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Sexual Divisions in Law

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Reviews

Protectionism and the Future of International Shipping. By Ademuni-Odeke. Dordrecht, the Netherlands: Martinus Nijhoff Publishers, 1984. Pp. xxviii, 446. Price U.S. $89.50.

It is Dr. Ademuni-Odeke's view that international shipping is "an industry in decline" and "in a mess" principally because of the abuse of national policies designed to give preference to national fleets or protect national fleets from international competition. The desire of non-traditional maritime nations to establish national merchant marines utilizing preference or protectionist policies has led to a confrontation with traditional maritime nations who espouse liberal economic principles, yet practice the same protectionist policies. The United States is the classic example of a maritime state which utilizes the full array of protectionist policies (flag preference, flag discrimination, state intervention, and subsidies), yet shouts the loudest when states adopt similar policies or take retaliatory action arguing that open competition should prevail.

The author's cure for the poor state of international shipping and the confrontation that dominates international shipping fora is cooperation, consultation and joint ventures between the confronting states and a recognition that the future of international shipping is not in developing national fleets but in developing international fleets. To this end an international shipping authority is proposed with the goal of making shipping truly international in character. The model adopted for the international shipping authority is the International Seabed Authority detailed in the 1982 United Nations Convention on the Law of the Sea which will be established when the LOS Convention is ratified by sixty states.[1]

The core of this book is an examination of the various methods utilized by states in establishing and developing national merchant marines. Dr. Ademuni-Odeke exhaustively discusses flag preference policies, flag discrimination policies, state interventionist programmes, and maritime subsidies, all of which have been traditionally used to build or protect national fleets. It is the author's conclusion that these policies and actions

1. Done at Montego Bay, 10 December 1982. Not yet in force. U.N. Document A/Conf. 62/122, 7 October 1982. Reprinted in (1982), 21 International Legal Materials 1261-1354. As of December 1984 fourteen states had ratified the LOS Convention. Almost all states have signed the Treaty. Noteable exceptions are the United States, United Kingdom and the Federal Republic of Germany. Canada, one of the major beneficiaries under the Treaty, has signed but not yet ratified.

are not in conformity with customary and conventional international law, contrary to economic efficiency, and should not be utilized by non-traditional maritime states in building national fleets. Such conclusions will be strongly disputed by many, particularly those who view the 1974 United Nations Convention on a Code of Conduct for Liner Conferences[2] and its cargo-sharing provision as being designed to promote fleet development in developing states.

This book is not primarily a legal book since international shipping policy is a multidisciplinary field involving economics, politics, law and maritime technology. Hence for the practising Admiralty lawyer this book may only be of passing interest. For those involved in development of shipping policy or involved in the international shipping arena this book, whatever its faults, is worth perusing.

Chapters eight and nine do deal with legal issues, namely whether methods utilized by states to support national fleets (flag discrimination, flag preference, state intervention, and subsidies) violate customary international law or conventional international law. Concerning conventional international law, or treaty law, the author does not state the fundamental point that treaties are only binding upon those states that are parties to them and obviously provisions in treaties that restrict action apply only to parties to that treaty. One is left with the notion that because a treaty adhered to by only a few countries has a vague reference to freedom of trade or equal treatment of vessels that a non-party following a policy of flag discrimination is violating international treaty law.

It is the author's view that the customary international law of freedom of the high seas as described in the 1958 Geneva Convention on the High Seas gives rise to the "undisputed" proposition that flag discrimination and other forms of national protectionist policies are in violation of international law. Such a perspective is questionable since freedom of the high seas relates principally to freedom of navigation and not to economic relations between a state and vessels flying the flag of that or any other state. It is a very large leap to suggest that discriminatory policies effect passage rights.

