Essays in the History of Canadian Law. Edited by David H. Flaherty. Toronto: The Osgoode Society and University of Toronto Press. Volume I, 1981. Pp. xiv, 432 ($35.00). Volume II, 1983. Pp. xiv, 592 ($45.00).

These two volumes of Essays are the first publications of the Osgoode Society. The Society was formed in 1979 as a joint initiative of the Attorney General of Ontario and the Law Society of Upper Canada "to encourage research and writing in the history of Canadian law".

The foundation of the Society and its publication of the two volumes reflect a distinct awakening of interest in Canadian legal history. The term "awakening" is used advisedly because, apart from the work of a very few pioneers in earlier periods,[1] Canadian legal history has been remarkable for its invisibility. Only since the 1970's has any notable enthusiasm for it developed in Canadian universities.[2] Fortunately that coincided with a revival of interest in legal tradition among segments of the legal profession. The two volumes under review are the first extensive product of this growth of academic and professional interest. They provide a valuable showcase for the impressive work currently being done in Canadian legal history, and a very extensive agenda of scholarship for the future.

Professor Flaherty argues persuasively in the first volume that Canadian legal historians should chart a course between the painstaking analysis and cautious process of induction which is typical of traditional legal historians and the more recent application of socio-historical methodology to legal history which emphasizes the social context of legal development.[3] His contention that Canadian legal historical scholarship should develop in

[1] See, for example, the work of Mr. Justice Riddell.

[2] See R.C.B. Risk, A Prospectus for Canadian Legal History (1973-4), 1 Dal. L.J. 227; G. Parker, The Masochism of the Legal Historian (1974), 24 U. of T. L.J. 279 for the stirrings in English Canada. The tradition in Quebec seems to reach further back, see A. Morel, Canadian Legal History — Retrospect and Prospect (1983), 21 Os. H.L.J. 159.

[3] Vol. I, pp. 12-19.

a comparative context is also well taken.[4] Comparative methodology is crucial in examining a legal system which has its roots in the two great legal traditions of Western society. Furthermore, it is impossible to conceive of studying or writing in Canadian legal history without reference not only to the traditional common law heritage of England, but also to its increasingly independent offspring in the United States.

Less convincing is Professor Flaherty's assertion that Ontario is the obvious place to start.[5] It may be conceded that in many ways nineteenth century Ontario provides the crucible out of which significant portions of modern Canadian law emerged. But can one see that process in its fullness, without some knowledge of the prior development of law and legal institutions within the Maritime colonies? Moreover, if, as is clear, the Civil Law of France and New France has an equal claim to the Common Law in providing a foundation for Canadian law, it is unsatisfactory to ignore that reality by arguing that "the Civil Law tradition of Quebec set that province apart and prevented it from playing a prominent national role".[6] Finally, as legal development is rarely completely linear in character, the development of law in Western Canada provides valuable and unique insights into the effects of both the application of law fashioned elsewhere in the country and the development of authentic solutions to new conditions and tensions. The argument, then, for a predominantly Ontario focus is tenuous to say the least.

As one would expect, the essays address a wide variety of topics. Despite this diversity there is an underlying theme which recurs again and again: the tension between the perceived need to sustain a legal system which is the product of many centuries of development and the demand for new legal solutions to problems which have grown beyond the scope of the traditional law, or with which the traditional law is ill-equipped to cope. The ways in which this tension manifests itself vary, of course, depending on the area of law or the legal institution involved. However, the recurrence of this theme demonstrates that the excitement of Canadian legal history lies in the opportunities which it provides to observe the impact of translating a traditional and venerable body of legal principle to new political, social and economic conditions, the stresses which those realities place upon the existing legal order, and the ways and means which are developed by a fledgling society both to refine and interpret the traditional law, and to devise totally new legal responses to the unique problems which that society faces.

Although the range of topics covered is diverse there are common points of reference between a number of the essays. One particularly intriguing sub-theme is the law's treatment of women's rights, sex and

[4] *Ibid.*, pp. 10-12.

[5] *Ibid.*, pp. 19-21.

[6] *Ibid.*, p. 20. He does seem to qualify this view in the preface to Vol. II, p. x.

sexuality. Professor Backhouse's essays on "Shifting Patterns in Nineteenth Century Canadian Custody Law"[7] and on "Nineteenth Century Canadian Rape Law 1800-92"[8] and Ms. Stoddart's piece on "Quebec's Legal Elite Looks at Women's Rights: The Dorion Commission 1929-31"[9] are pioneering studies. Both open up areas of historical research largely ignored in the past by male legal historians, but which are crucial to an understanding of the position of women in the Canadian socio-legal system. Both apply a feminist analysis to their topics, an ideological focus which has been largely absent in Canadian historical scholarship until recent years.

Professor Backhouse does a splendid job of demonstrating how during the nineteenth century changing social attitudes towards women were reflected in the pattern of law reform. In the case of custody rights and rape a growing feeling that women, especially respectable women, were both the mainstays of the family unit and entitled to protection of their virtue as women, induced legislators in particular to recognize progressively the wife's claim to custody of the children as equal to that of the husband, and to expand the definitions of both sexual assault and rape. In this, interestingly enough, the legislatures were inclined to look as much to the democratic trends in United States law as to the paternalistic solutions of English law. The process was fitful because the judges were less convinced that the law needed modification. In the case of sexual assault and rape in particular, the judiciary, not entirely free of the traditional notion that criminal prosecution was designed to protect the father or husband's proprietary interest in his daughter or wife, took the view that any woman, particularly a chaste one, had an obligation to protect her own virtue. This rather than the more extensive intervention of the law should be the guarantor of her personal safety.[10] Professor Backhouse strikes a good balance between analysis of primary materials, in particular court records, and a wealth of secondary literature which bears upon the changes in social attitudes towards women. It is encouraging that these two pieces represent only a portion of the research agenda which Professor Backhouse has, an agenda which will continue to provide new and valuable insights into a neglected area of Canadian legal scholarship.

Ms. Stoddart describes the work of the Dorion Commission, set up in the late 1920's by a traditionalist and grudging provincial government as a sop to a campaign by a group of feminists to improve the position and status of women in Quebec society. Ms. Stoddart paints a rich if depressing picture of the heavy hand and tenacity of traditionalism within Quebec. More particularly, she demonstrates adeptly how the Dorion Commission,

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[7] *Ibid.*, pp. 212-248.

[8] Vol. II, pp. 200-247.

[9] Vol. I, pp. 328-357.

[10] Vol. II, pp. 218-219.

by both applauding the prevailing conservative ideology on women's roles in Quebec and meeting criticisms of it by making minor adjustments in the legal status of women, was successful in guaranteeing the traditional regime for another thirty years.[11] The essay provides a very fine model for other work which needs to be done in Canada on the evolution of women's rights in the context of a legal system which has had an underlying ideology of male power.

A second area of linkage in the essays is the relationship between law and economic development. Professor Risk, in his essays on "The Law and the Economy in Mid-Nineteenth Century Ontario: A Perspective"[12] and "This Nuisance of Litigation: The Origins of Workers' Compensation in Ontario",[13] Dr. Nedelsky in "Judicial Conservatism in an Age of Innovation: Comparative Perspectives on Canadian Nuisance Law 1880-1930"[14] and Mr. Benidickson's "Private Rights and Public Purposes in the Lakes, Rivers and Streams of Ontario 1870-1930"[15] together provide a helpful conspectus of the law's attempts to deal with the commercialization of the economy, to foster the creation of incentives to economic development and to temper the adverse effects of the Industrial Revolution.

Professor Risk's essays on judicial attitudes in Ontario towards the economy at the mid-nineteenth century shows very nicely how the conservatism of the Ontario judges, and in particular their strong loyalty to an increasingly formalistic English jurisprudence, stood in the way of any significant creativity by the courts in fashioning the law to new economic realities such as that being developed in the more independent climate of the United States. Different opinions existed among the judges as to whether creativity had any part to play in the judicial process, but the band of opinion was a very narrow one. Even William Hume Blake, considered by Professor Risk to have had a more flexible attitude toward the judicial function, was very much a child of the legal tradition in which he was reared.[16] The adaptation of law to new economic and social realities was effectively the domain of the legislatures, which were felt by the judges to have far greater authority and freedom in creating a legal climate in which both public and private initiative could be facilitated.[17] The same message is to be found in Dr. Nedelsky's admirable analysis of the reported cases on nuisance between 1880 and 1930. Canadian judges were strongly wedded

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[11] Vol. I, pp. 339-345.

[12] *Ibid.*, pp. 88-131.

[13] Vol. II, pp. 418-491.

[14] Vol. I, pp. 281-322.

[15] Vol. II, pp. 365-417.

[16] Blake as an Equity judge and because of his liberal persuasion was willing to give some weight to the need for fairness in individual cases. In this he was perhaps redolent of the pre-Eldonian Lord Chancellors. On his attitudes on court reform see *infra*.

[17] Vol. I, pp. 118-125.

to traditional notions of the sanctity of property rights which were not to be sacrificed to the cause of industrial development. Moreover, they do not seem to have deviated from this position as English judges were prone to do.[18] Their view was that if attempts were to be made to temper the law to meet new economic conditions that was the function of the legislatures and not the courts.

Professor Risk does an excellent job of analyzing the courts' failure to respond with any degree of sensitivity to the increasing number of industrial accidents. In this, and in his examination of the courts' handling of remedial legislation designed to temper the harshness of the Common Law, he draws upon both court reports and the court records of Wentworth County which embraces industrial Hamilton.[19] He also provides useful insights into the interaction of the various interests which came to support a legislative scheme for workmens' injuries.[20] Interestingly Canada, perhaps because it addressed the problems somewhat later than Great Britain, was spared the often bitter political debate that occurred in Great Britain on how best to deal with injured employees. Even Canadian manufacturers who, it might be thought, would be philosophically opposed to a comprehensive legislative compensation scheme, had by the first decade of the twentieth century persuaded themselves that this was preferable to the uncertainty and tardiness of the Common Law.[21]

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[18] *Ibid.*, pp. 305-312. It is questionable whether the English courts were as ambivalent as Dr. Nedelsky suggests on the need to protect property rights during the nineteenth century. There is a good deal of evidence that late in the century there was a return to more pristine values in English nuisance and riparian rights decisions. However, the basic thesis is unassailable that the Canadian judges, almost without question, preserved the traditional wisdom of the common law, even though it represented a limitation on industrial development.

[19] Vol. II, pp. 419-450.

[20] *Ibid.*, pp. 452-471.

[21] An interesting sub-theme in Professor Risk's essay is his portrait of Chief Justice Meredith, the person appointed by the Government of Ontario to report on the Province's compensation system: see Vol. II, pp. 452-456. In Meredith (and in his political adversary, Oliver Mowat, sometime Vice-Chancellor and Liberal Premier of Ontario) we see that apparent paradox which was played out in the lives of Canadian judges who had been, or who would become, politicians; conservatism while engaged in the judicial role with a focus very decidedly on English tradition and experience, and progressive attitudes towards social change which were often uniquely Canadian while serving in or at the will of the legislature. Meredith, who had previously led the Conservative opposition in the Ontario legislature, and was well aware of the instrumental quality of the law, was typically circumspect and cautious as a judge. Charged with a job which meant his secondment from the bench at the behest of the Government to consider a matter of important public policy, he was able to convert a strong sense of social justice into what has been recognized as a unique stratagem for dealing with industrial accidents. Evidently Meredith and those like him felt no apparent discomfort about assuming a different approach to law and its functioning, depending on whether they were sitting on the bench on the one hand, or in the legislature, or on a public commission on the other. See also R.C.B. Risk, Sir William Meredith C.J.O.: The Search for Authority (1983) 7 Dal. L.J. 713.

Mr. Benidickson's valuable paper, "Private Rights and Public Purposes in the Lakes, Rivers and Streams of Ontario 1870-1930", shows that as the nineteenth century drew to a close it became apparent, especially in Ontario, that the Common Law was inadequate to mediate and resolve conflicts involving competing uses of natural resources. However, rather than supplanting the Common Law the techniques developed were either to vary it legislatively, or to circumvent it by developing statutory regimes appropriate to the broader issues of resource management, leaving to it a residual role in resolving disputes between individual parties. In the cases of the lumber industry the solutions developed represent a transitional point between the application of the Common Law and new legislative and administrative expedients.[22] The courts continued to resolve disputes according to Common Law principles. At the same time legislative direction was given to the judicial process on certain conflicts, for example, those between the lumbermen and river improvers. With water resource allocation to foster the development of the hydro-electric power, which came later, the government introduced more sophisticated management development techniques which were exclusively the creatures of legislation and administrative regulation.[23]

Professors Nedelsky and Risk and Mr. Benidickson have opened up an area of legal historical scholarship which demands even closer attention. Only with further work will we begin to develop a fuller picture of the role of law, legislators, administrators, judges and lawyers in the economic development of Canada, and of the influence of economic and social imperatives on the legal system. It is interesting to note, for instance, that despite the tendency of Canadian legislators towards the devising of instrumental legal solutions which would assist industrial and commercial development, they were not always at one in this respect. There are examples of vigorous campaigns carried out during the late nineteenth century by legislators who were concerned to curb some of the proclivities of industrial and commercial developers, because they were seen as producing negative social costs in environmental degradation and harm to other resources.[24]

A third major sub-theme of the two volumes of essays may be characterized as the administration of justice. At the level of descriptive work on court structures Dr. Margaret Banks has made a valuable contribution in her painstaking and detailed essay, "The Evolution of the Ontario Courts 1788-1891".[25] This, together with her exhaustive annotated bibliography of statutes and related publications for Ontario from 1792 to

[22] Vol. II, pp. 368-386.

[23] *Ibid.*, pp. 387-402.

[24] See J. McLaren, The Tribulations of Antoine Ratte: A Case Study of Environmental Regulation of the Canadian Lumber Industry in the Nineteenth Century (1984), 33 U.N.B.L.J. 203.

[25] Vol. II, pp. 492-572.

1980,[26] will provide indispensable tools for those doing further work on the legal history of that jurisdiction.

The other essays, to one degree or another, attempt to place the administration of justice in its political and social context. Perhaps the most intriguing offering is that of Dr. Wylie, who deals with the early attempts of the authorities in Upper Canada to develop a civil court system appropriate to a dispersed frontier community. In his essay, "Instruments of Commerce and Authority: The Civil Courts in Upper Canada 1789-1811",[27] Dr. Wylie shows how the informal and flexible system of justice in Upper Canada, was put to rest by the arrival of the administrators, judges and lawyers who, steeped in English tradition, progressively introduced the time-honoured court structures of England as well as the often retarded values underlying that system. Dr. Wylie's piece is particularly engaging because it provides a pungent critique of the ideology which demanded that transformation, and of its stultifying effect on Canadian legal, and indeed, political development.

