps to ensure protection and render it accessible to all." Unfortunately, she gives no evidence of the application of rules of customary international law in support of this view, and she herself points out that it was "the twentieth century [which] saw the real birth of the concept of universal patrimony". As to the protection of foreign cultural property, the same difficulties do not arise, for it is well established that a state may be internationally responsible for injury done on its territory to the property of another state or of the national of such a state. This leads, perhaps inevitably, to a discussion of the Polish art treasures brought to Canada in 1940 to avoid their falling into the hands of the German invader. These were placed originally in the federal Records Storage Building at the Central Experimental Farm in Ottawa, and the bulk of them were subsequently removed by the Polish Government-in-Exile to Quebec, the few remaining in Ottawa being returned to Poland in 1948. The remainder stayed in Canada until 1960, to a large extent due to jurisdictional conflicts between the federal government and Quebec, although it cannot be denied that the federal government
was clearly responsible and, as Dr. Williams indicates, had failed to show the "due diligence" required by international law.\textsuperscript{7}

Equally interesting, and perhaps more important from the point of view of the practitioner, is the analysis of the position of cultural property protection under Canadian law, described by Dr. Williams as being "in a state of flux". "There is some national legislation regarding historic sites and Indian artifacts and some provincial legislation protecting historical and archeological sites and objects. It is however, only in the province of Quebec that an Act to protect cultural property and the enforcement of export controls has been enacted. On the federal level, a general law entitled the Cultural Property Export and Import Act has recently been adopted [1975] to protect the Canadian heritage through inventory and export controls".\textsuperscript{8} The control list under the Act applies to articles over fifty years of age, provided their maker is no longer living, and covers all protected cultural items "situated in Canada, without regard to their place of origin or the nationality of their creator".\textsuperscript{9} The government may therefore be faced with similar problems as are others in so far as claims for the return of items of "alien" cultural heritage are concerned as the National Gallery of Canada has already experienced with its Bernini bust of Pope Urban VIII. It is being argued by the Director of the Italian Foreign Ministry's commission for the recovery of works of art that this was illegally exported in the 1960's and should be returned. Under the Act, "the importation of any foreign cultural property that has been illegally exported from its country of origin must be returned. For the purposes of this legislation an official request in writing must come from the requesting government (—and this has not yet come). The point that has been made is that in Ottawa the sculpture stands out in splendid isolation which makes it even more striking than if it were lined up with 'its brothers in Italy'. The Director of the National Gallery feels that this is so. Italy is rich in works by Bernini. . . . The bust . . . as the only example of a Bernini in a public collection in Canada, is very important, and it is felt by the Gallery that it should not be returned to Italy".\textsuperscript{10}

Controversies of this kind are likely to increase, and not only with respect to treasures coming from Europe, for the new countries are becoming increasingly conscious and possessive of their own contributions to mankind's cultural heritage and they frequently contend, often with reason, that these are inadequately represented at

\textsuperscript{7} Pp. 66-81.
\textsuperscript{8} P. 116.
\textsuperscript{9} P. 119.
\textsuperscript{10} P. 127.
home. Dr. Williams mentions a number of possible solutions all
directed to the "realization that works of art in general must be
preserved". No one would disagree with this, but it is feared that
she tends to ignore that, behind the ideology of co-operation that is
put forward, there remains an almost immovable belief in
nationalism and the need to manifest this by local preservation of the
national heritage, regardless of the interests of the rest of the world.
It is really only in time of armed conflict that states clearly become
interested in what is described as the need to preserve and protect
"the cultural heritage of mankind". Even then, however, it is a
selfish approach which maintains that it is one's own treasures that
form part of this heritage, and it may be doubted whether any
military officer is going to be over-scrupulous with regard to the
treasures of his adverse party, or whether any third state will in fact
be prepared to prosecute as war criminals those responsible for
destruction of such cultural properties in belligerent territory.

Professor Williams has produced a fascinating book, which is
easily readable. She has broken ground in a field that merits further
attention, and perhaps her own work may contribute to wider
recognition of the need for proper and enforceable international
protection of cultural property.

L. C. Green*

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L'accession à la souveraineté et le cas du Québec. Par J.
BROSSARD. Montréal: Les Presses de l'Université de Montréal.

Il s'agit ici d'un ouvrage de politique-fiction entamé par l'auteur dès
1964 et dont l'aspect fictif s'est progressivement atténué. Ainsi,
depuis les élections législatives québécoises du 15 novembre 1976,
la sécession du Québec a cessé d'être une hypothèse d'école. Il
apparaît, aujourd'hui clairement que les Québécois, sinon l'ensem-
ble des Canadiens seront bientôt amenés à se prononcer sur l'avenir
de la "Confédération canadienne" comprise dans sa forme présente.

Dans ce cadre, le livre de Jacques Brossard se caractérise
d'abord par une actualité certaine, puisqu'il s'y propose d'étudier les
conditions et les modalités d'un accession possible du Québec à la
souveraineté. Mieux encore, cette étude est marquée par un effort de
systématisation poussé qui atteste de son sérieux. Chaque notion y

11 P. 129.

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est ainsi disséquée et définie. L’auteur corrige par exemple l’erreur commune qui veut que l’accession du Québec à la souveraineté serait le produit d’une “séparation” (terme réservé aux États unitaires), alors qu’il s’agirait en fait d’une “sécession” à l’intérieur de l’État fédéral canadien. De même, cette accession du Québec à l’indépendance serait le fait d’un “détachement” territorial (puisque le Canada demeurerait) et non d’un “démembrement” territorial qui indiquerait la disparition de l’État d’origine.

Ces remarques étant faites, il importe de préciser que le livre de Jacques Brossard est scindé en deux parties ainsi qu’il a été suggéré plus haut. La première partie porte sur les conditions politico-juridiques de l’accession à la souveraineté et se divise elle-même en deux sous-parties. Dans celles-ci l’auteur analyse, tout d’abord, le droit international général relatif à l’autodétermination des peuples et le cas du Québec pour se concentrer ensuite sur l’autodétermination du Québec dans le contexte du droit interne canadien. Cette dichotomie logique à première vue, est cependant la cause d’un morcellement excessif du sujet et parait quelque peu artificielle vu l’enchevêtrement des circonstances politico-juridiques qui entourent l’accession éventuelle du Québec à la souveraineté. Ce morcellement amène d’ailleurs l’auteur à faire de nombreuses répétitions et crée une certaine confusion chez le lecteur; défauts sur lesquels nous reviendrons par la suite.

En ce qui concerne le droit à l’autodétermination et le cas du Québec, l’auteur indique en substance qu’en droit international public, l’idée de nation a été remplacée depuis la deuxième guerre mondiale par le concept plus large de peuple. De même, si sur le plan des concepts une distinction était faite à l’origine, entre le principe des nationalités et le droit des peuples à l’autodétermination, en pratique l’Organisation des Nations Unies (O.N.U.) semble aujourd’hui confondre les deux notions. L’auteur lui-même éprouve quelques difficultés à distinguer la nation canadienne-française du peuple québécois; il en vient ainsi à conclure que les Canadiens-français forment une nation de même qu’un peuple au sens de la Charte de l’O.N.U. et disposent comme tel d’un droit à l’autodétermination. La nation canadienne-française se trouve regroupée territorialement au Québec, de sorte que si elle choisissait l’indépendance (ce qui n’est pas nécessairement l’aboutissement de l’exercice du droit à l’autodétermination), il faudrait que celle-ci se réalise dans le cadre de l’État québécois, A cet égard, l’auteur rappelle les conditions nécessaires à la mise en œuvre du droit des peuples à disposer d’eux-mêmes et vérifie que le peuple québécois satisfait à ces conditions:

—En effet, les Québécois constituent un peuple au sens de la
Charte de l'O.N.U.\(^1\) et de la déclaration de 1970 sur les relations amicales entre les États.\(^2\)