The author is clearly not at home discussing the international law of the sea. At page 241 the author makes several references to treaties which prohibit a coastal state from charging differential fees for services

2. Done at Geneva, 6 April 1974. Entered into force 9 October 1983. U.N. Document, TD/Code/13/Add.1. Reprinted in (1974), 13 International Legal Materials 917-948. Neither the United States nor Canada is a party to this Treaty. The literature on the UNCTAD Liner Code is extensive, see: Charles H. C. MacKenzie, Michael E. Power, and Ted L. McDorman, *Liner Shipping Conferences: An Annotated Bibliography* (Toronto: Lexington Books, 1985), at 128-143.

rendered to vessels passing in the coastal states' territorial sea. On this basis he concludes that international law prevents states from levying discriminatory fees on foreign vessels when those vessels are in the port of a coastal state. Ports, however, are internal waters of a coastal state and an ocean area where the coastal state has full sovereignty. The international right of innocent passage prohibits discriminatory action by the coastal states regarding vessels transitting its territorial seas. No such right of innocent passage applies in internal waters. The author clearly has not distinguished between the territorial seas regime and internal waters.

Another problem with the author's view of customary international law occurs one page later when the author asserts that landlocked states have a right of transit passage to the sea across neighbouring coastal states, a very arguable proposition that received considerable attention during the Law of the Sea Conference, although no reference to those debates are found in the book.[3]

It is inevitable in a book of this scope that draws examples of national shipping policy from all nations that some of the information cited is out of date. The author is to be congratulated on securing and presenting such a detailed accounting of national shipping policy from so many countries. Appendix five which details the main flag discrimination provisions of sixty different states is in itself an impressive achievement. One necessary update that should be noted is the approval in March 1984 of the United States Shipping Act of 1984, Public Law 98-237 which changes U.S. law regarding liner shipping conferences.[4]

One interesting comment made by Dr. Ademuni-Odeke is that the 1931 British Commonwealth Merchant Shipping Agreement, to which Canada was a party, was designed to develop and expand the national merchant marines of the countries involved. This was neither the intention nor the affect of the Commonwealth arrangement. The Agreement had a much less ambitious goal, that of ensuring that the Commonwealth countries permitted British vessels to continue to operate in their coastal trades and ensuring that the shipping laws of the Commonwealth countries did not deviate from the Imperial example.[5]

A much more serious concern with this book is the questionable footnote support for the statements made in the text. In numerous

3. See: A. Mpazi Sinjela, *Land-Locked States and the UNCLOS Regime* (Dobbs Ferry, N.Y.: Oceana, 1983), 495 p.

4. Note: Peter A. Friedmann and John A. Devierno, *The Shipping Act of 1984: The Shift from Government Regulation to Shipper 'Regulation'*, (1984), 15 Journal of Maritime Law and Commerce 311-351.

5. Ted L. McDorman, *Shipping policy as a British export product: The Canadian case*, (1984), 11 Maritime Policy and Management 1, at 3-5.

chapters the citation allegedly to correspond with the footnote number is incorrect. It is apparent that at some point the footnotes were shuffled or otherwise put out of order. Prior to publication this should have been corrected. Typical of the footnoting problem is footnote 97 in chapter eight which has been left blank.

One can seriously debate the author's conclusion that a new international shipping authority is necessary to relieve the confrontationalist position now existing between the traditional and non-traditional maritime states. The debate, however, would most likely not be about the merits of the authority and whether it in fact could solve the problems that exist, but rather the debate would be about how realistic it is that the international community would adopt an international treaty to establish such an international shipping authority. In such a debate reference would inevitably be made to the U.S. failure in 1950 to accept the International Trade Organization and the ideologically-based U.S. position against the International Seabed Authority to be established when the 1982 LOS Convention comes into force. A large part of the debate regarding the proposed international shipping authority would arise because this proposal implies criticism of the work of the Committee on Shipping of the United Nations Conference on Trade and Development (UNCTAD) which is a continuing forum for commercial shipping issues such as liner and bulk shipping practices, and more recently, flags of convenience. It is, however, unfair to criticize Dr. Ademuni-Odeke on these grounds. He makes it clear that the suggestion is a long term goal and perhaps even an unattainable ideal, but one to which the logic of his argument draws him.