The ultimate restructuring of the court system in Upper Canada is described in Dr. Blackwell's essay, "William Hume Blake and the Judicature Acts of 1849: The Process of Legal Reform at Mid-Century in Upper Canada".[28] Pressures which built up in the early years of the new century for a separate court of equitable jurisdiction resulted in the establishment of the Court of Chancery in 1837. It was at this point that William Hume Blake appeared on the scene. He introduced a three-fold division with separate Courts of Queen's Bench, Chancery, and Common Pleas, expanded the equitable jurisdiction of Chancery and established a judicial Court of Appeal. Although this puts him in the ranks of nineteenth century legal reformers, it is difficult to agree with Dr. Blackwell that it demonstrates Blake's commitment to the development of Canadian solutions.[29] The solution achieved was one provided not by a process of original Canadian thinking, but by respect for English institutional structures. At the systemic level there was as yet no evidence of a desire by Canadian legislators or legal administrators to strike out in new directions.

Professor Craven's focus in two essays is on the process of justice in the inferior courts. This provides a nice counterbalance to the rather rarified atmosphere and procedures of the high courts. Moreover, it enables us to gain some insight into how the administration of justice affected the common people. The more successful of the two essays is "The Law of Master and Servant in Mid-Nineteenth Century Ontario",[30] in which

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[26] Vol. I, pp. 358-404.

[27] Vol. II, pp. 3-48.

[28] Vol. I, pp. 132-174.

[29] *Ibid.*, pp. 164-167.

[30] *Ibid.*, pp. 175-211.

Professor Craven investigates the handling of master-servant conflicts in the Ontario police courts. He shows how in mid-nineteenth century Ontario the ambivalence of the middle class to the property-less labourer, a person needed but feared as a potential cause of social unrest, resulted in the application and legislative refinement of the traditional English law of master and servant. This relatively harsh system attached considerable importance to the power and rights of the master, and to the obligations of the servant. Professor Craven notes that it was the legislators who in this context proved to be the more reactionary, reinventing, for example, the crime of breach of contract by the servant, an historic and draconian Common Law action which had been progressively ignored by the judges.[31] It was perhaps natural that the elected representatives of the middle class, in an atmosphere of uncertainty and fear of unrest, should feel that fear most acutely and react by "turning back the clock". The judges on the other hand, while they were not entirely insulated from these concerns and biases, saw their mandate as much narrower and felt no discomfort about finding reasons for tempering the law in individual cases in favour of employees where justice seemed to demand it.

Professor Craven's second essay, on "Law and Ideology: The Toronto Police Court 1850-1880",[32] is disappointing by comparison. The work, based on both the records of, and newspaper accounts about the work of this court, represents an attempt to describe the ambiance in which it administered justice. Taking a cue from Dr. Douglas Hay's view that the administration of criminal law in eighteenth century England represented a system of "legitimating ideology", Professor Craven attempts to show how this phenomenon operated through the vicarious experience of the court by the upper and middle classes in what they read about it in the press. The development of the inferior court system in Toronto, and the personalities and "pecadillos" of its judges are described at some length.[33] However, it is difficult to see much ideological significance in all of this. Perhaps, as in other courts of inferior jurisdiction, the pace of events and, therefore, justice was so quick, that even for the seasoned reporter it was difficult to get an overall sense of the "flavour" of justice, let alone its ideological import. Professor Craven does suggest that newspaper reporters were prone to using the metaphor of the theatre to describe proceedings in the police courts.[34] However, his discussion assumes a very abstract form at this point, and without more detailed data about the context it is difficult to form any clear judgment as to how the "theatre" was actually played out. One wonders at the end of the essay how useful it was to have attempted to use Dr. Hay's model to explain legal developments in a different era and social context.

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[31] *Ibid.*, pp. 187-191.

[32] Vol. II, pp. 248-307.

[33] *Ibid.*, pp. 251-286.

[34] *Ibid.*, pp. 286-292.

Two essays on the administration of justice in the West depart from the central Canadian context of the essays. In "Hudson Bay Company Law: Adam Thom and the Institution of Order in Rupert's Land 1839-54"[35] Dr. Kathryn Bindon offers helpful insights into the form of frontier justice practiced in the North West in the mid-nineteenth century. In particular, she reveals how with the growth of trade and settlement the pressure grew for a "domestic" court structure, the result being the establishment of the Recorder's Court and the development of a legal code for the territory by the first Recorder, Adam Thom. What the piece lacks from a lawyer's point of view is any significant elaboration of the legal complexities involved in this process.[36] More instructive is Dr. Bindon's examination of the career of Thom. His personality and prejudices, as she suggests, made it impossible for him to function effectively in the fragile and racially sensitive community on the Red River. The experience was to convince the Company that a more empathetic judicial officer was needed and the Metis that they should be wary of institutional structures which were alien to their traditions and needs. Although regrettably Dr. Bindon does not elaborate the point, this was one of the early examples of the clash of cultures which was to mark relations between the Metis and white community and which was to lead ultimately to the destruction of the Metis' way of life.

Professor Foster's excellent piece "The Kamloops' Outlaws and Commissions of Assize in Nineteenth Century British Columbia",[37] exposes the tensions which continued to exist between the old and the new legal orders at a relatively late date in newer parts of the Dominion. The tension, now one between English tradition and the new sense of Canadianism which emerged after Confederation, was played out in a frontier community and between unforgiving personalities which gave it a "rawness" not seen in the more settled areas of the country since the late 18th century. In the sparsely populated mainland colony of British Columbia prior to 1871 the lack of judicial and administrative manpower meant that both functions had reposed in one individual. The figure of Judge Begbie looms very large in the early history of British Columbia.[38] A combination of respect for English institutions and justice and direct involvement in creating both the law and administration of the colony meant that he had very strong ideas on how it and the new Province should be ordered and run. Moreover, he was not impressed with the outlook or policies of the democratic elements who had inherited the mantle of colonial government.

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[35] Vol. I, pp. 43-87.

[36] More could have been made of the jurisdiction of the Recorder's Court, the law to be applied in it and the legal status of the Company's Charter.

[37] Vol. II, pp. 308-364.

[38] See David R. Williams, ". . . The Man for a New Country" Sir Matthew Baillie Begbie (1977).

In the case of the Kamloops Outlaws this conservative judicial view of the legal order came into conflict with the more Canadian and democratic view of the government of that day. Professor Foster shows very adeptly how a trial, which on its facts should have been quite unexceptional, if titillating, became the battleground for a clash of personalities and philosophies in which stubbornness and pettiness seemed to have taken the place of mature thinking, the judges resorting to technicalities which were anomalous to salve their pride, and the government proving thoroughly stubborn and clumsy in pressing for reform.[39]

The four remaining pieces do not fall neatly into obvious categories, although each overlaps with other essays to a limited degree. The most instructive is Professor Baker's lengthy essay, "Legal Education in Upper Canada 1785-1889: The Law Society as Educator".[40] To most readers it will be a revelation to discover that for most of the nineteenth century Ontario had a viable and extensive programme of professional formation. This involved formal entrance requirements and pre-law training; apprenticeships; term keeping; an intriguing combination of law clubs, classes and lectures and the advent of bar admission examination courses.[41] The programme represented a marked contrast with the United States and with England. This commitment to legal education, as Professor Baker indicates, goes a long way to explain the strong sense of *esprit de corps* and elitism of the nineteenth century Upper Canada Bar.[42] By developing a unique and largely indigenous system of legal education the Ontario lawyers of the nineteenth century were able to instill amongst novitiates an appreciation for legal tradition and a sense of power of the legal profession. It was only later that these values were to be challenged by external influences and in particular by the emergence of industrialization, urbanization and the expansion of commerce.

Dr. Paul Romney in "The Ten Thousand Pound Job: Political Corruption, Equitable Jurisdiction, and the Public Interest in Upper Canada 1852-56"[43] provides us with a slice of social history with legal complications. By the 1850's the "railway boom" was in full swing, and the temptations for corruption and graft were strong. Dr. Romney takes us through the complicated process of stock manipulation engineered by Premier Hincks of the United Province of Canada and Mayor Bowes of

[39] Vol. II, pp. 330-353. This is only part of a more general study which Professor Foster plans on the legal history of British Columbia. He has already completed a piece which shows the same cast of characters bickering over who had authority over the rules of court, in which constitutional issues are more dominant than in the McLean story. See, the Struggle for the Supreme Court: The Politics of Law in British Columbia 1871-1885, to be published in Essays in Western Canadian Legal History, U.B.C. Press (1985).

[40] Vol. II, pp. 49-142.

[41] *Ibid.*, pp. 67-119.

[42] *Ibid.*, pp. 119-123.

[43] *Ibid.*, pp. 143-199.

Toronto to encourage the construction of a stretch of the Northern Railroad in the Toronto area.[44] This stratagem, which ensured the building of the railroad, also helped to "line the pockets" of the principals. From the lawyer's point of view the most compelling part of the story is the fact that the three levels of courts, including the Privy Council, found Mayor Bowes' conduct to be reprehensible and a breach of his duty to the citizens of Toronto.[45] Although neither the mayor nor his confederate, Premier Hincks, suffered any long-term political eclipse because of this incident, the courts were able to go on record as setting a high standard of probity for public officials and to underline the importance of the fiduciary nature of municipal officials' stewardship even in cases like this where, although the manipulators made a personal profit, there was no loss, and arguably a benefit to the public.

Professor Graham Parker's essay, "The Origins of the Canadian Criminal Code"[46] provides an incisive analysis and critique of the implementation of a criminal code for Canada in the late nineteenth century. As Professor Parker indicates, the achievement of the framers of the Code was not to state and elaborate upon its underlying philosophy. In this they were content to take their lead from the work of James Fitzjames Stephen.[47] The achievement was the speed with which the architects of the Code were able to translate well established rules and more recent proposals for amendment into a reasonably well-organized statement of the law. It is also instructive to read the range of concerns about the ambit of the Criminal Law which were inspired by the publication of a draft of the Code.[48] Responses were received from both lawyers and members of the public. Of particular interest is the obvious influence of the lobbyist D.L. Watt, the founder of the Society for the Protection of Women and Young Girls. His views on the need to use the Criminal Law to attack lax sexual morals were favourably received and a number of his suggestions implemented in revisions to the Code, demonstrating how receptive the system could be to articulate pressure from sectional interests, especially those arguing against moral decay.

In a useful postscript, Professor Parker contrasts the lack of tough thinking about underlying principle which attended the enactment of the Criminal Code in 1893 with the very extensive and reflective work done by the Law Reform Commission on the criminal law.[49] The contrast is ironic, for the Stephen Code was not the only model available at the time. The work of Thomas Babington Macaulay, which is partially reflected in the

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[44] *Ibid.*, pp. 146-155.

[45] *Ibid.*, pp. 155-178.

[46] Vol. I, pp. 249-280.

[47] *Ibid.*, p. 264.

[48] *Ibid.*, pp. 264-271.

[49] *Ibid.*, p. 276.

Indian Penal Code, might have been a better source of inspiration.[50] One is left with the impression that the architects of the Code were not only lacking in creativity, their respect for English authority was undiscriminating.

Obviously, such a wide range of essays raises many questions and issues which need to be addressed in further research. Much basic work remains to be done. We need extensive analysis of the data which will provide the essential descriptive accounts of how Canadian law and legal institutions developed. However, it is important that the work be balanced, as Professor Flaherty advocates, by serious reflection on the social, economic and ideological forces which affected the law. More needs to be known about what Canadians thought about society in general, and the law in particular, during the country's formative years, and about the major external influences on Canadian political, economic and social thinking which may be reflected in the law. As a number of the essays suggest, it is particularly important to investigate the influences which moulded the thinking of important legal decision-makers, the legislators, the administrators, those who proceeded from the practice of law onto the bench, and the lawyer-politicians. Who were they? What was their socio-economic background? What social and political philosophies did they espouse and so on?

Modern legal history must not only examine and describe but also consider critically the values and ideological assumptions which underlay law and its developments. The ideological analysis and critique of history no doubt induces "fear and loathing" in the minds of some legal historians. However, work of this vein is necessary if we are to avoid interpretations of history which are superficial and represent exclusively establishment or "respectable" views of the pattern of legal development. The historian who takes an ideological approach has to be careful that it does not get in the way of careful research. However, the combination of sound research and ideology is both possible and viable as the feminist writing in these essays in particular shows. More legal historians need to address this challenge.

Both the Osgoode Society and Professor Flaherty are to be commended for their parts in fostering and publishing two works of significant quality. Judging by the standard of scholarship set by them, the Society promises to make an immensely valuable contribution to our appreciation of Canadian legal culture.

JOHN P.S. MCLAREN*

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[50] *Ibid.*, p. 251.

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Le partage des pouvoirs. Troisième édition. By GÉRALD-A. BEAUDOIN. Ottawa: Université d'Ottawa. 1983. Pp. xx, 634. ($18.00).

The first edition of Le partage des pouvoirs appeared in December 1980. Within eight months that edition had been sold out. Because of Canada's fast moving constitutional development, a second edition was published in May 1982. Now there is a third edition which again seeks to keep abreast of Canada's constitutional development which still continues at a breakneck pace. Indeed, one wonders whether a fourth edition will not be needed in a year or so once interpretations of Canada's "patriated" Constitution start flowing from the Supreme Court of Canada. For Canada now has a Charter of Rights and Freedoms, as well as an amending formula, entrenched in its Constitution.[1] That has already meant increased litigation, much of which cannot help but continue to find its way to the Supreme Court.

Le partage des pouvoirs is written by Professor Gerald-A. Beaudoin, Professor of Constitutional Law at the University of Ottawa where he served as Dean for a decade. As the author states in his foreword, the book is a study of Canadian federalism. It presents an analysis of Canada's constitutional documents and of the decisions not only of the Supreme Court of Canada, but also of the Judicial Committee of the Privy Council which served as Canada's court of last resort until 1949. The second edition of Le partage des pouvoirs had something to say about the Charter of Rights and Freedoms which had just been adopted and entrenched in the newly "patriated" Constitution. The third edition brings up to date what was said in that second edition and discusses the effect that the Charter has on the principle of parliamentary supremacy and on the separation of powers in general. This new edition also discusses the effect that the Constitution Act 1982[2] has on the separation of powers in such areas as commerce, taxation, search and seizure, natural resources, and education. It also gives an analysis of important decisions of the Supreme Court of Canada in such areas as constitutional conventions, the veto power, natural resources, and health and welfare.

Like the first two editions, the third edition has an introduction, seventeen chapters, and a conclusion. In the introduction Professor Beaudoin sets out certain basic principles such as the position of the sovereign as the nominal head of the executive branch of the government of Canada at both the federal and provincial levels. Although the sovereign is represented at the federal level by the Governor-General and at the provincial level by the Lieutenant-Governors, Professor Beaudoin reminds us that in fact the executive power rests in the person of the Prime Minister and his cabinet and the Premiers of the provinces and their cabinets. He points out

[1] See Constitution Act 1982, being schedule B to the Canada Act (U.K.), 1982, c. 11. The Charter of Rights and Freedoms is contained in part I (sections 1-34) and the amending procedures in Part V (sections 38-49) of the Constitution Act.