—Le peuple québécois est regroupé sur un territoire clairement délimité qui est en fait l'un des plus vastes du monde; sa population placerait le Québec entre la Suède et la Suisse, soit au 55ième rang environ de la communauté internationale; son économie en fait "l'un des États les plus richesment dotés du monde"; il est également "doté d'un gouvernement structuré et efficace et d'une société hautement développée", de sorte qu'(un) Québec souverain aurait assurément tous les atouts requis pour constituer non seulement un État viable mais un État beaucoup plus sain, matériellement, que la plupart des 135 États qui font présentement partie de l'O.N.U.".\(^3\)

—Sur le plan international, tout laisse prévoir que le Québec respecterait les principes de la Charte de l'O.N.U. et du droit international et "l'on peut même prévoir qu'il le ferait de façon plus réelle que certains autres États".\(^4\)

A ces conditions générales, l'auteur en ajoute d'autres plus particulières aux cas de sécession d'États:

—En ce qui concerne la volonté populaire d'accéder à la souveraineté, il s'agit d'une hypothèse que seule l'issue positive d'un référendum pourrait confirmer, mais l'auteur indique qu'il "est extrêmement douteux qu'un gouvernement du Québec, quel qu'il soit puisse engager le Québec sur la voie de l'indépendance sans s'être d'abord assuré d'un appui populaire suffisant".\(^5\)

—Quant au désir du peuple québécois de faire sécession, il s'explique par une dénaturation du pacte confédératif, laquelle s'est traduite par une "minorisation" du Québec dans l'État fédéral canadien de même que par une centralisation accrue du pouvoir fédéral vis-à-vis du Québec. A défaut du consentement du Canada à l'accèsion possible du Québec à la souveraineté, ces motifs pourraient être invoqués pour justifier le désir d'indépendance des Québécois aux yeux du droit international. Pour faire une analogie avec le droit des traités, on songe ici à une application de la clause *rebus sic stantibus*.

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\(^1\) L'article 1 de la Charte énonce: "Les buts des Nations Unies sont ... de développer entre les nations des relations amicales fondées sur le respect du principe de l'égalité de droit des peuples et de leur droit à disposer d'eux-mêmes ..."

\(^2\) Le principe 5 de la déclaration indique: "L'Assemblée générale, ... proclame solennellement les principes ci-après: ... Le principe de l'égalité de droit des peuples et de leur droit à disposer d'eux-mêmes ..."

\(^3\) P. 191.

\(^4\) P. 194.

A cet égard, l'auteur examine un certain nombre de "détachements" territoriaux qui ont donné naissance à de nouveaux États et qui sont susceptibles de présenter des analogies politico-juridiques avec le cas du Québec. Parmi ces exemples, l'accession de Singapour à l'indépendance présente, d'après l'auteur, le plus de similarités avec la situation québécoise. Par contre, l'auteur conclut pour des raisons qui ne nous paraissent pas évidentes, que le cas du Québec est unique et ne saurait servir de précédent à d'autres tentatives d'accession à l'indépendance. Il faut remarquer, d'autre part, que les analogies étudiées sont toutes plus ou moins liées à la décolonisation, ceci, conformément à l'évolution du droit international (notamment avec la déclaration de 1970 sur les relations amicales entre les États) qui paraît limiter l'exercice du droit des peuples à l'autodétermination aux seules situations coloniales. C'est dans cette mesure que l'auteur replace l'évolution du Canada vers l'indépendance à l'intérieur du processus de décolonisation et analyse la question de savoir si le Québec peut être considéré comme une colonie. À cela, il répond par la négative sur le plan purement juridique mais par l'affirmative sur les plans psychologique, socio-culturel et pratique. La conséquence vient naturellement: il faut que le Québec "grandisse" libre de toute influence étrangère. On pense ici à la formule du philosophe allemand Hegel selon lequel "l'être se pose en s'opposant".

Finalement, l'auteur analyse les conditions nécessaires d'une accession du Québec dans l'optique du droit constitutionnel canadien. En effet, le droit international est insuffisant à justifier celle-ci et même si le succès peut créer la légalité, il vaut mieux compter avec le droit interne pour fonder la validité de la sécession du Québec. Ainsi, la déclaration unilatérale d'indépendance serait inconstitutionnelle au regard du droit canadien. Au contraire, l'accession légale du Québec à l'indépendance devrait prendre la forme d'un amendement global de la constitution canadienne, ce qui nécessiterait l'accord du Parlement fédéral canadien et l'intervention du Parlement britannique.

La deuxième partie de l'ouvrage porte sur "Les modalités politico-juridiques de l'accession à la souveraineté".

Faisant pendant à l'alternative dégagée dans les chapitres précédents, l'auteur envisage trois procédures d'instauration d'un Québec souverain. Il déconseille la proclamation unilatérale qui pourrait entraîner de graves complications sur le plan du droit interne et rendre plus difficile l'obtention de la reconnaissance inter-

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nationale. L'accession à la souveraineté, après une entente de principe avec le Canada, suivie d'une série d'accords au sujet des questions pendantes lui apparaît comme un procédé trop aléatoire, Jacques Brossard préconisé donc «l'étapisme» qui correspond, d'ailleurs, aux préférences de l'actuel gouvernement du Québec: affirmation populaire du principe d'accession à l'indépendance, négociation avec le Canada des ententes destinées à en arrêter les modalités et préparation simultanée d'une nouvelle constitution; enfin, proclamation de l'indépendance après l'achèvement et l'approbation de ces textes. La suite du livre examine ainsi un large éventail des problèmes d'une accession négociée à la souveraineté.

Le premier volet de cette procédure concerne le ou les référendums à tenir. L'auteur distingue alors la consultation ayant pour but d'affirmer le principe d'autodétermination du Québec de celle qui aurait pour objectif de ratifier la nouvelle constitution et les ententes conclues avec le Canada. La première n'aurait qu'un résultat indicatif à l'adresse des pouvoirs politiques du Canada et du Québec. La seconde aurait des effets juridiques directs sous forme d'adoption de la constitution et de ratification populaire des accords de caractère international. Il pourrait s'agir dans les deux cas de textes d'une complexité prononcée, négociés et rédigés par des représentants élus du peuple (membres du gouvernement lors d'une conférence bipartite Canada-Québec, membres d'une assemblée constituante peu nombreuse) et par de nombreux experts. Dès lors, il est permis de s'interroger sur la capacité du corps électoral d'en juger le contenu en pleine connaissance de cause. De surcroît, le recours à une telle consultation n'est, pas sans risque; elle pourrait déboucher sur une impasse dans le cas où des résultats contradictoires seraient obtenus au cours d'une même consultation référendaire au Canada et au Québec. L'auteur prend soin de souligner qu'à son sens la voie consultative électorale ou même l'expression de la volonté des assemblées parlementaires pourraient tenir lieu de référendum. Conformément à la notion de “peuple québécois” déjà définie, le droit de vote lors de ces consultations serait accordé selon les lois électorales en vigueur, le résultat étant acquis par la majorité absolue des votants.

L'auteur est assez laconique quant au contenu de la loi constitutionnelle d'un Québec indépendant et des ententes à conclure entre le Canada et le Québec. Il se borne à énumérer les thèmes qui pourraient être abordés par celles-ci. Le lecteur sera deçu de ne pas y trouver de renseignements relatifs à une éventuelle association économique préconisée aujourd'hui. Une telle association risque pourtant de compliquer et d'altérer singulièrement la notion d'indépendance prônée par l'actuel gouvernement du Québec. Elle pourrait, de surcroît, se heurter à des objections fondées sur la lettre
de l'Accord général sur le tarif douanier et le commerce. L'auteur suggère correctement, par ailleurs, que la sécession négociée du Québec pourrait faciliter son admission aux organisations internationales. Il souligne, que l'obtention de la reconnaissance internationale par le Québec, de même que son admission aux organisations internationales feraient intervenir l'appréciation de l'état des relations bilatérales entre le Québec souverain et chaque État étranger, à la lumière du droit international et des intérêts en cause. Le refus de reconnaître le Québec ne saurait mettre en doute son existence en tant qu'État indépendant, mais il serait susceptible, par contre, de restreindre singulièrement les moyens d'action de son gouvernement et d’hypothéquer, à long terme, l’avenir du nouvel État.