Dr. Ademuni-Odeke's subject matter is breath-takingly broad and the information he has accumulated is beyond compare. The disappointment one feels with this book is the product of high expectations created by the scope of the inquiry. The text is unevenly written and argued with the analysis of the problems unconvincing on some of the major points. This is not helped by poor editing regarding the footnoting and bibliography. In the end, however, the book was an interesting read with a challenging thesis that stands alone because of the breadth of the scope of inquiry.

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Procedures for Meetings and Organizations. By M. Kaye Kerr and Hubert W. King. Toronto: Carswell, 1984. Pp. xvi, 331.

Why would an academic psychologist and an academic engineer write a book about "how to set up organizations" and run their meetings? The authors do not answer that question in their preface so we are free to speculate that this is their escape from the "meeting madness" that threatens every academic. They have attempted not only to bring some order into that omnipresent aspect of their own lives but also to share the fruits of their efforts with the rest of us in this very fine handbook.

Procedures for Meetings and Organizations is more than a book of "Rules of Order" for meetings. As the title suggests, it is also a guide to the establishment and operation, and even the termination, of organizations of all kinds, from neighbourhood reading groups through service clubs and community boards to national professional or academic associations. As I read through Kerr and King (and it reads very easily) I found two questions, which reflect my own professional biases, recurring to me: "Is this a book for lawyers?" and, "is this too simplistic?" The answers, respectively, are "yes" and "no".

The authors state that their basic source for parliamentary principles and practices has been Beauchesne's *Rules and Forms of the House of Commons of Canada,* 5th ed. (Fraser, Birch and Dawson, 1978) with occasional reference to the 19th edition (1976) of Erskine May, *Treatises on the Laws, Privilege, and Procedures and Usages of Parliament,* and one of their appendices contains a listing of all Canadian, American and Commonwealth Companies Acts and statutes governing non-profit associations. The authors do not make other than occasional references to the way in which the law impinges on the creation, operation or termination of companies or non-profit organizations, but at all the appropriate points they do caution that legal advice and legal services should be sought where local legislation may impinge in the establishment, running or winding-up of an organization. In other words, they do not purport to provide a text book for lawyers, who are assumed to know something about the business of organization from other sources. On the other hand, a great deal of what this book has to say, particularly about running a meeting but also about the niceties of keeping order generally in an organization, will serve fledgling, and even experienced, lawyers very well. What lawyer has not been faced with the (unwarranted?) assumption that he or she knows all about such things. Doctors Kerr and King, non-lawyers both, have come to the rescue!

In *Procedures for Meetings and Organizations* the authors take a stance of crisp, albeit reasonable, command. Such and such a motion is not debateable, such another is to be passed by a two-thirds majority

because it infringes democratic rights, and so on. This gives rise to another lawyerish query. Are they declaring what the law is or making it? The answer is provided clearly enough on pages 20 and 21 and must be borne firmly in mind throughout:

> What is required is a mutually accepted system of rules which covers the range of possible activities of a group . . . organizations have the choice of either formulating their own procedures or adopting an authoritative and comprehensive set of rules of order . . . for example, if the present book were adopted for this purpose, an appropriate by-law would read:
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> > *Procedures for Meetings and Organizations,* by M. K. Kerr and H. W. King, Carswell Legal Publications, Toronto, 1984 or later editions, shall govern the organization in all procedural matters not otherwise covered by the Constitution or By-laws.

This self-serving but not ill-advised suggestion leads back to the question of whether this book is too simplistic. Undoubtedly one of the reasons why the question occurred to me is the exceptional clarity and directness of the writing. Most of this book is free of jargon; legal, engineering or psychological. It is certainly easy to read, but it is not simplistic.