[2] *Ibid.*

certain other basic principles, such as the power of the Governor-General to disavow provincial laws, which still exists in theory but which is, in fact, "dormant if not entirely dead".[3] He makes the following four basic points: (1) Canada has a Constitution which is in part written and in part unwritten; (2) Canada is a constitutional monarchy; (3) Canada has a parliamentary system which is modeled after that of England; (4) Canada is a federation and not a confederation.

Wisely, Professor Beaudoin establishes in the very first chapter of his book the importance of the judiciary in the interpretation of the Constitution. That is all the more true now that section 52 of the Constitution Act 1982[4] prescribes that the Constitution is the supreme law of the land. But, as Professor Beaudoin points out, "great judges are to a certain measure the architects of the Constitution",[5] which is another way of saying what the then Governor of New York, later Chief Justice of the United States, Charles Evans Hughes once said: "We are under a Constitution, but the Constitution is what the judges say it is".[6] That is why the appointment of judges is so important. Persons who are thought to be of a certain persuasion before they receive judicial appointment sometimes turn out to be of a different persuasion once they are secure on the bench. The judicial robe sometimes makes conservatives out of liberals, and *vice versa*.

Of the seventeen chapters in the book, chapter five has now become one of the most important. It is in this chapter, entitled Fundamental Freedoms,[7] that one finds a discussion of Canada's new Charter of Rights and Freedoms. The chapter starts with an examination of the protection of fundamental liberties before "patriation" and after. Case law from 1875 to 1950 is examined, as is that of the decades of the 1950's and of the 1960's. Included are comments on virtually all of the landmark cases of each of the periods. This is followed by a detailed study of the new Charter of Rights and Freedoms. This is done first from the point of view of its application and interpretation, and then from the point of view of the meaning of its different provisions. There are comparisons of the Canadian Charter with the Bill of Rights in the Constitution of the United States, with the European Convention on Human Rights, and with the Canadian Bill of Rights of 1960. The chapter presents an exhaustive study of each of the articles of the new Canadian Charter. There are numerous references to applicable case law and to relevant texts and legal periodical material. The effect that the Charter can have on the classic doctrine of Parliamentary supremacy is recognized.

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[3] Bora Laskin, The British Tradition in Canadian Law (1969), p. 122, quoted by Professor Beaudoin, pp. 1, 497.

[4] *Supra*, footnote 1.

[5] P. 18, (translation by the author of this review).

[6] Speech, Elmira Chamber of Commerce, May 3, 1903.

[7] The title and other subsequent titles, translated by the author of the review.

Equally important among the seventeen chapters is chapter sixteen in which Professor Beaudoin discusses the new amending formula. Under the heading, The Power of Constitutional Amendment, he divides his material into the power of amendment as it existed before "patriation", "patriation" itself, and the power since "patriation". He gives an excellent account of the search for a formula of amendment which started in 1927 and ended with the Constitution Act 1982. Included in his account are the efforts made by Louis St. Laurent in 1949, the Fulton Formula, the Fulton-Favreau Formula, and the Charte De Victoria, all of which failed.

Education and language rights, Canada's "hot potato", are described in chapter VIII which is entitled Education, Culture and Language Rights. As Professor Beaudoin notes at the beginning of this chapter, there are few areas that have played as important a role in Canada's constitutional history as education has. To that should be added that there are few areas in Canada's constitutional history that have been as controversial as has that of language rights. Indeed, the Quebec school and language controversies can be said to have started in 1760, those in Manitoba in 1890, and they continue unabated today. But, be that as it may, Professor Beaudoin effectively covers the applicable law. Not only does he include all of the cases, and there are many, but he also gives the background for, and the development of, the Manitoba controversy which is perhaps the most bitter in Canada's history.

Elsewhere in the volume there are excellent chapters on sections 91 to 95 of the Constitution Act 1867[8] and the rules and theories of interpretation of the separation of legislative powers (Chapter II); the general power of the federal Parliament to legislate (Chapter III); property and private rights (Chapter IV); legislative competence in economic matters (Chapter VI); navigation and transportation, communications, public works, and the federal declaratory power (Chapter VII); culminating finally in Chapter XVII in which the protection of the environment is discussed, and in which the need for effective measures at the provincial as well as at the federal level is emphasized.

In his conclusion to Le partage des pouvoirs Professor Beaudoin points out that the Judicial Committee of the Privy Council decentralized Canada's Constitution. The Privy Council gave wide scope to section 92(13) of the British North America Act 1867, which gives to the Provincial legislatures the authority to legislate with respect to property and civil rights in the province, interpreted the federal residual power in a very restrictive manner, and accorded little significance to the commerce clause of section 91.2 of that Act. Citing K.C. Wheare, he writes that on paper the Constitution is quasi-federal, but that in fact it has become federal. In this conclusion Professor Beaudoin asks whether the Constitution answers

[8] Formerly the British North America Act 1867; see schedule to the Constitution Act, 1982, *supra*, footnote 1.

Canada's actual needs. He answers that it does in part only, and he points out that the separation of powers was drawn up in 1867 before the advent of the automobile, the radio, television, the telephone, satellites, computers, and nuclear energy. For that reason he finds it not surprising that the Constitution needs modifications, chief among which is the need for the clarification of the separation of powers and the elimination of grey areas. But, as he also points out, with the new amending formula which favours the less populated provinces it will not be easy to amend the Constitution.

At the front of the volume there is an excellent table of contents which is followed by a table of abbreviations. At the end of the volume there are the following documents: the 1982 Canada Act, the Constitution Act 1982, the Constitution Act of 1867, and the Statute of Westminister 1931. In addition there is a general bibliography, a table of cases, a table of authors cited, a table of judgments cited, a table of reports cited (royal commissions, etc.), and an excellent index. At the end of each chapter there is a selective bibliography of texts and articles applicable to the chapter.

Le partage des pouvoirs is an excellent book. It is written by one of Canada's outstanding constitutional authorities who obviously likes to write and does so very well. It should be translated into English so that those who do not have the advantage of being bilingual can benefit from it also.

EDWARD G. HUDON*

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Constitutional Conventions—The Rules and Forms of Political Accountability. By GEOFFREY MARSHALL. Oxford: Clarendon Press. 1984. Pp. xvi, 247, ($27.00).

Dr. Geoffrey Marshall's most recent book on constitutional conventions comes at a most appropriate time. In the last twenty years or so, a series of political controversies of prime constitutional significance have occured both in the United Kingdom and in other Commonwealth countries, the result of which has been to bring to the fore the tremendous impact of what were labelled a hundred years ago by A.V. Dicey as "constitutional conventions". It is the main strength of Dr. Marshall's book to reassess the content and force of such rules in light of these recent developments.

This major contribution to the study of rules of political morality is particularly useful in view of the paucity of works on the subject. A.V. Dicey laid the groundwork in his famous book An Introduction to the Study

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of the Law of the Constitution in 1885,[1] a work that was to be joined in 1933 by the no less famous The Law and the Constitution[2] by Ivor Jennings. Since then, only a handful of articles have dealt with the subject,[3] most of which are concerned with the theory sustaining the very concept of a convention, its jurisprudential foundation, its authority, its creation and evolution, its role in legal argument, and so on. Dr. Marshall deals briefly with these perplexing queries in the first and last chapters of his book, while the main part of it concentrates on a reappraisal of the modern content of these rules.

With regard to theory, the author disputes Dicey's thesis that it is because a breach of a convention leads more or less directly to a breach of the law that conventions are obeyed. After quoting many examples where this would not be the case, he concludes that it is unnecessary to ask why they are observed, "since we pick out and identify as conventions precisely those rules that *are* generally obeyed and generally thought to be obligatory".[4] In this respect, at least, constitutional conventions would be similar to moral rules. Of course, all of this raises the obvious question: can a convention ever be broken? When we think of a practice as a rule, should we not say when it is not followed that the rule has changed, or that we were mistaken in thinking that it was a rule, instead of saying that the rule was broken?

To answer these questions, we must look to how a convention is established. Since K.C. Wheare's book Modern Constitutions,[5] it has not been disputed that conventions may arise either from a series of precedents or from a distinct agreement. Dr. Marshall, relying on the decision of the Supreme Court of Canada on the patriation process,[6] adds a third way: "a convention may be formulated on the basis of some acknowledged principle of government which provides a reason or justification for it".[7] After the Quebec veto case in the Supreme Court,[8] we may very well ask whether this is how conventions are "proven" rather than "created". By whatever means a convention is established, however, it seems that the primary

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[1] See now the tenth edition, with an Introduction by E.C.S. Wade (1959).

[2] (5th ed., 1959).

[3] Among the most interesting are the following: O. Hood Phillips, Constitutional Conventions: A Conventional Reply (1964-65), Jo. S. P.T.L. 60; K.J. Keith, The Courts and the Conventions of the Constitution (1967), 16 Int. and Comp. Law Q. 542; C.R. Munro, Laws and Conventions Distinguished (1975), Law Q. Rev. 218.

[4] P. 6. (Emphasis in the original).

[5] (2nd ed., 1966).

[6] *Re Resolution to Amend the Constitution*, [1981] 1 S.C.R. 753, (1981) 125 D.L.R. (3d) 1.

[7] P. 9. An example might be that Parliament does not use its unlimited sovereign power of legislation in an oppressive or tyrannical way.

[8] *Reference re Amendment of the Constitution of Canada (No. 2)*. (1982) 140 D.L.R. (3d) 385, 45 N.R. 317.

evidence as to the existence of a convention lies in the beliefs of the persons concerned. This is where the crucial choice must be made. Are conventions merely "the beliefs that the major participants in the political process as a matter of fact have about what is required of them"?[9] Or are they, alternatively, "rules that the political actors *ought* to feel obliged by, if they have considered the precedents and reasons correctly"?[10] Here is the real crux of the matter, for only if we adopt the second possibility will we, as observers, be able to say that a constitutional convention has been broken. This is indeed the position adopted by the author.

Marshall's approach, it must be noted, is not free from ambiguities. If conventions are rules that politicians are bound to follow, how can they ever be changed (short of a deliberate abrogation of an old convention or creation of a new one by agreement)? The author faces this dilemma at the very end of the book, by admitting that, precedents being the "stepping stones", "conventions will become in the end whatever politicians think it right to do".[11] In other words, a politician may at the same time be in breach of a convention and creating a new one! This may seem paradoxical, but since there does not exist, as in a legal system, any clear "rule of recognition", a sort of "grey area" is inevitable, as is the case of any moral or sociological rule.

Another interesting point raised by Dr. Marshall is the justiciability of conventions. Reviewing the case law on the subject, he points to the fact that there is no clear modern example of judicial recognition and enforcement of conventions, though they have sometimes been taken into account to clarify the law by the courts (by being a part of the material that was enacted into law, by helping to elucidate the background against which legislation took place, etc.). Of course, it could be advantageous to be able to resort to the courts in order to ascertain the "true" meaning of a convention. But in what sense could a decision on such a non-legal question be said to settle the question? The judiciary being vested with authority in the legal realm only, how could a critic or a politician be bound by the judgment of the court either about the existence or the particular application of a convention? Would it not be a serious breach of the time honoured principle of the separation of powers—unless, of course, we were prepared to accept that conventions may "harden" or "crystallize" into law? These questions, as many others, are not given any definite answers in the few pages devoted to the general theory, but they are set in a new perspective by the remaining chapters of the book, adding flesh to the bare bones of theory.

The second, third and fourth chapters of the book are devoted to what we may call the "traditional" conventions of the constitution, that is, to the

[9] P. 11.

[10] P. 12. (Emphasis in the original).

[11] P. 217.

role of the Queen (or, for that matter to the Governor-General or Lieutenant-Governor in Canada) as chief executive of the country, to the power to dissolve Parliament, and to the doctrine of ministerial responsibility. In each of these cases, the evolution recorded in the British practice seems to apply, broadly speaking, to the Canadian experience as well. For example, there now is, according to the author, a clear convention that royal assent cannot be refused when a legislation is passed by both Houses of Parliament. Similarly, it still seems possible for the Queen to dismiss a government. Even if there is no recent English precedent to that effect, the Australian experience (especially the dismissal of the Labour Government by the Governor General in 1975) shows that dismissal might still properly be used as a last resort if a government acts unlawfully in a way for which no conceivable justification exists; an example might be the abolition of the general elections. It might be questionable whether Governor General Schreyer's thought of dismissing the Liberal government had it not negotiated an agreement with the provinces after the Supreme Court decision on patriation[12] would have been a proper use of his power, but the incident shows eloquently that this prerogative of the Crown is but dormant and has not yet fallen totally into oblivion.

The advent of a third major political party on the British political scene could raise interesting constitutional questions in the near future. If it is now admitted that the Queen, in the exercise of her prerogative to appoint the Prime Minister, has no independant judgment and must sent for the leader of the largest party in the House of Commons, what should she do in a multi-party situation? Should she appoint the leader of the single largest party, or the leader of a coalition? A similar issue arises with respect to the dissolution of Parliament. It is now recognized that in the absence of a viable alternative government, the Queen is not constitutionally entitled to refuse a dissolution, whatever her views on the viability of Parliament or the need for a general election. A House with multi-party groupings would raise the possibility of finding alternative Ministers, thus enhancing the visibility and the role of the Crown.

As for the practice of dissolution itself, there is not much to say besides that the power to dissolve Parliament, which is an exercise of the royal prerogative, is by convention exercised not on the advice of the Cabinet any more, but on the advice of the Prime Minister alone.

In looking at the doctrine of ministerial resonsibility, one must distinguish between collective and individual responsibility. The collective responsibility splits into three rules. Under the "confidence" rule a government that loses the confidence of the House used to have no choice but to resign. It now seems that it may choose instead to advise dissolution. Moreover, it also appears that only a defeat in a vote specifically stated by the Government to be a matter of confidence will be taken as a loss of

[12] *Supra*, footnote 6.

confidence. The second rule, the "unanimity" rule, is often disregarded in matters of private morality (for example on the death penalty, abortion), and it was spectacularly put aside by the Labour government in 1975 during the referendum on whether or not the United Kingdom should remain in the European Economic Community. Finally, the "confidentiality" rule was dealt a severe blow by the publication of Mr. Crossman's Diaries of a Cabinet Minister.[13]

With regard to individual responsibility, the political struggles of the last two decades or so indicate that when action is taken of which a Minister disapproves and of which he has no prior knowledge, there is no obligation on his part to endorse it, to defend the errors of his officers, or to resign. If, on the contrary, a Minister is personally responsible for misjudgment or negligence, he must offer his resignation (the most recent illustration being Lord Carrington's resignation over the Falkland Islands crisis in 1982).