Jacques Brossard, ayant déjà publié plusieurs écrits à ce sujet, traite en détail des composantes de l’État du Québec. Le territoire est examiné dans l’optique de l’identité nécessaire du territoire de la province et de la portion correspondante du territoire du Canada. Cette optique fondée, nous dit-on, sur le droit comparé (par ex. la Suisse) semble difficilement acceptable en droit interne canadien. Si cette identité existait, il s’agirait d’un cas de succession automatique, écrit l’auteur; dans le cas contraire il faudrait recourir à la “succession négociée”. Cette affirmation apporte des précisions: il est vrai que les États se succèdent sur un territoire donné, mais ce territoire ne fait pas l’objet de ce qui est communément appelé la succession d’États. La substitution d’un État à l’autre sur un territoire est antérieure ou concomittante à la succession d’États puisque le territoire constitue un des éléments requis par le droit international afin qu’un État existe et qu’une succession puisse avoir lieu. Cette approche n’élimine pas la négociation, mais celle-ci ne porte dorénavant que sur les litiges territoriaux et non sur le transfert du territoire d’un État à l’autre.


En ce qui concerne les frontières maritimes, l’exposé est hésitant quant aux faits et semble, parfois, erroné en droit. L’auteur ne se prononce pas clairement au sujet du statut juridique des eaux de

la baie d’Hudson et du golfe du St-Laurent. Les dispositions législatives et les déclarations gouvernementales fédérales qualifient pourtant les deux comme faisant partie de la mer intérieure. La province de Québec n’a point de compétence territoriale sur les eaux de la baie d’Hudson en raison du tracé de la frontière qui suit la côte. Elle en a, par contre, sur une partie du golfe, d’après les règles énoncées dans l’arrêt Re Dominion Coal and County of Cape Breton, et confirmées par l’avis The Ownership of Off-Shore Mineral Rights. L’auteur critique sévèrement cet avis à cause de sa prétendue incompatibilité avec des jugements étrangers portant sur le même problème ainsi qu’avec le droit international. Les motifs de cette sévérité sont passés sous silence ainsi que l’effet conjugué de cet avis et du droit international en vigueur: un Québec indépendant incorporerait à son territoire, de plein droit, des portions de la baie d’Hudson et du golfe du St-Laurent qui correspondaient alors à l’étendue décrétée de sa mer intérieure et territoriale. Ce même principe s’applique aux droits sur le plateau continental. Il n’en demeure pas moins vrai que des négociations seraient nécessaires seulement en vue d’une délimitation des espaces susceptibles de faire l’objet de revendications simultanées des Etats voisins.

Les développements que l’auteur consacre à la population traitent séparément des nationaux et des étrangers. Quant aux premiers, il envisage naturellement une citoyenneté distincte qui ne serait pas nécessairement conférée à tous les citoyens canadiens résidant au Québec ainsi qu’un droit d’option régi par des ententes à conclure. Ces ententes ne paraissent pas nécessaires à cet effet: au lieu d’une option la population pourrait disposer d’un “droit de retour” à la citoyenneté, conforme au droit international et pratiqué, par exemple, en Israël et en Allemagne. On remarque aussi, dans la section consacrée à la protection des minorités, que Jacques Brossard est en faveur des garanties de certains droits linguistiques plus étendus que les dispositions de la Charte de la langue française actuellement en vigueur.

Les pouvoirs publics font l’objet de plusieurs chapitres distincts. L’examen des institutions est précédé par une section consacrée au remplacement d’un ordre juridique par un autre. La préférence de l’auteur sur ce plan va vers la disparition automatique du droit de l’État prédécesseur. L’État-successeur en maintiendrait, par décision expresse, une partie compatible avec la nouvelle constitution. Cette solution est certainement logique, mais l’expérience montre que, pour des raisons pratiques, on procède le plus souvent dans l’ordre inverse: abolition expresse de certaines

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8 (1963), 40 D.L.R. (2d) 593.
normes incompatibles avec le nouvel ordre juridique et maintien en vigueur implicite d’autres normes jusqu’à leur remplacement par la nouvelle législation. L’auteur en tire plusieurs conclusions, incontestables du point de vue du droit constitutionnel et ayant trait au transfert de l’ensemble des compétences législatives et exécutives au Québec. On constate cependant à cette occasion que l’auteur ne prend pas position sur la question du remplacement de la monnaie canadienne et qu’il passe sous silence le projet d’une union monétaire avec le Canada. Il est, par contre, très affirmatif à l’égard des élus, des fonctionnaires ainsi que des juges et des tribunaux relevant de la législation fédérale pour lesquels la sécession signifierait une brusque fin des fonctions. Le lecteur peut se demander si cette opinion correspond parfaitement à l’approche de continuité pratique dont l’auteur faisait état auparavant: mème en tenant compte de son animosité non dissimulée à l’égard de la Cour suprême du Canada et la nécessité du remplacement à terme de l’appareil judiciaire canadien, on devrait convenir que la justice fait partie des secteurs où la transition devrait être particulièrement ménagée. Si tel est le cas, on comprend mal les conclusions de l’auteur selon lequel toute décision des tribunaux relevant du droit fédéral ne serait, après l’indépendance, exécutoire qu’à titre de jugement étranger, même si ces tribunaux et leurs juges étaient encore les seuls compétents pour trancher des litiges en cours.

La dernière partie de l’ouvrage traite de la succession d’États proprement dite. L’auteur y brosse un tableau d’ensemble de la question en tenant compte des travaux de la Commission du droit international. Il établit une nette distinction entre l’obligation, fondée sur le droit international général, de succéder à certains traités conclus par l’État prédécesseur (par ex. les accords relatifs au statut d’un territoire) et le caractère habituellement consensuel de la succession d’État. A ce dernier propos, il relève également certaines disparités dans la pratique internationale: dans les cas d’émancipation coloniale, la rupture est souvent très prononcée tandis que les sécessions négociées accusent une relative continuité de l’ordre juridique. L’auteur opte évidemment en faveur d’un accord de dévolution qui stipulerait la succession aux obligations internationales du Canada. Il distingue également le régime des accords bilatéraux de celui des conventions multilatérales, ces dernières comportant souvent leurs propres règles en matière de succession que l’État-successeur doit suivre, quelle que soit son attitude à l’égard de leur continuation.

La succession à l’actif et au passif de l’État-prédécesseur obéit à des principes qui paraissent simples, mais qui se révèlent difficiles à appliquer. L’auteur constate correctement que la succession est globale quant aux biens publics de l’État, mais il complique le
problème en parlant des compagnies d’État canadiennes: s’il est clair que le Québec hériterait de leurs biens situés dans la province, il semble superflu de traiter de leur capital social sachant qu’en vertu des lois correspondantes leurs sièges sociaux doivent être localisés sur le territoire du Canada et que leur capital social ne peut appartenir qu’aux citoyens canadiens, voire au gouvernement du Canada. Les ententes à ce sujet ne sont pas exclues, mais il ne s’agit plus du droit international général. D’autre part, l’auteur fait quelques remarques fort judicieuses sur le partage des archives publiques et des collections de trésors d’art nationaux.

Quant à la succession au passif, l’auteur a manifestement de la peine à accepter l’idée que l’État doit assumer une part proportionnelle de la dette contractée par l’État prédécesseur dans l’intérêt général du pays. Il en fournit pourtant une justification fort simple, il cite l’avis de la Commission du droit international ainsi que plusieurs précédents. L’auteur accepte toutefois la succession à la dette localisée ainsi que celle qui est due à des engagements contractuels, du moins jusqu’au moment où le nouveau législateur pourra prendre position à ce sujet.