Some sections of the book, particularly those in Part I, where there is formal discussion in handbook style of types and models of organizations, their establishment, the roles of members, officers, directors and professional staff, may seem basic to the point of being self-evident to those of us who have been fated to spend a large part of our lives in organizations and their meetings. However, this is a complete handbook for a wide range of people, and for those who come new to such activities some of the commonplaces may be enlightening and will undoubtedly be reassuring. Sample minutes of meetings, committee reports, budget statements and the like, framed in the appendices and commented on in the text, will undoubtedly bring relief to many a harried novice volunteer. Beyond that, I have no doubt whatever that even experienced and professional organization people will find Kerr and King's precise and thoughtful checklists very useful, in, for example, organizing conferences, preparing agendas, making reports and following up action lists after meetings.

The "Meetings" sections of *Procedures for Meetings and Organizations,* that is Part II entitled "Procedures for Meetings", which takes up forty-five pages, are not simplistic from any point of view. They seem to me to provide a clear, logical and (I would be prepared to predict) workable set of parliamentary rules. A better qualified reviewer might at this point discuss in detail where the authors have been innovative, on which side they have come down where there are well known divergences between Beauchesne and Roberts, and the like, but that is not my aim. The authors talk that way themselves only in one or two places, for example

in connection with what they call a motion "to close the debate", which most of us may know as a motion to "put the previous question".

For the most part Drs. King and Kerr are content to set out a logical system of classifying motions as "regulatory", "substantive" and "procedural", with procedural motions clearly subdivided into those "that expedite a decision", those "that postpone or prevent a decision", those "that change the method of consideration", those "that allow further consideration of a substantive motion" and "procedural motions concerned with voting". They also deal with what they characterize as "specific appeals", which include "appeals against rulings of the chair, point of personal privilege and appeals for permission to speak ahead of others to correct a mistake or misquotation".

Their system strikes me as clear and logical, which means it could be relatively easily mastered by those using it regularly in complex meetings. The book itself is equipped with a good table of contents, a well organized index and full cross-referencing, so if it were adopted as the rule book for an organization it would probably serve that purpose very well.

Lest this comment lose all credibility, there are a couple of criticisms. Chapter 9, entitled "Enhancing Group Functioning", which the authors themselves refer to in their preface as "An exception to [the] scheme of presentation" and as "identify[ing] some novel roles and activities that may not be familiar to many readers", does contain some jargon and potted psychology which struck me as so simplistic that it is useless. The same comment might be made about the material on pages 149 and 150 on audio and audio-visual recording. This book is simply not the place for throw-away opinions on the effects of television in Parliament. But this is a very minor theme in my comment.

The major theme is that this book contains a very useful elaboration of a set of rules of order for meetings and says a great many useful things about other aspects of running organizations. If, for example, you have never conducted a telephone meeting or were not particularly happy about the way the last one went you would do very well to turn to pages 138-140 of Kerr and King, and be guided by their seventeen steps in "A Typical Telephone Conference".

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Sexual Divisions in Law. By Katherine O'Donovan. London, England: Weidenfeld and Nicolson, 1985. Pp. xii, 242. Price £ 8.95 in U.K.

I remember Katherine O'Donovan vividly. She was a young law lecturer at Queen's University Belfast when I was a first-year student there seventeen years ago. Law, on the whole, does not provide a large number of women to stimulate one's aspirations, but Katherine O'Donovan would have been outstanding in any context. She was clever and as beautiful as her name. She has written an outstanding book.

It appears in the Law in Context series and lives up to the promise of this title for two reasons. Most importantly, and most unusually, it demonstrates sensitivity to gender as a significant part of the context in which law is made, used, taught and studied. Secondly, as one would expect from the history of this series, the book draws heavily and usefully from other disciplines. An example can be found in the discussion of medical research on sex classification in Chapter 3, The Legal Construction of Sex and Gender.

The general theme is that the root of inequality of the sexes lies in the dichotomy between the public and the private. The contents are divided into three parts. Part One is entitled Definition and History of Public and Private and includes a chapter on the history of patriarchy. For me, the historical material had a fascination which it ought to have in theory but so rarely has in practice. An example of the oppression women suffered untouched by the law can be found in the material on wife-sale. A Yorkshirewoman called Mrs. Dunn describes her own experience in 1881:

> Yes I was married to another man, but he sold me to Dunn for twenty-five shillings and I have it to show in black and white, with a receipt stamp on it, as I did not want people to say I was living in adultery. (p. 52).