How far these changes in the rules of political morality (as Dicey sometimes called constitutional conventions) will find—or have already found—an echo in Canada remains to be seen and could very well be the subject of further study from a Canadian perspective. But one thing is certain. The numerous facts presented by Dr. Marshall in support of his contentions provide ample material from which the Canadian student of constitutional law and politics could draw parallels.

The next five chapters of the book, entitled The Principles of Ombudsmanship, The Morality of Public Office, The Politics of Justice and Security, The Status of the Police, and The Duties of the Army, are much less relevant to a Canadian reader. This is not to say that there is no possible analogy between the two countries, especially with regard to the judiciary and the civil service. But the whole structure, machinery and evolution of these functions bear very little resemblance to their Canadian counterparts.

The chapter on the Problem of Patriation (chapter eleven) is probably the most controversial. Preceded by a chapter entitled the Rules of the Commonwealth and followed by another on the Limitation of Sovereignty, this part of the book provides a very interesting and illuminating perspective on the patriation process in Canada which culminated in the adoption of the Canada Act[14] by the United Kingdom Parliament. Dr. Marshall's analysis is particularly relevant as he was one of the experts, along with Professors Wade and Lauterpacht, whose testimony was considered by the House of Commons Foreign Affairs Committee in 1981.[15]

Marshall first briefly sketches the background from which the controversy arises, and then goes on to defend the view espoused by the eight

[13] (1975).

[14] 1982, c. 11 (U.K.).

[15] In his preface, the author indeed acknowledges that some sections of chapter eleven were adapted from a memorandum prepared for this Committee and published as minutes of evidence.

dissenting provinces and finally adopted by the Supreme Court in the first Reference on the subject.[16] He is firmly convinced that in a federal state the central government does not represent the nation in relation to the process of constitutional amendment, and goes to great lengths to demonstrate that the federal thesis, according to which the British Parliament or Government may not look behind any federal request for amendment (including a request for patriation of the constitution), was grounded in a mistaken interpretation of the precedents. This thesis, initially stated in 1940 in relation to a proposed amendment of the British North America Act involving unemployment insurance to which there was no provincial objection, had never subsequently been debated. Consequently, maintains the author,[17]

> No series of precedents could therefore be said to have established a convention for acting automatically upon a Federal request for an amendment that clearly did affect the Federal-Provincial balance of powers and the legislative powers of the Provinces, when that amendment was opposed by a substantial number of Provinces (and in this case a majority of Provinces).

Perhaps the most forceful argument in favour of the provinces' theory was the one derived from the inclusion of section 7 in the Statute of Westminister[18] at the express request of Canada. Since the provincial and federal authorities of the time could not agree on an amending formula, they asked the British parliament to retain a protective role by submitting the repeal or amendment of the Constitution Acts themselves to the mechanism of section 4 of the Statute of Westminister, by which a British enactment might extend to be part of Dominion law only at the request and consent of the Dominion. All this, of course, would make no sense were we to adopt the federal government's thesis.

> But Canada would have been wasting its time if it had intended the British Parliament unquestionably to carry out the requests and resolutions of the Federal Parliament to enact in Britain amendments to the BNA Act that it could not bring about in Canada on its own legislative authority.[19]

Besides arguing his thesis, the author raises a number of very perplexing questions about the irreversibility of the process according to which Britain is no longer to have authority over Canada. The Canadian Constitution not having been severed from its imperial roots (and thus not being "autochtonous"), how would the Canadian courts react to a repeal of the Canada Act[20] by the British Parliament? Marshall has no doubt about the answer. He suggests that this might be a case where the courts, by ignoring such a repeal, would give legal effect to a conventional rule, or, alternatively, where a convention could be said to have crystallized or ripened into law.

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[16] *Supra*, footnote 6.

[17] P. 185. (Emphasis in the original).

[18] 22 Geo. V. c. 4 (U.K.).

[19] P. 188.

[20] *Supra*, footnote 14.

The book is completed by two Appendices[21] and by a selected bibliography and a general index. It is well presented and constitutes, with Dr. Marshall's earlier work, Parliamentary Sovereignty and the Commonwealth,[22] a major contribution to the modern understanding of two major themes dealt with by A.V. Dicey almost a hundred years ago and which have pervaded English (and Canadian) constitutionalism ever since.

YVES DEMONTIGNY*

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Constitutional Law of India, Third Edition, Volume 1. By H.M. SEERVAI. Bombay: N.M. Tripathi Private Ltd. London: Sweet & Maxwell. 1983. Pp. xlvii, 1071, App. 229, Index 33. ($32.50)

The first edition of this book was published in 1967. The second edition was published over a number of years, volumes 1 and 2 in 1975-76 and volume 3 in 1979. The book is aimed at providing an exhaustive commentary on the Constitution of India. As in the previous edition, volume 1 consists of a narrative on connected topics rather than commentaries on each Article separately. The author has been sparing in the citation of American, Canadian and Australian cases as the Constitutions in these countries are different from the Indian Constitution.

To help the reader understand the Indian Constitution, the book provides its historical background and legal framework. The largest part of the history deals with the transfer of power in India beginning with the Cripps Mission in March, 1942 and ending with the transfer of power to India and Pakistan on August 15, 1947. It was decided in England in 1967 to publish official documents dealing with the transfer of power and ten volumes were published between 1970 and 1980. Further, the publication in 1973 of Wavell, The Viceroy's Journal, gave a first hand account of the part which Lord Wavell played in the transfer of power. In the introduction to this edition, the author gives a fresh account of the transfer of power by weaving the old and new materials into a brief, but coherent narrative.

The author in "A New Introduction" to the third volume of his second edition of his book gives an account of four critical years (1975 to 1979) in India and this has been reproduced as Appendix 1 to this volume. These

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[21] Containing extracts from *Attorney-General* v. *Johanathan Cape Ltd.*, [1976] Q.B. 752, [1975] 3 All E.R. 484 (Q.B.), and *Reference re Amendment of the Constitution of Canada, supra*, footnote 6.

[22] (1957).

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four years left a permanent mark on Indian history and on the Constitution. An emergency was proclaimed in India on June 25, 1975 by the President of India on the advice of the prime minister, Mrs. Ghandhi. There were large scale arrests and detentions of the prime minister's political opponents, imposition of censorship, and abuse of the powers of preventive detention. The courts were faced with important questions arising out of applications for *habeas corpus* and for the granting of relief to the aggrieved party in appropriate cases. During this time numerous amendments to the Constitution were made. However, following the elections held in March 1977 the Janata Government came in to power and proceeded to repeal all these amendments to the Constitution and to introduce further safeguards for freedom against future abuse of power. In the last chapter under the heading, "An Epilogue: 1980-1983", the author gives a brief account of Mrs. Gandhi's return to power, first at the national level after a landslide victory in the elections held in 1980 and later in the States, and surveys some of the constitutional problems which have arisen for India since then.

It would be quite impossible within the brief compass of this review to present in any detail the painstaking discussion which the author devotes to each of the topics with which he deals or his criticism of decisions of the High Courts and the Supreme Court, a criticism which shows the importance of case law in relation to the Constitution. This volume deals with such topics as interpretation of the Constitution; Courts and the Constitution; Preamble to the Constitution; Federalism in India; Territories and New State and Citizenship; Fundamental Rights—General Considerations: 'The State' and Fundamental Rights; Violation of Fundamental Rights' Right to Equality; Right to Freedom; Right to Freedom of Religion; Cultural and Educational Rights.

Chapter II deals with 'The Interpretation of the Constitution' and in view of the importance of the subject, it has been greatly enlarged. It has taken into account recent trends in England and India in statutory interpretation.

Chapter VII is devoted both to a general consideration of the Fundamental Rights and to the more specific topic of the 'State' and 'Fundamental Rights'. The Indian Constitution followed the American precedent and enacted fundamental rights in the Constitution itself. This was done by arming the Supreme Court, and the High Courts with power to issue writs of *habeas corpus, mandamus,* prohibition, *certiorari* and *quo warranto*. The effectiveness of these writs in securing the liberty of the subject, the performance of public duty, the due administration of justice by inferior tribunals or courts and holding of a public office by lawful authority had long been proved in England. The Indian Constitution went further and by Article 32 made the right to move the Supreme Court for an appropriate writ for the protection of fundamental rights, itself a fundamental right. The author is of the opinion that the actual working of the

Constitution for over thirty years shows that such inclusion has been more than justified. The law reports bear witness to the fact that legislative and executive interference with fundamental rights has been effectively checked by the courts. In this Chapter, the author also discusses the recent developments by which the Supreme Court finally reached the position that corporations, government companies, companies incorporated under the Companies Act and registered societies are "the State" within the meaning of Article 12.[1] The tendency in the United States is to bring more and more activity within the reach of constitutional limitations, as is evidenced by *Marsh* v. *Alabama*.[2] Mathew J. in India observed that the concept of "state" had changed radically in recent years and the state could no longer be looked upon simply as "a coercive machinery wielding the thunderbolt of authority".[3] A public corporation, being the creation of the state, is subject to the same constitutional limitations as the state itself. Two conditions are necessary, namely, that the corporation must be created by the state and it must invade the constitutional rights of individuals.

In this edition the author, for the first time, has dealt with primary estoppel as a topic by itself because of its increasing importance in Administrative Law, and because the Supreme Court decisions in India on promissory estoppel are conflicting. The question whether the state is amenable to estoppel has several aspects which require to be distinguished. It requires consideration of acts done under a statute and an examination of the provisions of a statute to see whether they preclude a plea of estoppel in respect of action under it. A coherent account of the principles which emerge from English and Indian decisions is given, and this shows that even if it be generally true "there can be no estoppel against a statute", this proposition is subject to many qualifications.

The form and arrangement of Chapter XI on "The Right to Freedom" is new. It deals with the constitutional questions raised by preventive detention, cases of preventive detention arising under various preventive detention acts, fundamental rights of prisoners and the sentence of death. On the question of capital punishment, the author remarks that it is difficult to appreciate either the logic or the morality of allowing a man to take the life of his assailant in self-defence while denying to a judge the power under stringent conditions to impose the death penalty on successful assailants, who brutally or sadistically kill their helpless victims. On the fundamental rights of prisoners, the Supreme Court has continued to develop the law in the right direction. In the *National Security Case*,[4] the Supreme Court took

[1] Art. 12: Definition. — In this part, unless the context otherwise requires, "the State" includes the Government and Parliament of India and the Government and the Legislature of each of the States and all local or other authorites within the territory of India or under the control of the Government of India.

[2] 326 U.S. 501, 90 L. ed 265 (1946).

[3] *Sukhedev's case* (1975) A.S.C. 1331, at p. 1349.

[4] *A.K. Roy* v. *Union ("The National Security Case")* (1982), A.S.C. 710, at p. 752.

a step forward in emphasizing that any element of punishment must be excluded from preventive detention, and gave effect to this view by observing, among other things, that there was "no reason why (the detenus) should not be permitted to wear their own clothes, eat their own food, have interviews with members of their families at least once a week, and . . . have reading and writing material according to their reasonable requirements".

In view of the freedom of association provision of the Canadian Charter of Rights and Freedoms, it will be interesting to watch what the Supreme Court of Canada may decide on the constitutional question of the right to strike in the public sector. It may be argued that freedom of association means the freedom to organize, to bargain collectively, and to strike. But the courts in India have decided that freedom to associate means the right to join together, but that there is no fundamental right to strike. In *Kameshwar Prasad* v. *Bihar*,[5] the question was raised of the validity of Rule 4-A, Bihar Government Servants Conduct Rules, 1956, which ran: "No Government servant shall participate in any demonstration or resort to any form of strike in connection with any matter pertaining to his condition of services". The Supreme Court of India held that a person did not lose his fundamental rights by joining government service and that his rights could not be abrogated or abridged. Accordingly, it was held that although Rule 4-A was valid insofar as it referred to strikes, it was void insofar as it referred to demonstrations, because it violated the freedom of speech and assembly guaranteed by the constitution.

This is a very scholarly work, and one of the best books available on this subject. It will undoubtedly be of great value to the practitioners in India and to comparative lawyers, and will remain so for many years.

S.P. KHETARPAL*

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Recognition of Family Judgments in the Commonwealth. By J.D. McCLEAN. London: Butterworths. 1983. Pp. xxxvii, 370 (£33).

This book is part of a series on Commonwealth law published under Sir William Dale's general editorship. Other books in the series (either commissioned or already published) include The Modern Commonwealth by Sir William Dale[1] and Recognition of Commercial Judgments and Arbitral Awards in the Commonwealth by Keith Patchett.[2]

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[5] (1962), 3 Supp. S.C.R. 369, (1962), A.S.C. 1166.

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[1] (1983); see review, *supra*, p. 231.

[2] At the time of writing not yet published in Canada.

This book by a distinguished English scholar shows the fruits of his raids on "that treasure-store of admirably ordered material, the Commonwealth legal library in the Foreign and Commonwealth Office".[3] The text contains nine chapters:- (i) domicile; (ii) divorce — the common law rules; (iii) divorce — the statutory bases; (iv) financial provision — the enforcement of maintenance; (v) the Commonwealth Maintenance Orders Scheme; (vi) variant Commonwealth maintenance orders legislation; (vii) financial provision — international developments; (viii) financial provision — the Commonwealth position surveyed; (ix) custody of children. In addition four appendices set out selected texts.

To attempt to survey upwards of eighty-five jurisdictions[4] is something of a heroic undertaking but Professor McClean has done so from a wider perspective than English law. Given the length of the lines of communication, being up to date has, of necessity, not always been easy. Even if the book has been overtaken by recent developments in some areas[5] this is not to deny its usefulness. In relation to a concept like domicile we need constantly to be reminded that the fact that a number of countries use the same concept or label does not mean that the contents of the bottle are the same.[6] Differences within the Commonwealth emerge at common law about whether a minor who has attained the age of discretion can alter his or her domicile of origin or whether an award of custody to a mother in custody proceedings will make the children dependant on her for their domicile of dependence.

Canadian readers will find the comparative analysis of the common rules of recognition of divorce particularly helpful. The somewhat confused common law rules would continue to apply under the proposed Divorce Bill[7] of 1984 and the analysis in Chapter 2 has good coverage of the Canadian authorities including an informative discussion of the temporal problem in *Bevington* v. *Hewitson*[8] at paragraph 2.07. Unfortunately, the brief reference to *Holub* v. *Holub*[9] does not indicate the problems that O'Sullivan J.A. encountered in trying to reach the same result so easily

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[3] P. vii.

[4] Amongst the least familiar jurisdictions (to Canadians) are references to the laws of Nauru, the British Virgin Islands, Western Samoa, Saint Helena, The Gambia, Kiribatu, Brunei, Tuvalu, Botswana and Belize.