Finalement, un certain nombre de remarques s’imposent en ce qui a trait aux qualités et défauts de l’ouvrage sous étude. Ainsi que nous l’avons déjà indiqué, l’étude des conditions politico-juridiques de l’accession du Québec à l’indépendance pèche par son morcellement; celui-ci reflète de la part de l’auteur un effort louable de traiter la question sous un angle scientifique, mais il semble que cet effort nuise dans une certaine mesure à l’ouvrage; en effet d’une étude trop nuancée résulte une certaine confusion à l’égard des conclusions que le lecteur peut tirer de cet ouvrage. Il faut noter d’ailleurs que cette confusion ne saurait être dissipée par l’affirmation répétée de l’auteur qu’en matière d’accession à la souveraineté, les faits priment le droit et peuvent rendre légal ce qui ne l’était pas à l’origine ou vice versa. En effet, malgré une tentative appliquée de l’auteur de prévoir un calendrier des événements qui pourraient conduire le Québec à la souveraineté, il démeure que l’on ne saurait prévoir exactement la course du futur. De la sorte, la deuxième partie du livre apparaît au mieux comme la “recette” d’une accession “parfaite” du Québec à la souveraineté. Il faut noter également un effort de la part de l’auteur d’atteindre le plus grand nombre de lecteurs possibles par une vulgarisation des problèmes que pose l’accession du Québec à la souveraineté. Il s’agit, une fois de plus, d’une tentative fort appréciable mais dont on peut se demander si elle ne conduit pas parfois à une analyse trop simple pour le juriste et pourtant trop complexe pour le profane. De plus, on ne peut que regretter l’insertion trop fréquente de citations en anglais à l’intérieur d’un paragraphe et l’utilisation d’un système
de références peu pratique qui renvoit le lecteur à la fin de chaque chapitre et de là, à la bibliographie en fin de volume. Pour un ouvrage de cette envergure, les références nous ont d'ailleurs parfois insuffisantes. On peut également relever un certain nombre de carences de la part de l'auteur. Par exemple, il faut noter l'importance des lettres patentes de 1947 dans l'évolution du Canada vers l'indépendance. Aux sources du droit constitutionnel canadien mentionnées dans l'ouvrage, il faut ajouter les lois provinciales adoptées dans le cadre de l'article 92(1) de l'Acte de l'Amérique du Nord britannique et il faut mentionner que si le Québec est bien baigné par deux océans ainsi que l'affirme l'auteur, il n'a pas d'accès direct à la haute mer.

Enfin, il semble que les événements aient déjà dépassé les idées de l'auteur à certains égards: le gouvernement du Québec fait d'une éventuelle association avec le Canada et d'une étatisation progressive de l'économie provinciale les deux fondements de la future indépendance du Québec. Le livre de Jacques Brossard signale à peine ces deux thèmes. Dans ces circonstances, il ne saurait être considéré comme une indication de ce que sera l'avenir de la province de Québec.

Cependant, malgré les quelques lacunes qui ont été notées ci-dessus, nous nous devons de remarquer l'intérêt évident que l'ouvrage de Jacques Brossard présente pour quiconque désire, à la fois, mieux comprendre la situation actuelle du Québec face à la "confédération" canadienne et analyser clairement ses développements futurs.

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In late 1972 the Association of the Bar of the City of New York decided to hold a series of symposia "devoted to an examination of certain ethical considerations, disciplinary rules and difficult

10 30 & 31 Vict., ch. 3 (R.U.).

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practical questions involving the professional responsibility of lawyers". The meetings began in early 1974 and ran through to the spring of 1975. This volume includes the minutes of those meetings along with lengthy appendices made up of codes of ethics, statements of principle and constructions of the various canons and rules of conduct. Of course, over the period of these discussions the lawyer-President Richard Nixon and his palace guard were under siege and ultimately toppled on account of their collective illegalities. Those visiting American law schools then will remember the anguished guest lectures on lawyers’ morality given by such distinguished speakers as Ramsay Clark and Erwin Griswold (former United States Attorney General and Solicitor General respectively). Meanwhile the law deans were hurriedly running up new and improved courses on legal ethics so as to hastily refurbish the moral fibre of the graduating classes. Thus, all at once the area of concern in the United States shifted from lawyers’ liabilities to lawyer’s responsibilities. In Canada today we remain consumed by the former.

The chapters, in order, deal with some of the ethical dilemmas peculiar to practice in the area of tax, corporate, criminal, family, governmental and estate planning law. The problems faced by the litigator and the moral role of the law schools make up the remainder of the text.

The speakers first addressed the question of whether the lawyer owes his tax client full advocacy to the detriment of whatever responsibility he might owe to the government. This was resolved by agreement that the taxpayer and the lawyer preparing his return are entitled to resolve all doubts in favour of the taxpayer provided that there is at least a respectable argument in his favour and provided that the transaction is fairly reported. But the experts were less clear on whether or not the lawyer ought to flag a doubtful deduction for consideration of the revenue officers or whether the lawyer owed a duty to report where the client persisted in indulging in sharp practice with regard to such as entertainment expense deductions. To these questions there were as many answers as there were speakers.

In the discussion of corporate matters there emerged a consensus that the Bar Association had the duty to set minimum standards for practice and to set objectives and aspirations for the

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1 P. vii.

2 See: National Conference on Teaching Professional Responsibility (ed. Goldberg, University of Detroit, 1977) and citations therein to books and articles aimed at these new courses.

individual lawyer and so to protect him from the blandishments of the aggressive business client. In such a way they fudged the question of conflict of loyalties where the lawyer becomes a director of a corporation, at the invitation of a valued client, and then discovers violations of the securities legislation. At that point, who is his client? What are his duties to the corporation, the corporate officers, the shareholders and the government? The duty to report was also left unclear.

The criminal law seminar is probably the best of the eight. Good questions were asked and contradictory answers were forthrightly given. For example: is it proper to give your client legal advice when you have reason to believe that the knowledge you give him will tempt him to commit perjury? The responses varied between prompting the client, bearing in mind his problems of accurately reconstructing the past, and withholding all information as to the law which might encourage tailoring of the facts. Again: is it proper for the prosecuting lawyer to negotiate a plea of guilty without disclosing to the defence that there is a serious weakness in the provability in his case because of the unavailability of a material witness? Here all were agreed that the duty is determined by the degree of belief of guilt of the accused held by the prosecuting lawyer. And lastly: what should be the response of the defence lawyer when asked by a client, accused of a serious crime, for the names of three or four other jurisdictions which would be least likely to extradite the accused. This provoked a clash between those who, as officers of the court, would withhold the information and others who, seeing themselves as legal resources of the client, would answer any legal question posed by the client which would aid his decision-making.

The material on family practice, like that on lawyers in government service, is weak. In the former questions are asked whether or not lawyers love the battle too much to be really concerned with effective and humane settlements of clients' problems and whether lawyers ever truly pursue the child's best interests when in fact they are hired to get hold of or to retain the child in dispute. In regard to government service the spokesman makes the point that it is possible to enter government service in the United States and to return to private life without passing through jail in the interim. He emphasized that the government-employed lawyer should not shrink from rocking the boat and should bear in mind that his loyalties lie to the public and not to politicians nor to the members of the clubhouse.

In the next to the last chapter a distinguished judge points up the all too usual abuses of the court system by litigators who mercilessly use the "shot-gun" approach in multiparty suits, who press
unmeritorious claims for the nuisance settlement, who advance unfounded defences; who continually delay trials by unsustainable objections and who are most times unprepared. The speakers reiterated the four duties of the trial lawyer: to his client, to the Bar generally, to the court and to society at large. No more immediate panaceas were offered.

The final chapter deals with the law schools, contribution to goodness in lawyers which is relevant to all Canadian law schools that have gone through or are going through major curricular reform. It is admitted that law students learn primarily from their families, their social life and through primary and high school and immediately in college. That being so, by the time they reach us in law school they can be divided roughly into three categories: (a) those of moral character who require no training because their correctness of judgment is instinctive, (b) those who no matter what they are taught will always be opportunistic and wholly self-centred, and (c) the great mass, who can be saved by appropriate training and example.