[5] E.g., some of the almost annual changes to Canadian Provincial laws to implement the recommendations of the Uniform Law Conference.

[6] On a point closer to home the differences in nuance between the interpretation of the Federal Divorce Act of Canada in Quebec and the common law provinces (or even between them) is worth close scrutiny. Moreover the common law rules of domicile have been affected by statute in some Canadian provinces; see, e.g., in Ontario, Family Law Reform Act, R.S.O. 1980, c. 152, ss. 63, 68. This is duly noted by McClean.

[7] Bill C-10, 2nd Sess., 32nd Plt., 1983-1984.

[8] (1974), 47 D.L.R. (3d) 510, 4 O.R. (2d) 226 (Ont. H.C.).

[9] (1976), 71 D.L.R. (3d) 698, [1976] 5 W.W.R. 527 (Man. C.A.).

reached under the real and substantial connection test of *Indyka* v. *Indyka*[10] but without recourse to that decision.[11]

The section on the Hague Convention on Recognition of Divorces and Legal Separations is also potentially useful since the influence of the Convention, as McClean properly points out, transcends the number of Commonwealth countries that have ratified it. To take but one example, its influence and the influence of the English Act of the same name may well have significance for Canadian courts wrestling with problems of recognition of non-judicial divorces.

Chapter 4 on financial provision is less helpful from a Canadian point of view. Professor McClean introduces the chapter by demonstrating the wide powers of Australian courts to deal with all sorts of financial orders including rearrangement of property interests and maintenance on separation. No mention is made of the fact that in Canada property rearrangements are dealt with under Provincial laws which differ markedly from province to province,[12] and that the jurisdiction asserted by some provinces is extremely wide, catching both residents outside the jurisdiction[13] and even the value of property outside the jurisdiction.[14] This is all the more remarkable in view of the fact that assertions of jurisdiction by Canadian provinces under the "*ex juris*" head do not fit within the Reciprocal Enforcements of Judgments legislation. It is true that, having opened up the issue of the extremely wide range of orders for financial provision, Professor McClean then attempts to backtrack by saying that it is not his intention to cover property orders which most commonly depend on the *lex situs*. But even this tends to gloss over the problems arising under Canadian legislation where title to foreign immovables is recognized by the forum but at the same time the value of all foreign property is taken into account.[15]

Nevertheless the discussion of maintenance orders with foreign elements is extremely valuable. The number of orders involved within the Commonwealth is considerable — for example, between 1971-73 British Columbia alone sent out 1,102 such orders and received 1,602. The history of Reciprocal Enforcement of Maintenance legislation is informative and well done. Unfortunately, some of the comments at page 123 have been overtaken by the plethora of Reciprocal Enforcement of Maintenance Act

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[10] [1969] 1 A.C. 33, [1967] 2 All E.R. 689 (H.L.).

[11] See further (1977), 9 Ottawa L.R. 676.

[12] See further A. Bissett-Johnson and W. Holland, Matrimonial Property Law in Canada (1980).

[13] See for example R.10.08 of the Nova Scotia Civil Procedure Rules which asserts an *ex juris* jurisdiction without leave from the court over any defendant resident in Canada and the U.S.A.

[14] See further Bissett-Johnson and Holland, *op. cit.*, footnote 12, pp. I-67 *et seq.*

[15] See the annotation by Vaughan Black to *Cowan* v. *Cowan* (1983), 37 R.F.L. (2d) 66 (N.S.T.D.).

amendments enacted both before[16] and after[17] the book went to press. Nevertheless the discussions of principle remain valuable, particularly on cases of jurisdiction to make provisional orders and the procedures for varying such orders. Moreover, the discussion of the Hague Applicable Law and Enforcement Conventions may serve as a focus for future legal developments by Commonwealth countries. The concluding country-by-country survey of financial provision orders provides an invaluable global picture of this area of law.

The final section in the book covers custody of children and the question of whether the courts of a country to which a child has been removed contrary to law should enter into a full enquiry into the child's welfare or should simply return a child to its jurisdiction of origin unless, after a limited enquiry, this would put the child at grave risk or involve unnecessary expenditures on airfares. Perhaps the reference to *Re T*[18] at page 258 would have benefitted from emphasizing the problems of using the return of the child to its jurisdiction of origin to force a reconciliation on the parties.[19] Moreover leaving a child in the care of an elderly and infirm paternal grandparent and an alcoholic father was not without some risks. There is a good account of the Canadian authorities, although for obvious reasons the internal constitutional problems of section 11(2) of the Divorce Act[20] and the extent to which provincial *parens patriae* powers have been extinguished go unmentioned.[21] More significantly, though Professor McClean traced the Canadian Extra Provincial or Reciprocal Enforcement of Custody Orders legislation passed from 1974 onwards, no mention is made of the passage of legislation implementing the Hague Convention in most provinces in 1982 as a replacement for the earlier legislation. The Hague Convention is, however, analysed and Canadian readers will find this a helpful introduction before plunging into their provincial legislation.

In short this is a work of comprehensive scholarship by an author who has obvious firsthand knowledge of his material. If there be minor criticisms they arise either from the problems of keeping up-to-date with the mass of material over slow or non-existent lines of communication, or alternatively for a Canadian reader's desire to have just a bit more information about Canadian law. In some sense this is an unreasonable desire

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[16] E.g., the Manitoba legislation cited was replaced by S.M. 1982, c. 12.

[17] E.g., S.P.E.I. 1983, c. 39.

[18] [1968] Ch. 704, [1968] 3 All E.R. 411 (C.A.).

[19] See the comments of Russell L.J. at pp. 718 (Ch.), 415 (All E.R.).

[20] R.S.C. 1970, c. D-8.

[21] Compare *Re Hall* (1976), 70 D.L.R. (3d) 493, [1976] 4 W.W.R. 634 (B.C.C.A.) with *Ramsay* v. *Ramsay* (1976), 70 D.L.R. (3d) 415, 13 O.R. 85 (Ont. C.A.). Equally there was no room for the controversy in the appellate cases starting with *Gould* v. *Gould* (1980), 114 D.L.R. (3d) 646, [1980] 6 W.W.R. 506, (Sask. C.A.) on the extent to which Divorce Court maintenance orders could be enforced under R.E.M.O. legislation rather than under the Divorce Act ss. 14 & 15.

because the space given over to Canadian material is probably already disproportionate to the size and population of Canada. However, since some of McClean's comments are so penetrating, the Canadian reader always hopes for just a bit more.

A more serious problem arises from the author's recognition of the practical problem of balancing length against the desire, expressed in the introduction, of writing a study in the comparative conflict of laws of Commonwealth countries. The section on divorce allows the author most scope in comparative conflicts analysis; elsewhere practical constraints on length make this much more of a survey. To have gone beyond 350 pages would have greatly increased the cost and its price of £33 for a relatively slim book probably restricts its sales to a select band of libraries and even more select personal readers throughout the Commonwealth. This is a pity since the book deserves a wider audience.

ALASTAIR BISSETT-JOHNSON*

* * *

The Western Idea of Law. By J.C. SMITH and D. WEISSTUB. Toronto: Butterworths. 1983. Pp. xxix, 685. ($42.00).

J.C. Smith is Professor of Law at the University of British Columbia. His thought and skill are very much in the style of the Anglo-American analytic tradition of philosophy.[1] David Weisstub is Professor of Law at Osgoode Hall Law School and Professor of Law and Psychiatry at the University of Montreal. Interested in law, psychiatry[2] and historical research[3] his style tends to be sweeping and his insights profound. The collaboration of these two scholars has produced the most exciting and useful introductory jurisprudence book currently available in English.

Student expectations often combine with the normal law school curriculum to produce a forceful but rigidly limited way of thinking. Students with diverse backgrounds in any number of other disciplines learn to think in the restricted concepts of current doctrine, and rarely put the legal materials they are studying into the contexts they learned in the years before law school. The perceived pressures of preparing for a career in practice discourage the pursuit of courses which might force any fundamental

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[1] See, for example, his writings on the law of Tort, in particular: The Mystery of Duty, in L.N. Klar (ed.), Studies in Canadian Tort Law (1977), p. 1; Requiem for Polemis (1965), 2 U.B.C. Law Rev. 159; Comment (*Wagon Mound*) (1967), 45 Can. Bar Rev. 336; and on jurisprudence, Legal Obligation (1976).

[2] See Law and Psychiatry in the Canadian Context (1980).

[3] He is also the author of a volume of poetry, Heaven Take My Hand (1968).

reappraisal of "the law". As a result, courses in jurisprudence and legal history play a vital role in legal education, and carry the heavy responsibility of driving home the connections between the present legal enterprise as the judge and lawyer know it and other human endeavours, past and present. These courses should provide a broad appreciation of the nature of law and its relationship to morality, politics, science, rationality, religion, mythology, and other important aspects of human life. If it does nothing else, the Western Idea of Law should impress on the reader the importance of law in society as well as its massive dependence on cultural, historical, and other non-legal factors. It places present civil and common law systems in the broad sweep of social and intellectual history, showing both their uniqueness and their place in the development of cultures.

Like many introductions to jurisprudence this is a collection of carefully edited readings. What makes it special is the unusual nature and scope of the materials used and the challenging theory (or theories) informing its organization, selection, and editing. The "conventional" book of jurisprudence often takes a "schools of jurisprudence" approach, limiting itself to illustrating the broad theoretical approaches which have been taken to law, such as positivism, natural law theory, Marxism, American Realism and so on.[4] Smith and Weisstub, in contrast, organize the materials according to principles or questions which relate directly to law: What is special about modern Western law? What are the mythological origins of law? What are the major historical threads which have been woven into Western law? How are the individual, the law and the state related? Answers to these four questions constitute the four chapters of the book. Notice that each question concerns the law itself and not legal theory. The very structure of the book directs the student to thinking about *law*, but from a perspective unusual in law school. This has one distinct advantage over the more traditional approach. The latter may encourage the student to spend too much time and effort abstracting and comparing the major theories and authors without actually concentrating on those issues the theories were intended to address.

The present book also gives up the appearance of neutrality found in the traditional approach. The very questions which structure the book suggest particular views of the nature and history of law. It may therefore be of little use to instructors bent on presenting a different view of law and theory. For the normal reader, however, the large vision presented can encourage a depth of thought not often attempted by students, practitioners, or even academics. As a stimulus to sustained thought about fundamentals, the non-neutral approach cannot be faulted.

The first chapter (Law and Culture) illustrates the responses of different cultures to fundamental law regarding agreements, property, and

[4] See for example, Lord Lloyd of Hampstead, Introduction to Jurisprudence (4th ed., 1979).

persons, as well as attempts to dispense with legal rules altogether. The readings include selections from anthropolgists, historians, and legal theorists, as well as the Hammurabic Code, the laws of Manu, the laws of Howel Dda, the Lex Salica, and the laws of Alfred. Short excerpts from Professor Smith's unjustly neglected article, "The Unique Nature of the Concepts of Western Law",[5] set the tone not only for this chapter, but for the entire book. The central thesis of that article was that modern Western law differs from the law of ancient and primitive societies in having *abstract legal concepts*, which are central to all modern civil and common law systems.[6] While the material in chapter 1 is fascinating in itself and can be used to illustrate a number of different theses about law, culture, and history, it quite clearly stands as evidence of Smith's thesis.

The second chapter (The Mythological Origins of Law) attempts to show the importance to law of the myths surrounding matriarchy and patriarchy. The thesis is that these myths go some way toward explaining the history of law from its very beginnings as well as the present widespread disaffection with law. These materials are in themselves provocative and supportive of a number of uses and theoretical positions, but they appear to be primarily intended to provide support for the connection between law and myth sketched in the introduction to the chapter. It becomes apparent later in the book that the notion of patriarchy which developed through myth is crucial to understanding present-day law. Indeed, patriarchy and myth provide the counterpoint to reason and justice in the general vision or theory of law which emerges from this book.

The third chapter (The Foundations of Western Law) is in many ways the core of the book. It is a 200 page intellectual history of Western law, which supports and unifies the claims regarding the special nature of Western law, the role of myth, and the analyses of contemporary problems of sexism and loss of individual freedom. The thesis found in the chapter is obvious from the section titles: "Jerusalem", "Athens", "Rome", and the "Hellenic and Judeo-Christian Synthesis". The authors see the Jewish tradition as centering on particular or personalized justice for individuals, while the Greco-Roman approach looked to reason, science, and universal consistency. Christianity attempted to unite the traditions. The tension between the two strands is a continuing problem for Western law.

The chapter is probably subject to most of the quibbles and attacks common to any intellectural enterprise done in the grand style. But it is indeed well done. Within relatively few pages we are led through many centuries of legal history in a way which goes to the core of the cultures considered and makes sense out of a vast amount of cultural, historical, and legal information. The work remains true to a substantial body of historical

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[5] J.C. Smith, The Unique Nature of the Concepts of Western Law (1968), 46 Can. Bar Rev. 191.

[6] *Ibid.*, p. 193.

data while giving the audience an understanding of and appreciation for our place between past and future, enriching and partially defining the present by showing the patterns and connections with the past. On any standard, this is good history.

The final chapter (Law and State) is the longest (255 pages) and the most difficult. It explores the problems generated by the elements considered in the earlier chapters. The mixture of the mythical or non-rational, particularly in its patriarchal guise, with the unique blend of Judaic individualization and Hellenic rationality is shown as producing readily recognizable tensions. The three sections in the chapter deal with three of those tensions. The first concerns itself with the relationship of the state and the law, or what is essentially the dispute between constitutionalists and absolutists.[7] The treatment is to a large extent historical, running from Bracton, Coke, and James I to Mr. Justice Black and the Canadian Charter of Rights and Freedoms. This provides the overview which is so often lacking in courses on constitutional law.

The second section centres on the individual against the community, raising a fundamental question for both legal and political theory, the legitimacy of state power and the role of law in the state. Selections from Wolff, Nozick, Rawls, Dworkin, Bentham, Austin and a variety of Marxists cover the most important theoretical positions on the issues. Here as elsewhere the book is careful to distinguish between law and the state, something often not done in this age still under the influence of positivist theories of law.

The final section examines problems of equality, status and liberty in the modern industrial state. The major selections deal with sexism in law and theory, liberty under modern economic conditions, and myth and irrationality. There may be here an initial appearance of disjointedness, but this is deceiving. The section in fact illustrates two major difficulties, or perhaps limits, for the "Western idea of law": its inability to incorporate and productively utilize the non-rational elements in man, and its failure to preserve individual liberty in the face of the dominant economic theories of the modern state, capitalism and Marxism. Both problems involve what appear to be failures to realize fundamental values in the basic theory embodied in Western law.