Therefore the law schools, by the structuring of ethics components in all courses and by the choice of appropriately qualified staff can show that adherence to the set standards is in the students' best interests and is vital to a distinguished and rewarding legal career. This requires eschewing adulation of trickery, the crafty and other sharp practice. If this is to be done efficiently then it may be necessary to set up courses in professional responsibility for instructors rather than for students and to bring sanctions to bear against the unrepentant cynic, the cavalier and the uncommitted teachers for their confirmation of nascent lawyers in their amorality. On the other hand, it may be that the most crucial period in the formation of the young lawyer's morals is his first two or three years in practice wherein the vital influences are the advice and example of his seniors at the Bar, which hopefully will accord with the perception of practice taught in the law schools.

In brief, the material in the volume poses some of the right questions and suggests answers: together these make for good reading for those interested.

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Alan Hunt in The Sociological Movement in Law has attempted to shape a logical progression in sociological theory beginning with the pre-realist jurisprudence of Roscoe Pound and extending to the post-Weberians. It is clear from the outset that Hunt had to make decisions about which authors to include and the terms of reference around which he could organize a body of theory which shares as its concern the subjecting of the phenomenon of law to a sociological analysis. In Hunt’s perspective the sociology of law movement had its origins in the nineteenth century but rather than explaining the theories of precursors such as Eugen Ehrlich he has chosen to delineate the parameters of the major influences on contemporary sociology of law. It is not his view that the evolution of theory has been monolithic nor is it his contention that the developments in this area have been satisfactory.

Although Hunt admits a Marxist orientation, it is his conception that he is not offering a Marxist interpretation of law or the sociology of law, or both because admittedly Marx did not have a well organized legal theory. Yet it is safe to say that Marxism imposes itself on his analysis for wherever Hunt raises serious doubts about the direction of sociological jurisprudence—American legal realism, Durkheim or indeed Weber—it is from the standpoint of indicating the extent to which these modalities of thought treat or respond to Marxist premises. It may be then that a proper treatment of what can or cannot be safely interpreted as the essential ingredients of Marxism, a defence of its methodology, and some remarks on the prescription for its application would have lent more credence and coherence to the enterprise.

In developing his theme Hunt points out that his intention is to avoid the polemics of traditional jurisprudence writing and the questionable intellectual exercise of going over the ground of history for its own sake, thereby indulging in speculative biography. As well Hunt wants to bring to the attention of the English speaking world the importance of the influence of continental thought on the founders of the sociological movement in jurisprudence in North America. Interestingly Hunt’s work moves in the direction of Marxist historiography with the result that his summaries of figures like Pound and Durkheim involve broad generalizations about the social and economic contexts in which they wrote. Some of the insights are intriguing while many, despite Hunt’s disassociation from traditional jurisprudence writing, read like standard fare and in fact go over old terrain. It may well be arguable that the Pound chapter is gratuitous. It has been accepted by many commentators that Pound failed to integrate his inheritance of continental Europe
with rudimentary natural science and psychology-methodologies which were emerging in twentieth century America. This coupled with Pound's inability to structure his incipient theory of pragmatism leads Hunt, as others have stated before, to suggest that Pound's eclecticism had no central core and therefore is really of historical rather than conceptual interest. Hunt focuses on the theme that Pound was struggling with the tension between individual and group interests; because Pound lacked a framework to balance the interests, never resolving his various attempts at doing value theory, and insofar as he was confused about the process of social causation (means-ends relations) Pound could not move beyond the shackles of the nineteenth century. If success may be ascribed to Pound it must be that as a propagandist for sociology he created a mood upon which others could build a constructive theory. Hunt is also inclined to see as a profound shortcoming of Pound that he could not escape from nineteenth century legal traditionalism which regarded law as a system of rules. This Hunt believes was part of Pound's desire to give theoretical meaning to the practitioner in order to assist members of the legal profession in rationalizing their social engineering tasks. Unfortunately Hunt does not dwell reflectively on the persisting efforts of analytical jurisprudence (the mainstream jurisprudential trend in Anglo-American circles,) which understands law as a rule-covered structure, the sociological movement notwithstanding. Indeed the sociology of law has an ill-defined presence in most North American law faculties at the present time, wavering from its treatment as an historical manifestation of inter-disciplinary zealousness of World War II vintage, to the perspective that the sociology of law is the only sensible replacement of the classical bourgeois option in Western legal theory, that moves back and forth with unrelenting repetition between positivism and natural law.

It was the American legal realists who once and for all attempted to break out of traditional jurisprudential debates. Hunt sees the credos of the American legal realists as a response to the necessity of state intervention to reduce social conflict and encourage socially progressive legislation. Although the realists were reformers Hunt hastens to fault them as individuals who committed themselves to capitalism, individualism and the existing social order. Although the realists pursued social activism they did not achieve the goal of theory, namely, to present a structure for analysis which would deal with the relationship between law and values, with a defensible scientific methodology. It is Hunt's belief that the realists succumbed to the lowest common denominator of pragmatism and their crude forms of functionalism, based on or affected by behaviouralism, led them to emphasize prediction at the expense of critical analysis. Hunt implies that they escaped from the
hard and pressing questions of properly conceived (Marxist) sociological investigation and that Llewellyn in his *The Common Law Tradition*\(^1\) exposes the retreat of realism from sociology. Realism ended with the work of Llewellyn, according to Hunt, on the note of judicial ideology, thereby substantiating the claim that jurisprudes unless harnessed by critical sociology will use their theories to defend the status quo and to regard jurisprudence as a servant of description and history.

Hunt treats the work of Emile Durkheim as a natural step in the direction of defining the ground of the sociology of law. Hunt’s understanding of Durkheim is that his concentration on social facts and the reification of society subdued the individual to an inherently conservative theory of state interest. What intrigued Durkheim was the role that law plays in creating order and stability. He assumed a “common conscience” in the will of the social order and was wedded to an evolutionary theory of social development. Hunt’s criticism is that Durkheim failed to sort out the relationship between legal and human domination and did not successfully treat the transition between tribal and industrial society in terms of social and state forms of control. Despite the fact that Durkheim attempted to analyze the social institution of contract law, Hunt’s thesis is that he was simplistic in assuming “exchange” as a natural consequence of the division of labour. Hunt insists that a necessary feature of sociological theory must entail the assessment of various exchange relations as manifestations of the development of economic activities (barter, capitalism) which have exercised serious influence over the structuring of legal expressions. Wherever he could Durkheim construed law as embodying a functional integration. He avoided analyzing law as a manifestation of social disharmony or conflict and law’s relationship to power and domination. Hunt concludes that Durkheim along with the realists and Pound must take his rightful place as a defender of legal bourgeois ideology.

It is with Max Weber that Hunt believes that modern sociology of law occurred. In Weber’s thinking law is central to his general sociological theory. Weber was severely restricted however by his own culture and emphasized the historical growth of institutions in such a manner that he justified the “rational instrument” of legal and political nationalism. For Weber, Hunt points out, the rational became the defence of the irrational. He is to be identified with the long tradition of glorifying law as an internally consistent, gapless, logical universe of rules. Hunt acknowledges that contrary to the opinion of some commentators Weber was in fact aware of the inherent tension between formal rational law and justice. Weber

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\(^1\) (1960).
regarded his own systematization as archetypal and noted that the irrational dimensions of legal phenomena are never to be completely superceded by the advancements of rational law.

Weber knew very well that Western capitalist society specifically created a class of law tasks, a professional elite which was pre-occupied with managing bourgeois interests, and an alignment with institutionalized legal education, which contributed to abstract definitions of law. Weber like Hegel contended that the rise of the nation state represented a culmination of the rational and impersonal market economic system. Weber more so than Hegel emphasized the centrality of law and lifted its bureaucratic administration to a level beyond the social and economic conflicts of society. In short, law for Weber replaced the Hegelian state. Insofar as Weber explored the relationship between law and political forms of social order, and questioned the legitimization of domination, he alerted modern thinkers to the debate with Marxism as to whether law may be properly described as the product of economic forces. Weber resisted the notion that law merely involves a response to economic situations. He protected the autonomy of law and although law is perceived as related to economic determinations and as the protector of particular class interests Weber contended that the abstract nature of formal justice ultimately guaranteed the maximum freedom for interested parties to represent their formal legal interests. Weber’s in depth understanding of this process did force him to admit that the inequality of ownership and access to legal expediency produce situations which run contrary to religious ethics or deeply held values. This Weber regarded as a natural consequence however of putting economic interests before an all encompassing conformity to the impartial rules of law. Although in Hunt’s opinion Weber did not foster a constructive solution to the analysis of law and economy, he did admit the question into discourse and, as a prolegomenon to Marxism, Hunt would regard him as fleshing out the groundwork for critical sociology.