The patriarchal myths embedded in all aspects of our culture, including politics and law, are only beginning to be examined, and yet they run directly contrary to the entire basis of the Greco-Roman model of law. If Western law involves in an essential way the rationalism of the Greeks, how can these non-rational, non-egalitarian, status-determined attitudes, structures, and content have survived and, indeed, thrived in our legal and

[7] For these purposes a constitutionalist can be characterized as someone recognizing *legal* limits on political authority, while an absolutist denies such limits.

political culture? Sexism, it seems, is fundamentally inconsistent with the intellectual underpinnings of our law.

Modern capitalism and Marxism both have the effect of threatening the free individual. Capitalism has created massive structures of economic and political power which have no clear legitimization and yet dominate the individual. For its part, Marxism seems to encourage dictatorship or domination of the individual by a new class (the ruling party). In addition, both capitalism and Marxism typically use Western forms of law, which are hierarchical and implicitly patriarchal, thereby perpetuating sexism and its subjugation of individuals. Once again one wonders how this is possible, given the *intellectual* heritage of Western law.

The final pages of the book suggest in a tentative manner that the answer to these puzzles is to be found in man's psychology, which contains non-rational elements (hence the recurrence of mythological elements of patriarchy and state) and needs both for individuality (liberty) and community (status and collectivity). Some may feel more comfortable with an explanation in economic or political terms, and the materials could be supplemented easily. Whether an explanation in terms of a deep psychology is acceptable or not, there is no denying that Western culture has paid lip-service to rationality and universal justice for centuries, even to the extent that all manner of tyrannies feel compelled to put the mask of rationality and justice on their activities. Yet, even the briefest study of history will reveal the irrationality, if not downright stupidity, of much of mankind's efforts. If the general thesis of this book is correct, the failure of mankind to be rational is the central challenge to the Western idea of law. One cannot help but wonder whether the legal enterprise as we know it can be shaped to fit the dangers of modern economics, politics, and technology while realizing the ideals of equality, universality, and individuality, or whether it is fundamentally and irreparably flawed. This book is an important contribution to the debate, for it makes the issues accessible, and even gripping, to an educated reader.

As may have become apparent this collection can and, indeed, should be used to present what are usually considered "feminist" issues. It is, indeed, a "feminist" book if by "feminist" one simply means that it analyzes those aspects of history and culture which create and constitute male dominance. But if "feminist" is meant to imply a narrow focus which misses the central historical and cultural problems while railing at restricted issues of content, then it is not feminist. All too often philosophers, historians, and other social analysts nod in the direction of sexual equality and then completely ignore it in the core of their work. Smith and Weisstub suggest that one cannot understand either the general nature or the history of Western law without appreciating the central role of patriarchy (and hence male dominance) in legal and political structures, forms, and content. Adult male dominance runs so deep in Western law, politics, and society that any social theory which relegates it to a footnote is condemned

to being relatively shallow. The reader of this book should gain an improved understanding of "the feminist perspective" which is necessary today for doing good theoretical work in jurisprudence, law, history, or indeed any other discipline studying society.

It should be emphasized, however, that the book is in no way polemical, doctrinaire, or contrived. Its structure and editing are both theory-laden and probably controversial, but this is a criticism only for those who believe either that older theories already have attained truth or that exploration of ideas not shown to be correct is dangerous or otherwise undesirable. Any selection worthy of the name will be based on some theory, for otherwise there is no basis for choosing one reading rather than another. Smith and Weisstub's work is different only in the depth and sweeping character of their grounds choice and organization. While there is much more theory embedded in this work than is argued for, to a large extent the theory *shows* itself in the selections. The readings come from respected sources and are honestly edited. The controversial theories running through the collection sit quite naturally with the materials, with little sense of artifice. And the selections are of such quality that the book is not *simply* an extended statement of a particular view of law and legal theory.

This review has said very little in criticism of the book. In part this is a result of the intellectual excitement which came from exploring the ideas contained in it. In addition, any important criticism should be directed against the underlying view, and that would be a much more massive undertaking than can be attempted in a short review. Suffice it to say that there are "soft" spots in the book. The notion of myth is poorly defined, at times seeming to envelop everything non-rational or non-scientific. If myth is simply the non-rational, then it is trite to point out that law has always involved myth. I suspect, and authors seem to believe, that myth is something more than this, that it is a peculiarly human intellectual device weaving together psychology, epistemology, and the narrative form. In short, the book needs an analysis of myth adequate to the tasks given it.

A second "soft" spot is the final appeal to a deep psychology. While I have great sympathy for this approach, it calls for an extended justification not found in the book. The present state of psychological theory is chaotic at best. The view of man it suggests is clearly in the Greek tradition, giving rise to suspicions that it might be yet another reflection of the cultural heritage which has created the original problems in law and politics. In other words, viewing man as having a given, limited nature discoverable by rational means (the presupposition of most psychologies) may be yet another manifestation of the world-view which has produced Western law. If the problems of individual/community, particular/universal justice, etc., are problems inherent in that world-view then *any* psychology squarely within the Western intellectual heritage may be inadequate to the task. What is needed is an examination of whether a psychology *within* the tradition can solve fundamental problems of the tradition. The issue is

difficult and important, for it requires consideration of the extent to which systems of thought create problems incapable of internal solution. Interestingly enough, the book itself emphasizes the need to extract oneself from a presupposed cultural context, and the extent to which intellectual progress is often accomplished by revolutionary paradigm shifts.[8]

Overall, the book contains so many insights and so much to challenge and stimulate the reader that it should find a broad audience. It is a clear choice for jurisprudence courses, but is so well structured that practitioners and judges who never quite got around to taking a jurisprudence course in law school or who would like to look at some of the broad issues once again can profit from reading it. It is also sufficiently free of legal jargon to be useful in a general philosophy of law course, although some introduction to modern substantive law would be helpful. Measured by the intellectual impact The Western Idea of Law can have on anyone who reads it with care, the book sets a new standard and deserves to become a classic.

MYRON GOCHNAUER*

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Vocabulaire de la "common law": Vocabulary of the Common Law. T.I., *Droits des biens — Procédure civile; Property Law — Civil Procedure*. Par MELVIN MCLAUGHLIN (1ère partie), Léonie Ngarambé et Marie-Anne Breau (2ème partie). 1980. Pp. 235. ($12.00). T. II, *Droit des fiducies — The Law of Trusts*. Par TERENCE WADE. 1982. Pp. 92. ($9.00). T. III. *Procédure civile — Preuve; Civil Procedure — Evidence*. Par MICHEL BASTARACHE, GÉRARD SNOW et DAVID G. REED. 1983. Pp. 235 ($16.00). Les trois publiés par les Editions du Centre universitaire de Moncton.

Le centre de traduction et de terminologie juridiques de l'École de droit de l'université de Moncton se propose de publier un jour un dictionnaire juridique français de la "common law". Ces trois premiers tomes, auxquels on devrait ajouter le Lexique anglais-français du droit des sociétés, paru in 1979, ne constituent qu'un début d'exécution de ce projet; ils se présentent comme provisoires, et invitent les commentaires.[1] En fait le

[8] The first chapter (Law and Culture) begins with a selection from Thomas Kuhn, The Structure of Scientific Revolution (2nd ed., 1970).

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[1] Les éditeurs ont cependant fait la sourde oreille au compte rendu du tome I par Lucie Lauzière et Michel Frederick (1980), 11 Revue générale de droit 679—commentaire avec lequel nous aimerions nous associer pleinement.

tome III reprend, modifie et augmente la deuxième partie du tome I, qui traitait de la Procédure civile: la plupart des additions sont en matière de preuve, principalement pénale.

Il ne fait aucun doute, vu la qualité des dictionnaires juridiques bilingues qui existent, qu'un bon vocabulaire anglais-français est une nécessité de premier ordre, et ceci au niveau mondial. Nous devons saluer le courage dont ont fait montre les responsables de cette entreprise en relevant ce défi redoutable; mais il convient en même temps de se demander s'ils s'en sont acquittés mieux que leurs devanciers.

Le premier point qui frappera le lecteur est la répétition volontaire qui consiste à citer séparément chaque élément d'une expression à sa place alphabétique. Cette méthode présente des avantages incontestables pour le traducteur pressé; mais, étant donné la fréquence des termes doubles, même triples et quadruples (l'expression *trust under a registered supplementary unemployment benefit fund* figure six fois), l'importance véritable de ces Vocabulaires ne dépasse guère la moitié de ce qu'elle semble à première vue. Il y a aussi des exaggérations bizarres. Au tome II le mot *trust* a 138 emplois, et au tome III le premier sens du mot *evidence* en a 181: on retrouve chacun de ces emplois à sa place ou à ses diverses places ailleurs, et dans le même ordre alphabétiuue. Le groupement des emplois selon le sens plutôt que par ordre alphabétique aurait permis de distinguer les sens voisins et de souligner les antonymes et synonymes; ce n'est pas le cas ici.

Plus importante est l'absence d'un énoncé des critères qui ont guidé le choix d'équivalents en français des termes anglais.[2] Il faut lire attentivement les avant-propos pour comprendre qu'il y a trois sources de ces équivalents. On a pris comme source principale les textes législatifs et jurisprudentiels bilingues déjà publiés au Canada, sans tenir compte de l'opinion largement répandue que beaucoup de ces textes sont mauvais du point de vue tant juridique que linguistique. Si les auteurs ne partagent pas cette opinion ils auraient du moins pu le dire. Il nous disent, bien entendu, qu'ils rejettent parfois les traductions qu'ils ont trouvées dans ces sources, sans cependant expliquer le motif de ce rejet; et malheureusement les expressions rejetées sont souvent supérieures du point de vue juridique à ce qu'on y substitue.

Les autres sources sont: l'usage (c'est à dire l'usage du barreau local); d'une façon étrangement ambivalente, la terminologie civiliste; et en large mesure la simple invention. On ne saurait trop souligner, contrairement à ce que semblent penser les auteurs, que la spécificité de la common law ne réside pas (sauf exceptions évidentes) dans ses notions mais dans sa

[2] Le lecteur avisé trouve cependant, sous la plume de Michel Bastarache et de David Reed, un exposé récent qui consacrerait l'usage local en vigueur au Nouveau-Brunswick: Language du droit et traduction, ed. Jean-Claude Gémar, Conseil de la langue française, 1982, pp. 207-216, aux pages 211 et 212.

structure et dans ses sources. Il existe déjà des termes courants dans le système de droit civil qui donnent exactement le sens en français de presque toutes les notions de la common law. En présence de cette terminologie établie il n'appartient à personne d'en inventer une nouvelle.

Pour en venir aux détails, il faut noter d'abord de nombreux termes qui ne font pas partie de l'anglais juridique, ou de l'anglais sérieux, ou de l'anglais tout court: au tome I, *legatary, legator, patrimony, renunciate, substitution*; au tome III, *complice, criminate, criminating, criminative, criminatory, culpatory, exculpative, inculpation, inculpative, inculpatory, interrogator, preconstituted evidence,* pour ne pas parler de *defeat a proceeding, ear witness, instructed verdict.* Il y a aussi des expressions anglaises mal comprises: *common count* n'a pas le sens de "allegation générale" mais de "chef stéréotypé" (quitte à trouver une expression plus élégante); *concurrent writ* n'est pas "bref concomitant" mais "duplicata du bref"; *specially endorsed writ* n'est pas "bref portant mention spéciale" mais "bref accompagné de la déclaration".

C'est faire preuve d'une certaine pauvreté que de recourir au seul mot "annuler" pour traduire sept termes anglais dont chacun possède son propre équivalent: *abate an action* (éteindre); *discharge an order* (donner mainlevée); *defeat a title* (résoudre); *disentail* (mettre fin à la substitution); *quash* (casser, correctement au tome I); *rescind an order* (rétracter); *set aside* (également rétracter dans le contexte).

Mais suspendons cette litanie de critiques pour admirer la trouvaille de génie qu'est "préclusion" pour *estoppel* (tomes II et III). Il a fallu inventer parce que, premièrement, le terme anglais n'a pas d'équivalent en français. En second lieu, le choix est tout à fait satisfaisant puisque le mot n'existant plus, il n'a pas d'autre sens établi en français. Et enfin, troisième critère, le mot en tant que mot est vraisemblable et s'insère naturellement dans le contexte de la terminologie existante. Mais ce n'est que le lecteur assidu du "Mot", bulletin bimensuel de ce Centre, qui peut être sûr de l'originalité de l'invention.[3] Et il ne semblerait pas que ces trois critères aient trouvé faveur auprès des éditeurs, puisque la traduction suggérée de *interpleader* — "entreplaiderie" (aux tomes I et III) — les enfreint tous les trois. Pour les prendre en sens inverse, "entreplaiderie" signifiant une procédure est une formation choquante; deuxièmement, "entreplaider" existe déjà dans un autre sens, celui d'intenter des actions réciproques (voir Littré); et enfin, *interpleader* a bel et bien déjà un équivalent en français, tant en France qu'au Québec: c'est l'appel en garantie formelle qui, comme *interpleader*, s'exerce par demande soit principale soit incidente. On n'aurait donc pas dû se permettre d'inventer un autre terme.

[3] Ce lecteur se tromperait. L'article précité de Bastarache et Reed—Langage du droit et traduction, ed. Jean-Claude Gémar, Conseil de la langue française, 1982, pp. 207-216—revèle en détail, aux pages 213 à 216, les sources de ce choix.

On est témoin de la même contradiction partout. Il y a des anglicismes très nombreux là où des termes parfaitment adéquats existent déjà en français juridique, côtoyant des expressions qui, elles, sont bien à leur aise en français et qui ne poussent certainement pas sur les arbres du Nouveau-Brunswick.

Pour parler d'abord des anglicismes: au tome I les plus frappants sont "rente-charge" pour *rentcharge* (bien que les Lois Revisées du Nouveau-Brunswick[4] donnent correctement "rente foncière": pour ce Vocabulaire "rente foncière" traduit faussement *ground-rent* suivant en ceci l'anglais fautif du Code civil du Québec); "droit d'usage" pour *use* (quoique le *use* n'ait aucun rapport avec l'usage, et que le "droit d'usage" ait déjà deux sens très spécifiques en français); "titre" pour *title* (au lieu de "droit de propriété"); "propriété à titre nominal" pour *nominal ownership* (pourquoi pas "nue propriété"?); "doctrine" pour *doctrine* (aussi au tome III, quoique le tome II ait donné mieux: "principe"). Au tome II on trouve "ordonnance d'investiture" pour *vesting order* (au lieu de "jugement qui tient lieu de transport": ceci devient au tome III "ordonnance d'envoi en possession", terme respectable, mais qui signifie autre chose); "charitable" et "oeuvre de charité" pour *charitable* et *charity* (quoique les Lois revisées du Nouveau Brunswick[5] donnent correctement "de bienfaisance"). Au tome III: "adresse aux fins de signification" pour *address for service* (au lieu de "domicile élu"); "joindre comme partie" pour *join as a party* (au lieu de "mettre en cause", que ce Vocabulaire reserve comme traduction de *third party proceedings*: cette dernière procédure n'est qu'une parmi plusieurs espèces de mise en cause); "motion" pour *motion* (alors que les règles de procédure de la Cour fédérale utilisent correctement "requête"); "frivole" pour *frivolous* (c'est l'usage montréalais, mais le terme correct est "téméraire"); "compromis" pour *compromise* (au lieu de "transaction", même en donnant ailleurs à "compromis" son sens juridique correct de *submission to arbitration*); "ordonnance par consentement" pour *consent order* (au lieu de "jugement convenu"); "produire un aveu concédant jugement" pour *confess judgment* (au lieu de "acquiescer à la demande"); "perpétuation de témoignage" pour *perpetuation of testimony* (au lieu de "enquête à future"); "confidence privilégiée" pour *privileged communication* (au lieu du "secret professionnel" ou "protégé"); "preuve documentaire" pour *documentary evidence* (au lieu de "preuve littérale" ou "écrite"); "preuve suffisante à première vue" pour *prima facie proof* (au lieu de "faisant foi jusqu'à preuve contraire") et aussi pour *prima facie case* (au lieu de "charges suffisantes": "charges" ici ne traduit pas *charges*). Combien de ces anglicismes sont inventés?

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[4] Voir, par exemple, Loi sur les biens, L.R.N.B. 1973, c. P-19, art. 16.

[5] Voir, par exemple, Loi sur les fiduciaires, L.R.N.B. 1973, c. T-15, art. 35: mais voir aussi Loi sur les subventions de *charité*, L.N.B. 1983, c. 2.01, dans laquelle on utilise "de bienfaisance" (art. 3) et "charité" (le nom de la loi et le nom de la Commission—établie par la loi—Commission des subventions de charité (art. 4).

Combien sont déjà d'usage au Nouveau-Brunswick? Sur ce point les auteurs ne nous donnent aucune indication. Il y a un anglicisme, cependant, qui relève, on le sait, d'un régionalisme plus étendu: on ne s'étonne pas que *circumstantial evidence* se traduise par cette expression, inintelligible en dehors du Canada, qu'est "preuve circonstantielle". Or, la *circumstantial evidence* n'est pas la chasse gardée de la common law: la notion est parfaitement bien connue dans l'autre système, tant au civil qu'au pénal, et les auteurs de ce système l'appellent uniformément "preuve par indices". "Indice", en passant, n'a pas le sens que lui attribue ce Vocabulaire, de *scintilla of evidence*.

Il faut ajouter à ce point que les expressions données au paragraphe précèdent comme étant correctes ne s'inspirent pas d'une préférence personnelle. Elles sont au contraire les expressions que n'importe qui peut trouver, et de façon constante, sur les pages de la doctrine—dans le vrai sens de ce mot. Personne, bien entendu, ne saurait demander l'exclusion doctrinaire des régionalismes: on devrait seulement les identifier comme tels, avec le terme correct à côté, dans l'espoir qu'en fin de compte ce dernier s'y substitue, comme ce fut le cas de "l'aviseur légal" qui s'est vu supplanter—mais très récemment—par "le conseiller juridique".

Les anglicismes ne sont pas les seules traductions qui ne soient pas conformes au français juridique établi; celui-ci cependant n'est pas non plus systématiquement écarté. Tout au contraire, on trouve de nombreuses expressions correctes, d'un civilisme authentique. Au tome I, par exemple: "droit de retour" pour *reversion* (mais "droit reversible" pour *remainder* est discutable); "reliquat" pour *residue*; "titre de propriété" pour *instrument of title* (mais remarquons que "titre" traduit *instrument* et "propriété" traduit *title*: "titre" n'est pas *title*); "durée" pour *term* (en évitant ainsi l'anglicisme qu'aurait été "terme"); "rente" pour *annuity*; "compensation" pour *set-off*, et "indemnisation" pour *compensation*; "compromis" pour *submission to arbitration*; "jour franc" pour *clear day*; "demande reconventionnelle" pour *counterclaim*; "duplique" pour *rejoinder*; "désistement" pour *discontinuance*; "consignation au greffe" pour *payment into court*; "interrogatoire préalable" pour *examination on discovery*; "saisie-arrêt" et "saisie-gagerie" pour *garnishment* et *distress* (mais "saisie-revendication" n'a pas le sens de *replevin*); "mainlevée" pour *discharge*; "dépens" pour *costs*.

Le tome II reprend quelques-uns de ces termes, et le tome III la plupart d'entre eux. Mais le tome III abandonne en même temps plusieurs termes corrects du tome I: "erreur matérielle" (pour *clerical error*) se dégrade en "erreur d'écriture"; "à charge d'appel" (pour *subject to appeal*) en "susceptible d'appel"; "décerner un mandat" (pour *issue a warrant) en* "émettre".

Enfin il faut faire remarquer la métamorphose curieuse de "conjointement et solidairement", contradiction dont l'origine remonte à la pratique

du notariat en France.[6] On le retrouve au tome I comme traduction de *jointly and severally*, mais le tome III le convertit en "conjointement et individuellement", en laissant tomber ainsi le mot correct ("solidairement", qui traduit bien tout seul la double expression de l'anglais) pour conserver "conjointement" qui (dans ce contexte) ne traduit pas *jointly* mais *severally*. *Jointly* tout court est faussement "conjointement" dans les trois tomes; mais le tome I est le seul à énoncer, ne serait-ce que dans la définition, l'expression française qui en donne le sens: "gain de survie".

Comment comprendre, en l'absence de toute explication dans ces volumes mêmes, l'acceptation d'un bon nombre de termes civilistes en certains cas et la substitution d'anglicismes flagrants en d'autres? Il serait simpliste de supposer que les auteurs connaissaient quelques terms juridiques et non les autres. En l'absence de l'explication des éditeurs on en est réduit à des suppositions; peut-être ne veut-on pas choquer la profession en présentant une terminologie qui semblerait étrange. Les termes civilistes qui sont déjà connus par les avocats en exercice sont acceptables, les autres, non. Si c'est le cas, les éditeurs ont sûrement sous-estimé le désir sincère et largement répandu dans la profession de s'instruire. Bien des avocats aimeraient parler un français correct; mais ils ne trouveront pas dans ces Vocabulaires la nourriture qu'ils cherchent, et le manque d'explication les empêche même de savoir qu'ils ne sont pas nourris.

Gardons cependant, en terminant, le sens des proportions. La plus grande partie de ces Vocabulaires ne se prête à aucune critique. À part les fautes qui de temps à autre détonnent (et ce ne sont que les plus frappantes dont on a fait mention dans ce compte rendu) l'ouvrage constitue un outil d'une grande utilité. Et il faut féliciter les auteurs pour la façon dont ils traitent les termes historiques, tel que *fee simple*. "Pleine propriété" en aurait donné impeccablement le sens mais non l'ambiance: on a fait beaucoup mieux d'opter pour le "fief simple". Espérons somme toute que les fautes disparaîtront par voie de révision, et que les tomes successifs préciseront lesquels des termes adoptés sont des régionalismes et lesquels relèvent du français universel.

J.A. CLARENCE SMITH*

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[6] Voir la condamnation magistrale de Pierre Mimin, Le Style des Jugements, Paris, 4ème édition mise à jour 1978, à la page 38.

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International Encyclopedia of Comparative Law. Chief Editor, ANDRE TUNC. Vol. XI, Torts, Part I. The Hague: Martinus Nijhoff. 1983. Pp. xliv, 814. (U.S. $310.00).

The increasing complexities of international life, coupled with the greater facility for international traffic, travel and trade have made it necessary for lawyers to consider legal systems other than their own. As a result comparative law has become a respectable field of study which academic and practising lawyers ignore at their peril. Any attempt to facilitate the national lawyer's acquaintanceship with a system other than his own is to be encouraged and we must be grateful, therefore, to the International Association of Legal Science and the Stiftung Volkswagenwek in Hannover, the former for having lent its auspices and the latter its finances, to the production of what will eventually be a seventeen-volume International Encyclopedia of Comparative Law, the undertaking of which began in 1965. Now, almost twenty years later, the first volume—numbered Part One of Volume eleven—has been published.

The opening comment by the Chief Editor, Professor Tunc of the University of Paris, sets the tone for the entire work:[1]

> Encounters of civilizations have, through cross-fertilization, produced renaissances. A world-wide comparative study of law may not only spread information, particularly to developing countries, but may also start a world-wide process of modernization, which would allow the law to respond better to the needs and expectations of contemporary societies. Perhaps greater mutual understanding between lawyers might even improve relations between communities of mankind . . .

Moreover, his introduction to the volume might well be recommended to any law student for the comprehensive way in which, in some 180 pages, he deals with the concept of tort and the delimitation of the law of tort, provides an historical and geographical survey of the law of tort, discusses the proper place of fault in that law and considers the functions of a law of tort. His conclusions are as follows:[2]

> . . . all accidental damage should receive compensation. Only deliberate fault on the part of the aggrieved party [—?failure to use seatbelts—] should nullify or decrease the right to indemnification . . . A Modern law calls for a complete rethinking of tort law as an instrument of compensation in the context of the more recent means, i.e., insurance and social security. It also calls for a drastic simplification . . . In all countries . . . the modernisation and streamlining of tort law are an urgent necessity. Even the socialist countries, notwithstanding the recent dates of some of their codifications, may appear to have failed to build a law truly responding to modern conditions . . . Encounters between civilizations have often brought revivals. It is earnestly hoped that the comparative researches contained in this volume will permit, perhaps through further international efforts, the birth of new laws, giving a fuller response to the legitimate expectations of contemporary man.

To this end, the contributors, drawn from the Universities of Antwerp, Athens, Brussels, Budapest, (it has been noticeable for some

[1] P. vii.

[2] P. 1-181.

years now that Hungarian lawyers are among the most willing in eastern Europe to cooperate with their western colleagues and to write with a minimum of Marxist jargon), Ghent, Oxford, Paris, Reims and Tulane, have dealt, in this first part of the volume on Torts, with a variety of issues relating to liability—for one's own act, for the act of persons under supervision including minors, private and governmental liability in respect of the acts of employees and organs, for damage caused by things and the persons liable for the various offending "things", professional liability as it affects physicians, attorneys, architects and civil engineers, and finally causation and remoteness of damage. It is perhaps unfortunate, however, that despite the publication date the latest article in the volume is dated 1975 so that the law and literature relating to any specific country is somewhat dated, to say the least. Moreover, there is no evidence to suggest that any contributor consulted colleagues abroad when commenting on the latter's legal system. Most of the papers, for example, include references to the law and literature of Canada, though there is no Canadian contributor. In addition, there is no index which would enable one to ascertain the views of any particular national legal system on any of the topics analyses.

Part 2 of volume 11 will be devoted to, among other topics, remedies, personal injury, damages and procedural issues, and on this occasion the contributors will be drawn from Athens, California at Berkeley, Cambridge, Freiburg, Oxford, Paris and Reims. Perhaps it is not too late to express the wish that Part 2 will contain a comprehensive index to enable one to see how one's own system of law compares with other systems, and perhaps future volumes will also include some indices.

L.C. GREEN*

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Prisoners of Isolation: Solitary Confinement in Canada. By MICHAEL JACKSON. Toronto: University of Toronto Press. 1983. Pp. xii, 330. ($35.00 cloth; $12.50 paper).

In Prisoners of Isolation: Solitary Confinement in Canada, Professor Jackson once again carries the banner, this time against the inhumane treatment of prisoners placed in solitary confinement arbitrarily, without the procedural safeguards that mark the rest of the justice system in Canada. He also inveighs against the conditions of solitary confinement which are physically and psychologically devastating to prisoners. In doing so, he has resisted the temptation to join the movement to abolish the penitentiary system entirely. Instead he has more realistically set out to reform one

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aspect of it. His previous recent major work, Sentences that Never End: The Report of the Habitual Criminal Study,[1] was instrumental in the release of many so-called "habitual offenders" who had been incarcerated for long periods of time without regard to their actual potential for dangerousness.

Professor Jackson came to appreciate the nature of the solitary confinement experience through extensive communication with several inmates of the British Columbia Penitentiary before it was closed in 1980. He played a major part in bringing before the court the case of *McCann et al.* v. *The Queen*,[2] a protest against the procedures leading to solitary confinement and the conditions of confinement in the British Columbia Penitentiary. The court was subjected to the horrors of the experience through the emotional testimony of "hardened" criminals who broke down on the stand from the strain of re-living their degradation and de-humanization.

Jackson's readers also are given a mental image of a cell, eleven feet by six and a half feet with three solid concrete walls and a solid steel door with only a five inch square window. A cement slab four inches off the floor covered with plywood and a four inch thick foam pad serves as a bed. At the end of the bed is a combination toilet and wash basin, the only other furniture in this "vault". You, if you can imagine it, are forced to sleep with your head next to the toilet to facilitate the inspection process. A light burns twenty-four hours a day. You are allowed one cardboard box of personal effects. Twice a week you are given a cup of hot water for shaving and a razor which is shared by the other prisoners on the unit. The rest of the time you have only cold water in your combination toilet and wash basin. In this cell you remain for twenty-four hours a day except for a half hour daily exercise in a seventy-five foot corridor in front of the cells with armed guards watching you from a position of safety. There are no hobbies for you, no work, no television, no movies, no sports, and no calisthenics. You never see the sunlight. In this purgatory you see other prisoners, similarly situated, set fire to their cells or to themselves for temporary escape, slash their wrists in an effort to focus their pain, or become psychotic and scream out in agony and unbearable frustration. You are less than human.

In this setting, for administrative reasons, (the maintenance of good order and discipline in the institution), not for punitive reasons, some of the plaintiffs in the *McCann* case, spent periods as long as 338 days, 682 days, even 754 days at a time. They won their case, at least in part. Solitary confinement at the British Columbia Penitentiary was declared "cruel and unusual punishment" contrary to section 2(b) of the Canadian Bill of Rights.[3] However, they lost the second half of the battle. The plaintiffs had

[1] (1982).

[2] *McCann et al.* v. *The Queen and Cernetic* [1976], 1 F.C. 570 (F.C.T.D.).

[3] R.S.C. 1970, Appendix III.

also challenged the procedures which allowed them to be placed and kept in solitary for administrative purposes, as contrary to section 2(e) of the Canadian Bill of Rights,[4] that is, a violation of the principles of fundamental justice, the "due process' provision. For many prisoners, this was the more unbearable burden, the arbitrary way they were banished to solitary and the fact that they were completely helpless to affect their plight. Prison officials gave no notice of the grounds for segregation. The prisoner was given no hearing and could express no opinions about his continued segregation at monthly "reviews". One inmate described a Catch 22. His report said that he was "quiet and co-operative but this attitude might belie the mental activity which could take a devious route".[5] Another inmate's report said that he had "protested continued detention, been 'disrespectful' to the guards, and developed 'behaviour problems'".[6] Both men were kept in solitary confinement for these reasons.