Hunt probes why the sociological movement has not taken up the invitation afforded by Weber to delineate the subleties of legal domination and more importantly the scope and nature of the power relations that are entailed in the rule of law. In embracing the constitutional doctrine of the separation of powers “sociologists” have only served in Hunt’s opinion to substantiate the myth of law as a central and autonomous institution with its own self-justifying norm structure.

It remains then for Hunt to establish sign posts for future endeavours in the field. Working from Marxist premises Hunt has observed that sociology’s subservience to legal professional elitism only serves to perpetuate the law’s control over critical analysis.
Ironically it was sociology and sociological jurisprudence both which attempted to begin afresh, standing outside of the legal game model in order to develop an observational standpoint which would not be reducable to an internal perspective. In Hunt's judgment this sociological movement to date has failed to live up to its mandate. This has stemmed from a number of factors which include the mystique attached to legal craftsmanship, the normative characterization of law, and the pre-occupation of sociologists with informal processes of dispute resolution. The general commitment of American academe to liberal capitalist ideals is viewed as a further obstacle facing the definition of an independent sociology of law.

It is Hunt's dissertation that if we finally disabuse ourselves of our entrenched belief that the law is a fundamentally rational means of social organization and that adherence to it is not only natural but inevitable we might then arrange our intellectual affairs so that we can question its association with coercion and legitimacy. Hunt feels that the legal systems of the industrialized nations are standing at a moment in history where beneath the veneer of social stability lie pressing contradictions and anomalies which threaten the foundations of bourgeois legal ideology. It is not clear that his assessment is ill-conceived but it is apparent that Hunt offers little in the way of constructive solutions except to repeat the well worn assumptions of Marxist doctrine. To elevate sociology of law to a special status and to force its separation from legal ideology or positivism (behaviouralism) may be deserving of pursuit but aside from announcing the necessity and timeliness of the venture Hunt leaves us as much in the dark with respect to methodology at the end of the book as he did at the beginning. His disavowal of Marxism in any concretized form and his resistance to bring our attention to the ideologies propagated in its name add to the difficulty of knowing what it is precisely that Hunt wants or expects of the new sociology movement, whose roots he has properly identified, and status prescribed, but whose future in substantial terms eludes us.

DAVID N. WEISSTUB*

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These twelve essays derive from seminars given by a variety of guest speakers to students in jurisprudence classes at the University of

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Glasgow. The aim of the essays is, in the words of the editor, "to attempt in varying degree either to illustrate the relationship between legal theory and law as an existing institution or to base legal theories in a wider philosophical or historical context". The breadth of this aim is reflected in the topics covered by the essays which range from medieval history to codification.

Five of the essays deal with topics relatively familiar to students of current English legal philosophy. These are: Liberties, Rights and Powers by Elspeth Attwooll; the Acquisition of Possession in Roman and English Law by David Hughes; Coercion and the Law by Dudley Knowles; Positivism, Principles, and Rules by Richard Tur; Indefinite Sentences and Compulsory Treatment by Kevin McCormick.

There are two historical essays: the Lawyer, the Historian and the Glorious Revolution by Lionel Glassey, and Interpreting the Rules at Barnwell Priory, Cambridge by Michael Clanchy.

Of the remaining essays one deals with comparative law: Codification by Michael Berger; three fall into the net of political and social philosophy: Renner Revisited by Peter Robson; John Austin’s Political Pamphlets 1824-1859 by Eira Ruben; and Adam Smith: Society and Government by Andrew Skinner. The essay entitled Possession in Scots Law: A Comparative Response, by Robert Sutherland may be classified as polemic.

There appears to be no common link between the essays. Unlike, for example, the first edition of the Oxford Essays in Jurisprudence, they are not written from a similar philosophical standpoint and the aim of the essays seems too vague to deserve being called a theme. In addition, the diversity of subject matter covered is matched by a diversity of style. Thus a number of the essays reflect their origins as broad introductory student lectures, whereas others are much more particular in design.

Those essays that appear especially to reflect their origins as student lectures are Codification by Michael Berger and Liberties, Rights and Powers by Elspeth Attwooll. The former essay paraphrases the existing literature in the field. We are given a summary of the views of Lawson, Bentham, Carter, Field, Scarman, and Hahlo on codification. Such a contribution hardly merits publication and it is unfortunate that the writer did not consider the interesting work that has been written on the values and ideology that codification represents. Ms. Attwooll’s essay on Liberties, Rights

1 P. vii.
and Powers is a collage of views on this issue. The essay lacks a clear organizing theme as does Mr. Hughes' essay on The Acquisition of Possession in Roman and English Law. In this latter essay the reader is unaware of any of the aims of the essay until two pages into the piece when he is informed casually that "one aim of this article is . . .". 

Eira Ruben in his essay on John Austin's Political Pamphlets suggests that he is exposing a novel point of view on the work of John Austin, namely that Austin's jurisprudence was designed to defend laissez-faire economics and the interests of the middle class. While interesting to read, this thesis is not novel and perhaps some reference might have been made to works such as Professor Shklar's Legalism, and also Lon Fuller's attempts to demonstrate the ideological preferences of legal positivism.

Renner Revisited analyses the relevance of Renner's analysis to contemporary society. The essay is written from a Marxist viewpoint and paints the picture with broad strident strokes. It has, like much Marxist writing, a convincing touch to it.

Michael Clanchy's historical essay is an intriguing account of certain English Medieval cases as recorded in the plea rolls and as unofficially recorded by the monks of Barnwell Priory. The value of this essay lies in its revelation of the discrepancy between the official record and what in fact appeared to have been happening in the cases. It thus suggests that we should have doubts concerning the historical value of official legal documents of that era.

Mr. Sutherland's essay is a rather polemical assertion of the superiority of the methods of the Scottish legal system compared with those of the English system. English law is described as "empirical and unphilosophical patchwork", and it has "failed to develop to an equivalent degree of refinement and scope of efficiency". Mr. Sutherland does, however, admit that the English lawyer is sometimes susceptible to enlightenment; that comparative study by an English lawyer might allow him to perceive what would be necessary to be done for the improvement "of his own nation's treasured but adolescent jurisprudence". I wonder whether this type of comparative writing serves a useful purpose?
The essays are, in general, unremarkable. There is, however, one shining exception to this comment. This is the scholarly essay by Andrew Skinner entitled Adam Smith: Society and Government.\textsuperscript{11}

In conclusion, therefore, each essay could have been published separately in an academic journal. There seems little justification for collecting together such a disparate group of essays simply on the basis that a certain group of people happened to be at a particular place at a particular time.

IAIN RAMSAY*


As the preface indicates, this book is a combination of two previous works\textsuperscript{1} by Professor Kerr. Although the book is divided principally into two parts—the law relating to immovable property and the law of succession—the first twenty-four pages which cover five chapters, may be regarded as a section on legal theory with particular application to customary law.

In these first chapters, the author raises a number of problems relevant to the third world, three of which merit particular emphasis. First, the problem of terminology. The author poses the problem of explaining in the English legal language customary legal concepts which are best left to be explained in the varying tribal languages of South Africa. This problem is endemic to Africa. The English common law in British colonial Africa, with its limited sets of relationships, has often confused tribal "ownership" with "ownership" in the common law. West African decisions expose crude and unorganized. The question of superiority is really beside the point. Sophisticated comparative lawyers within both traditions long ago abandoned discussions of relative superiority or inferiority.\textsuperscript{1} The Civil Law Tradition (1969), p. 3.