Punitive dissociation, on the other hand, resulted from a disciplinary hearing and the sentence could be for a maximum of thirty days. The prisoner in such a case knew why he was there and how long to expect to be there. However, often such sentences were followed by indefinite periods of administrative segregation. As Andy Bruce, one of the *McCann* plaintiffs put it: "They say it depends on your behaviour but there's nothing you can do. You can't do nothing except get worse, and when you do get worse, they say that's why you're up there".[7] The plaintiffs lost this round. However, Jackson points out that in a later case which went to the Supreme Court of Canada, *Martineau (No. 2)*,[8] the Court ruled that the ". . . board's decision (to segregate) had the effect of depriving an individual of his liberty by committing him to a 'prison within a prison'. In these circumstances, . . . elementary justice requires some procedural protection. *The rule of law must run within penitentiary walls*".[9] The court also ruled that "certiorari avails as a remedy whenever a public body has power to decide any matter affecting the rights, interests, property, privileges, or liberties of any person".[10]

The author reminds us that since *McCann* and *Martineau (No. 2)*, other cases involving the rights of prisoners have been won. The British Columbia Court of Appeal decided that *habeas corpus* lies to ensure that penal authorities act within their jurisdiction in confining a prisoner to the

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[4] *Ibid.*

[5] P. 58.

[6] P. 58.

[7] P. 63.

[8] *Martineau* v. *Matsqui Institution Disciplinary Board (No. 2)*, [1980] 1 S.C.R. 602, (1979), 106 D.L.R. (3d) 385, 50 C.C.C. (2d) 353.

[9] P. 132 (emphasis in original).

[10] *Ibid.*

"prison within a prison".[11] This judgment was followed in the Ontario Court of Appeal, which also added that the internal decision-maker who determines the question of segregation is subject to a duty to act fairly, the breach of which may result in a loss of jurisdiction.[12] In an earlier British Columbia ruling, prison guards were convicted of shaving a prisoner against his will.[13] Mandatory supervision can no longer be revoked without just cause.[14]

Other battles have been lost. Prisoners still have no right to protest a transfer between prisons even though the decision may destroy the possibility of family visits.[15] Prisoners cannot always marry without permission.[16] Parole can be revoked for minor infractions although some procedural rights are now protected.[17] But what effect have these cases and the *McCann* case had on the practices surrounding solitary confinement in Canada? Formed by the Solicitor-General, a study group on dissociation investigated the effects of prolonged segregation and found that "it enhances the inmate's anti-social attitude and in general, constitutes a self-fulfilling prophecy".[18] It called for inmates to have all the same amenities as other prisoners except for association and to be re-integrated as soon as possible into the general population through a system of phases. It recommended that a Segregation Review Board consider each case within five days of segregation.

The British Columbia Penitentiary made temporary changes following the *McCann* decision but most improvements were apparently short-lived and the penitentiary itself was shut down in 1980. In 1976 a Parliamentary Subcommittee on the Penitentiary System in Canada recognized these principles; that the rule of law must prevail inside Canadian prisons and that justice for inmates is a personal right and an essential condition of their socialization and personal reformation. The arbitrariness traditionally associated with prison life must be replaced by clear rules, fair disciplinary procedures and the provision of reasons for all decisions affecting inmates. These principles were accepted by the Solicitor General of Canada. As a result, two special handling units (S.H.U.'s) were estab-

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[11] *Cardinal and Oswald* v. *Director of Kent Institution* (1982), 137 D.L.R. (3d) 145, [1982] 3 W.W.R. 593 (B.C.C.A.).

[12] *Re Miller and R.* (1982), 29 C.R. (3d) 153 (Ont. C.A.).

[13] *R.* v. *Berrie et al.* (1976), 24 C.C.C. (2d) 66 (B.C. Prov. Ct.).

[14] *Re Moore* and *The Queen* (1983), 41 O.R. (2d) 271 (Ont. C.A.).

[15] *Re Bruce et al. and Reynett et al.*, [1979] 4 W.W.R. 408, (1979), 48 C.C.C. (2d) 313 (F.C.T.D.).

[16] *Ibid.*, (note that Bruce was one of the plaintiffs in the *McCann* case).

[17] See *Re Dubeau and the National Parole Board*, [1980] 6 W.W.R. 271, (1980), 54 C.C.C. 553 (F.C.T.D.) holding that members of the Parole Board should not have questioned the prisoner about pending criminal charges without allowing him to have his lawyer present.

[18] The Vantour Report, p. 134.

lished to house "dangerous" prisoners, at Millhaven Institute in Ontario and the Correctional Development Centre in Laval, Quebec. Conditions in these units were intended to be greatly improved over those in the British Columbia Penitentiary which had been ruled to be cruel and unusual punishment. Professor Jackson, however, has visited these two S.H.U.'s and the unit at Kent Penitentiary which replaced British Columbia Penitentiary, and interviewed their inhabitants. The substantive conditions of these units had apparently not changed much from the pre-*McCann* days, although today improvements have been made and some open visits, some hobbies, television sets, etc. are now allowed. The procedures, although improved, still need reform.[19] The prisoners see the phase system as cruel and arbitrary. The only way to progress through the stages is by putting in time, one year at least, and by causing no trouble. There is still nothing positive a prisoner can do to progress more quickly through the phases. A minimum of two years is required on the unit and in reality, only the six month reviews which are conducted by national headquarters have any real effect.

Professor Jackson proposes a Model Segregation Code. He recognizes that there are times when a prisoner must be segregated immediately without a hearing and these circumstances are set out specifically. However he would set strict time limits, two weeks, unless more time is legitimately needed for investigation of charges, with a maximum of one month. Placement in administrative segregation would have to be preceded by a full hearing with notice, disclosure of most evidence against the prisoner and the opportunity to participate fully in the hearing. Where segregation may continue for more than thirty days, the prisoner may present expert evidence as to the effects of segregation on the individual. In any case, the maximum time spent in administrative segregation could not exceed thirty days. Standards would be set for the actual conditions of segregation as well, which would restore some dignity to the isolated prisoner. He would be clothed, fed, and housed in the same way as other prisoners. He would have the same opportunities for visits, correspondence, and telephone privileges. He would not be deprived of any amenities awarded members of the general population. Professor Jackson faces the criticism that his Code may help to legitimize segregation practices but sees hope in the fact that the "systematic questioning of the administration's authority is fundamental to the operation of the code as a control on the abuse of that authority. Such questioning is most likely to come from the young lawyers and law students upon whom the weight of prison legal work is likely to fall".[20]

[19] For a very recent critical review of the S.H.U.'s, see V.L. Quinsey "Behavioral Management of Special Handling Unit Inmates", Psychological Services Division, Offender Programs Branch, Correctional Service, Canada. Though written from a social science rather than legal perspective, Quinsey reaches similar conclusions about the ultimate futility of fighting violence with violence.

[20] P. 242.

Whether or not one considers rehabilitation to be a proper and a possible objective of incarceration, the fact remains that one day the prisoner will be released. It is bad enough if he leaves prison with the same attitude which he brought with him. If, however, he has been made worse by his experience, more outraged by the lack of justice within the institution, society will be infinitely worse off. As Dr. Fox testified in the *McCann* case: ". . . when a person comes to have no dignity, and no self-respect, no identity, you are faced with the most violent, the most dangerous possible human being. You can't reduce men to that, you risk your life to reduce them to that. . .".[21] It is with this reality in mind that Jackson's Model Segregation Code, a "justice" model, becomes so compelling and so deserving of close study by prison administration.

Prisoners of Isolation is an important book because it deals with an important topic and ends with important recommendations. It merits careful study by the judiciary, lawyers, criminologists, interest groups, and prisoners. It is well-researched and well-written and has been placed in historical and legal context. Some critics might suggest that Jackson's descriptions of the conditions may be over-drawn and histrionic. But from some knowledge of the actualities in Canadian penitentiaries, we would have to stand with Professor Jackson and would suggest that the overall emotional tone of his book, though strong, is carefully restrained. We applaud this work, which, as we have said, follows his recent remarkable success in obtaining outright pardons for many former habitual criminals. It is to be hoped that a form of his model code will not be long in finding application and that this will ease the lot of these men deemed violent but perhaps in some cases better viewed as 'afraid'. Jackson's book tells us that no solution to violence in prisons will be forthcoming so long as attention is focused on the behaviour of individual inmates at the expense of close examination of the legal and correctional systems as a whole. The book helps us understand 'where' the violence in prison is located. Only in part is it to be found 'in' the men in S.H.U.'s. That is the easy bit to 'see'. The rest is in the legal apparatus, or lack of it, which regulates life in prison and also in the training, or absence of it, of correctional staff and administrators.

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[21] P. 73.

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Canadian Criminal Evidence. Second Edition. By P.K. McWILLIAMS, Q.C. Agincourt: Canada Law Books Ltd. 1984. Pp. cxlii, 1131. ($95.00).

Since it was first published in 1973, McWilliams' Canadian Criminal Evidence has become an indispensable tool for all practitioners of criminal law. Its clear, straight-forward style made it invaluable for those moments in court when time permitted only a quick reference. In many small remote court houses it made up fully one-third of the library holdings on criminal law, the other two being Salhany's Criminal Procedure[1] and Martin's Criminal Code.[2] Likewise, it also provided an excellent starting point for in-depth research on evidential points. Practitioners, therefore, will welcome the much expanded and improved second edition.

Over four hundred pages have been added in the second edition. Although the basic structure remains the same, many chapters have been reworked and expanded and in some cases almost completely transformed. Major changes have been made in the areas of confessions, opinion evidence, character and corroboration. Interception of private communication and privilege have been added as separate new chapters. These revisions reflect the many important changes of the last ten years.

The original purpose of the book remains, to provide "ready reference for busy practitioners".[3] But the second edition has taken on the greater and possibly more difficult task of appealing to law teachers and students generally. The difficulty of simultaneously reaching these two laudable goals lies in attempting to reconcile the practical needs of working lawyers with the academic and theoretical needs of professors and their students. The style generally employed in the first edition, and for the most part carried on in the second edition, is one where a principle of law is stated followed by a supportive case citation and in some instances a quotation, usually without discussion or analysis. McWilliams has purposely tried to alter this approach in the second edition by being more discursive and critical. There are specific instances where arguments on policy and suggested reform have been injected into the old material. This unfortunately leads to an awkward and stilted style which may appeal to neither the practitioner nor the student.

The little bits of injected policy and reform which have often been wedged into the old material will for the most part be a nuisance to the practitioner who, when looking for authority to support his position, is intent on telling the judge what the law *is* not what the law *could be*. Students on the other hand have need of much more than bits of policy and reform wound around a large core of specific rules and case verdicts. They

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[1] (4th ed., 1984).

[2] (1983).

[3] P. ix.

require an understanding of the history and evolution of laws of evidence, they must be taught the underlying principles and philosophy, the whys and wherefores, so that they can continue to cope with, and understand, the continuing evolution. Our law schools must not fall into the easy and inviting trap of teaching what the law is here and now without providing a theoretical background. McWilliams has perhaps started on the path to establishing a text that could one day be useful for law schools. For instance, relevant sections from the Draft Uniform Evidence Act[4] along with annotations have been worked into the text. A useful background discussion on the rationale of hearsay has also been added. But even with such revisions the text has yet to reach its stated goal of appealing to law schools. It would be unwise to rely on this text alone for teaching purposes. In essence, the book remains practice oriented. The words of Neil Brooks, taken from a review of the original, still apply: "It will not be condemned by practising lawyers as academic".[5]

As a practice manual though, the second edition will continue to be an essential tool for all criminal lawyers. This is especially true with respect to the revised material on such crucial topics as confessions and privilege. As wide-spread and useful as the revisions have been however, there still remains material from the first edition which continues to be misleading or which has been superseded. For instance, McWilliams continues to refer to the oft quoted (by the defense invariably) decision of O'Halloran J.A. in *Rex* v. *Browne and Angus*,[6] in which he ruled that "in court" identification without more is of little or no value. But McWilliams fails to point out that the British Columbia Court of Appeal in the later decision of *Regina* v. *McKay*[7] disassociated itself from that view, saying O'Halloran J.A. had been speaking only for himself in *Brown and Angus*. Other instances of failing to update include references to the existence of common law conspiracy and the uncertain effect of putting a record to a witness, matters commented on by the Supreme Court of Canada in *R.* v. *Gralewicz*[8] and *R.* v. *Morris*[9] respectively.

One questionable feature of the new edition is the author's tendency to editorialize on and to critize the practice of Crown Counsel. A scholarly work on evidence should be a statement of law and principle and should not stoop to examining the allegedly dubious habits of Crown attorneys in a particular jurisdiction. Surely if the activity of which McWilliams complains is contrary to law or ethics it should be stated as such rather than being mere opinion on a question of practice.

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[4] Federal/Provincial Task Force on the Uniform Rules of Evidence (1982).

[5] (1976), 54 Can. Bar Rev. 179.

[6] (1951), 1 W.W.R. (N.S.) 449, 99 C.C.C. 141 (B.C.C.A).

[7] (1966), 61 W.W.R. (N.S.), 528 (B.C.C.A.).

[8] [1980] 2 S.C.R. 493, (1980), 116 D.L.R. (3d) 276, 54 C.C.C. (2d) 289.

[9] [1979] 1 S.C.R. 405, (1978), 91 D.L.R. (3d) 161, 43 C.C.C. (2d) 129.

On a purely chauvinistic point, one unfortunate irritant that continues in the second edition is the author's preference for using Ontario in his references to provincial legislation. True, there are many criminal lawyers in Ontario, but judging by the crime rates of Montreal, Calgary, and Vancouver one suspects there are criminal lawyers elsewhere too.

The second edition comes at a very exciting time when many facets of our criminal law, including evidentiary issues, are being tested against the Charter of Rights and Freedoms.[10] Its release coincides with the mushrooming growth of "Charter" cases dealing with section 24(2), the crucial section in terms of the law of evidence. It also coincides with the promulgation of the all new Young Offenders Act,[11] itself containing a myriad of new evidentiary rules. Although both the Charter and the Young Offenders Act are incorporated into the text with some commentary, the real impact of these new pieces of legislation has yet to be truly felt and understood. Therefore, as valuable as a second edition is, it is in danger of becoming very quickly dated as the Supreme Court of Canada comes to deal with these new issues. Therefore, it is hoped that we will not have to wait another ten years for the next edition of Canadian Criminal Evidence.

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[10] Constitution Act, 1982, Part I, being Schedule B of Canada Act 1982, (U.K.) 1982, c. 11.

[11] S.C. 1980-81-82, c. 110.