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\textsuperscript{1} See The Native Common Law of Immovable Property in South Africa (1953), and The Native Law of Succession in South Africa (1961).
this error.\(^2\) It appears that in South Africa too judges have often committed that error.\(^3\) The author however fails to lay emphasis on the danger of such conceptual mis-associations. The result could be the complete bastardization of the customary law. The need to hold customary legal proceedings in the language of the tribe in question, appears to be obvious. Second, the author makes the important point that "in customary law, legislation may be abrogated by disuse" for which he correctly cites a number of very relevant authorities.\(^4\) It would have been useful if he had proceeded further to explain the rationale underlying this principle. Legislation, in customary law, is no more than a source of law. The customary law recognizes, both the creation of a new rule of law by, "freely, frequently and consistently observing over a long period [a] just and [a] reasonable"\(^5\) custom, and the extinction of an existing rule of law by disuse "freely, frequently and consistently" over a long period of time. The extinctive aspect through disuse is unknown to the English common law tradition. Thirdly, the author brings into focus the application of the "repugnancy principle".\(^6\) It must be said, at once, that throughout British colonial Africa, the application of the native law was limited by the overriding requirement that it should not be repugnant to "equity, justice and good conscience". The author has failed to draw attention to a wealth of materials now available regarding this clause.\(^7\) Admittedly, his first five chapters were not designed to introduce the reader to the legal theory underlying customary law, but some reference to the affect of the repugnancy clause should have been made.

The next part of the book deals with immovable property. Two significant issues call for our prompt attention. First, the problem of ownership. The author, after a careful analysis concludes that in South African tribal societies there is a concept of private ownership.


\(^3\) Gaboetloeoe v. Tsikwe (1945), Native Appeals Court (C. & O.) 2 and S. v. Nkonzangoe (1965) (2) S.A. 321 (0), at pp. 324-325. See also book under review, p. 11.

\(^4\) Pp. 16-21.


\(^6\) P. 19.

\(^7\) Loromeke v. Nekegho and Ayo; Mariyama v. Sakiku Eyo; Amachree v. Goodhead; Bikani Mia v. Shuk Lal Poddar (1893), Indian L.R. 20; Administrator General v. Thoraya Ibrahim Salama AC—App—41—1955 (Sudan); Kirkov v. Fawaz (1900-31), 1 Sudan L.R. 194. See also: the High Court of Lagos Law, 1955, c. 80, s. 27(1); s. 9 of the Civil Justice Ordinance of the Sudan, Laws of the Sudan, Vol. 10, tit. XXVI, sub. tit. I, and Z. Mustapha, The Common Law of the Sudan (1971).
He correctly draws a distinction between these societies in South Africa and those in the rest of British colonial Africa. Citing the leading Privy Council decision in *Amoudu Tijani v. The Secretary, for Southern Nigeria*, the author makes the point that in customary law in the rest of Africa, "land belongs to the community, village or family, never to the individual".

In taking that position, it would have been useful if the author had attempted to suggest a justification for this difference in South African tribal societies. I am somehow tempted to say that the notion of individual ownership in South Africa, could well be the result of an interaction between the tribal laws and the Dutch law during a very early period of time which could be traced to the beginning of the eighteenth century. In any event, grazing land appears to be common property, while individual ownership was restricted to residential premises. Some explanation for this particular feature of South African customary law merits the author's attention.

Second, the position of the chief. Again, after a careful analysis, the author has succeeded in presenting the many faces of the chief of a South African tribe: He is sometimes the Chief-in-Council and sometimes a sovereign in the true, Austinian sense. The chief, as both the custodian of the land, "owner" of land, "not by himself but with his tribe" gives the idea of a common ownership with the tribe. He is also a "trustee" of the land. The "trusteeship" is that which was described by the English Court of Appeal in *Rustomjee v. The Queen*, that is trusteeship in the law of sovereignty and not as in the law of property. This pot-pourri of attributes appears to gravitate towards the point at which the chief may appear to share a common ownership with his tribe, and to that extent, the case law which the author cites seems to indicate a latent "common ownership" with its many-sided relationships. The author quotes from the 1881 Commission report on tribal land. Section 5 of that report states:

... and, according to original native law, [land] was vested in the chief, as a trustee for the nation—*jure imperii* rather than *jure proprietatis*—and his people are allowed to live on it without liability to a money rent (money being unknown) but subject to various sorts of render.

It is, therefore, tempting to suggest that some deeper research may provide the answer to the question as to whether customary

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8 Pp. 58-61.
9 [1921] 2 A.C. 399 (P.C.).
10 See the references which the author gives on p. 4 of his work. The authorities he cites suggest 1702 A.D. as the year of the first contact between the Dutch settlers and the local tribesmen of the Xhosa tribe.
12 (1876), 1 Q.B.D. 487 and (1876), 2 Q.B.D. 64 (C.A.),
ownership is in fact one of individual ownership, and if so the reasons why this notion differs from that of the rest of Africa.

Aside from these two matters requiring some further work, the rest of the chapters on immovable property have been well written and are very informative; they indeed are of a high order of scholarship. His treatment of such customary land holdings as *Imilimandela*, *strata* and a whole host of personal servitudes is succinct and clear. It is somewhat interesting to note that South African judges, like their counterparts in British colonial Africa, have attempted to explain customary servitudes within the broad framework of civil law concepts such as "usufruct", "usus" and "habitatio", with confusing results. As for the common law Lord Denning\(^{13}\) once remarked.

Just as with an oak, so with the English common law. You cannot transplant it to the African continent and expect it to retain the tough character which it has in England.\(^{14}\)

It appears to be clear from Professor Kerr's work that by attempting to expound customary legal concepts in terms of the Roman-Dutch common law, the South African judges have weakened both their common law and the law of the indigenous people.

The final section of the book deals with succession. In five chapters, the author gives a lucid exposition of all the material, while incorporating all the important conceptual propositions related to customary succession. Chapter XII deals with the aspects of universal succession, spun within the broad concept of primogeniture. Professor Kerr brings into focus the effect of polygamy upon the rights of succession. It is interesting to note, purely from an anthropological standpoint, that the various living arrangements which a Kraal-chief makes with his several wives, to a large extent, as a matter of law, do affect the rights to succeed. The hierarchical arrangements within a kraal of a senior wife and several junior wives, remain linked to a senior household and a junior household. The eldest male born in the senior household, unless disinherited, succeeds as the universal successor at the death of the father. Those in the junior household remain as members of the kraal. These arrangements draw a very close parallel to the "tsipsis marriages" in Chinese customary law.\(^{15}\) Commonwealth courts have recognized\(^{16}\)

\(^{13}\) *Nyali Ltd v. Attorney-General*, [1955] 1 All E.R. 646.

\(^{14}\) *Ibid.*., at p. 653.


\(^{16}\) E.g., *Lee v. Lau*, *ibid.*, where Cairns J. wrote at p. 252: "Under a Chinese customary marriage, even if the title of 'wife' is given only to the woman who was joined to the man at the marriage ceremony, the ceremony cannot be used to bring about a union to the exclusion of all others, since the husband can take fresh partners, to whose status some legal recognition is given".
that these wives are "lawful wives" and could succeed even under the non-customary, common law. The author discusses the rights of succession to Ikazi paid under a Lobola contract. It would have been helpful if he had proceeded to discuss the socio-economic aspect of the Ikazi. From an anthropological standpoint Ikazi signifies the gratitude of the groom for the bride he is about to receive. Ikazi is not a payment but a gift made as a token of the groom's gratitude to the father or the eldest brother of the bride, for delivering such "a perfect woman". In customary law, this payment is incorporated into a special type of contract, the Lobola contract, which is used to evidence not so much a legal obligation but a spiritual or a moral obligation. Conceptually, Lobola has no parallel in the common law. Its closest parallel in the civil law, is perhaps, the stipulationes, Highlighting this special feature of the Lobola contract, Whitefield in his treatise on native law in South Africa wrote:

Basuto case of Presenti and Another v. Mashalaba (1941), N.A.C. (C. & O.) 78. The father of the groom entered into an agreement of a customary union on behalf of his absent son, and paid bohali (Ikazi in South African customary law) to the father of the girl as engagement cattle, who on his return home refused to ratify the agreement of marriage and declined to marry the girl. The facts of the case were put to the Native assessors, who expressed the following opinion: "The father of the boy has with these seven cattle already married the girl, that is to say he has paid part of the dowry. If the boy repudiates the girl, the cattle paid are forfeited. The fact that the boy did not agree to the marriage makes no difference to the liability of the father. In other words the father of the boy made a contract with the father of the girl, and is bound by it." The Court held that in view of this expression of opinion the father of the groom was not entitled to recover the cattle paid by him in contemplation of a customary union between his son and the girl and which did not take place owing to his son refusing to marry the girl.

Although the judgment speaks of the groom's father being bound by the contract, it should be noticed that the remedies attached to a failure of consideration, such as, condictiones in the civil law, were not available to him. Case law abounds in support of the moral obligation theory, as the rationale for the payment of Ikazi, and for the Lobola contract. Professor Kerr has not brought out these aspects in Chapter XII.

Chapter XIII, is most useful from an anthropological standpoint. There, the author discusses "the effect of the practice of

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17 Ikazi is considered as a payment which the groom must make, usually in money's worth such as livestock to the bride's father or her elder brother, where the father is dead.
18 Lobola contract is a special type of contract under which Ikazi becomes due.
19 South African Native Law (1948).
20 Ibid., p. 86.
polygamy' in succession. At pages 169-173, the author by way of diagrams, illustrates the geography of a kraal. As an introduction to this section, he cites Mounu v. Mounu, \(^{21}\) a decision by the Appellate Division of the South African Supreme Court where Sir Rose Innes C.J. discussed the structure of the kraal as a legal concept and said:\(^ {22}\)

Strange to say, the code of 1878 (differing in that respect from the Natal Code of 1891) makes no mention of an Ikohlo section or an Ikohlo heir. It does, however, recognise the left-hand wife, and the possibility of subordinate houses on that side.

The structure of the kraal is based on the Zulu customary law. Although the Zulus limit their seniority to three wives—the Inkosikazi, the Igadi and the Ikohlo—other tribes do not have such a limitation. Tribes in West Africa, particularly, those that occupy the Rivers State—the Igbirra, the Iiawa and the Ibos have one senior wife and several "other wives". Therefore, no generalization could be made of the hierarchical structure of a polygamous family.

In Chapter XIV, the author deals with the order of intestate succession. There again, his discussion is limited to the Ciskei and the Transkei. It is necessary to so limit the discussion due to the proliferation of tribes and the disparities in their tribal customs regarding succession.

Chapter XV, deals with internal conflict of laws. The author identifies the problem in the opening sentences of this chapter. He says:\(^ {23}\)

The customary law system of succession, having developed in a polygamous society, is inappropriate where the deceased entered into a monogamous South African common law marriage. The rule of succession of males through males, by primogeniture, was suited to a primitive tribal society.

—The rule is frequently found to be unsuitable in a society where a brother or uncle of a man who leaves a wife and daughters in a rural area may have his home elsewhere or may be at work in an urban area.

The choice of law, in cases of a conflict between the customary law and the South African common law is now statutory.\(^ {24}\) The need to legislate the choice of law rules has been felt in other parts of Africa too.\(^ {25}\) The critical question in every African jurisdiction pertaining to

\(^{21}\) [1918] A.D. 323.

\(^{22}\) Ibid., at p. 328.

\(^{23}\) P. 219.

\(^{24}\) S. 23, Bantu Administration Act, No. 38 of 1927, regulations contained in Government Notice No. R34 of 1966 and several other subsidiary statutes.

\(^{25}\) S. 35, High Court Law, No. 8 of 1955 (Northern Nigeria); s. 12, High Court Law, c. 44 (Western Nigeria); s. 64, Courts Decree, 1966 (Ghana); s. 9, Judicature and Application of Laws Ordinance, c. 453 as am. by the Magistrates Court Act, Act No. 55 of 1963, c. 537 (Tanzania); s. 8, Judicature Act, Act No. 11 of 1967 (Uganda); s. 3(2), Judicature Act, Act No. 16 of 1967 (Kenya); see also s. 10 of The Customary Law (Application and Ascertainment) Act No. 51 of 1969.
a codified set of choice of law rules for succession is the presumption which marriage raises as an issue of submission.

In Nigeria, section 36 of the Marriage Act reads: 26

Where any person who is subject to native law or custom contracts a marriage in accordance with the provisions of this Act and such person dies intestate—the personal property of such intestate and also any real property [of such intestate]—shall be distributed in accordance with the provisions of the law of England relating to the distribution of the personal estates of intestates, any native law or custom to the contrary notwithstanding.

Similar provisions are found in all the West African former British colonies. In Tetani v. Tetani, 27 the South African courts, in 1939, concluded that a marriage according to Christian rites, necessarily made the marriage binding, in all respects, "and to have the same effect upon the parties to the same, and their issue and property as a marriage contracted under the marriage laws of the Cape colony". 28 Later on in the same judgment McLoughlin P. concluded: 29

There appears to be no room for doubt that the effect of — in bringing both the issue of the marriage and the property of the spouses under the common law, includes succession under that system of law.

This judgment has been followed 30 with a remarkable consistency in subsequent decisions. In South African native law and custom, it appears, that once a marriage takes place according to Christian rites, the presumption becomes almost irrebuttable that the parties have thereby chosen the non-customary law for their succession. In Nigeria too, this presumption holds, but after Smith v. Smith 31 in 1924, the courts have taken the attitude that the presumption was rebuttable. There Van der Meulen J. wrote: 32

The fact that a man has contracted a marriage in accordance with the rites of the Christian church may be very strong evidence of his desire and intention to have his life generally regulated by English laws and customs, but it is by no means conclusive evidence. In my opinion the question as to what law it is equitable to apply in any given case can only be decided after an examination of all the circumstances of the case . . .

The absence of such a decision in the South African customary law, has made the submission to the South African non-customary law almost irrebuttable, where natives happen to marry according to Christian rites. This fact, coupled with the absence of wills and

26 C. 115, of 1949 (Federation of Nigeria).
28 Ibid., at p. 63.
29 Ibid., at p. 64.
30 Kerr, op. cit., pp. 221, et seq.
31 (1924), Nig. L.R. 105.
32 Ibid., at p. 107.
will-making powers\textsuperscript{33} in the South African customary law leaves the South African native open to a difficult choice. He must now choose between a Christian marriage or the customary law of succession. A possible institutional by-pass may, however, be borrowed from the Nigerian experience. There, the Catholic church has worked out a \textit{modus operandi}, by which they bless the customary union and issue the following certificate:

\begin{quote}
This is to certify that the marriage of
\vspace{1em}
was blessed at this church.
\vspace{1em}
Dated:
Name and address of church:
Signature of the Chaplain:
\end{quote}

The certificate serves as evidence of marriage in a very limited way. But, what it does is to exclude the operation of the choice of law rule, effectively.

The final chapter\textsuperscript{34} deals with the administration of estates. As the will-making power is totally absent in the South African customary law, the native who dies testate, would always fall under the South African common law. To that extent, The Administration of Estates Act of South Africa\textsuperscript{35} shall govern the distribution of the estate of a native who dies testate.

In four appendices, the author provides the reader with a number\textsuperscript{36} of useful legislative provisions. The book as a whole is good reading and is most interesting. It touches a number of non-legal issues within the broad heading of social anthropology. The book is informative and could be highly recommended, for a course on sociology of law and anthropology. It also presents some very useful jurisprudential leads in the area of the historical school and the \textit{Volkgeist}.

\vspace{1em}
M. L. Marasinghe*  

\textsuperscript{33} In \textit{Sigidi's Executors v. Matumba} (1899), 16 S.C. 497, Buchanan J, wrote, at p. 501: "The evidence shows that a will such as we have here [validly made according to South African Common Law] is totally unknown to Native Law. . . ."

\textsuperscript{34} Ch. XVI.

\textsuperscript{35} Act No. 66 of 1965.


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