The author astutely observes that the fact that women shared in the ideology permitting such sales is irrelevant. "The internalisation by the subordinate of dominant beliefs is well-documented." (p. 52).

Part Two, Divisions Between the Sexes and the Public/Private Split, contains the main thesis of the book. Reference is made to acceptance of law as embodying the "natural" division between male and female. Law is seen as natural and inevitable instead of historically contingent. This idea can still be encountered in Canada too. In a recent decision of the Manitoba Court of Appeal, involving a constitutional challenge to the male-specific offence of having sexual intercourse with a foster-daughter, Chief Justice Monnin stated:

> What [counsel for the accused] seems to have entirely forgotten is that the distinction — or the inequality or the discrimination as he may call it —

> does not arise from an Act of Parliament but from an act of Mother Nature. . . .
>
> Counsel in his vain attempt to force equality has mixed apples and oranges and cannot be successful.[1]

In this discussion, the author treats sex and gender as analytically distinct concepts which merge in practice (p. 69)[2]. "Biology or 'nature' has a social meaning when translated into law, which itself operates on the social." (p. 69). A broad range of issues are discussed in Chapter 4, The Boundary Between Private and Public, and Chapter 5, The Private Relationship of Marriage. Examples are contraception, abortion, sexuality, prostitution, property, violence and divorce. The ideas presented here would be useful for Women and the Law courses as well as for teachers anxious to inject some sensitivity to gender into their traditional courses. For instance, there is a short section on Contracts or Agreements Between Spouses.

Inevitably, in such discussions, there is a slant toward the law of the United Kingdom. However, the policy questions are international ones and as well, the author draws on an extensive knowledge of European and North American law and legal writing.[3] The benefits in a comparative approach are vividly illustrated in Chapter 6, Public Law from the Private Perspective, in which the role of the European Economic Community in promoting equality is documented.

> Community interest in equal treatment does not necessarily stem from a belief in human rights. Free movement of workers within the Community is an essential part of the E.E.C. Treaty . . . This is facilitated by certain universal principles in social security laws. Equal pay for equal work ensures that unfair competition is not engaged in by countries underpaying women as cheap labour. (p. 144-145).

The impetus toward equality has been fuelled by fears of unfair competition from countries exploiting women workers. This is worth consideration at a time when free trade in North America is very much

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1. *R.* v. *McIntosh* (1984), 12 C.C.C. (3d) 130 at 136. The result may well be defensible, but the idea of differences as natural ones justifiably reflected in the law is a dangerous one for women. For an excellent analysis of this issue, see F. Olsen, *Statutory Rape: A Feminist Critique of Rights Analysis* (1984), 63 Texas L.R. 387.

2. I am inclined to agree with this as I find the usual distinction between sex as biology and gender as a social and cultural construct too simplistic. See C. MacKinnon, *Not a Moral Issue* (1984), 2 Yale Law and Policy Review 321 at 322. She suggests that the terms sex and gender can be used interchangeably.

3. Canadian readers will be intrigued to discover, at 122, that "Canadian [sexual assault] law, points the way to the future." The author also draws on work done by Dorothy Smith, *Women, the Family and Corporate Capitalism* in M. Stephenson (ed.), *Women in Canada,* (Toronto: New Press, 1974) and C. Backhouse, "Shifting Patterns in Nineteenth Century Canadian Custody Law" in D. H. Flaherty (ed.), *Essays in the History of Canadian Law,* Vol. 1, (Toronto: U. of Toronto Press, 1981).

in the air and when it is therefore vital to examine the pros and cons of free trade for women.

Part Three is entitled Crossing the Divide: Reformist Possibilities. It is clear that the debate about the meaning of equality resembles the Canadian debate given such dramatic impetus by s. 15 of the Canadian *Charter of Rights and Freedoms*.[4] O'Donovan favours an equality of results approach allied to changes in the private sphere. The limitations of formal equality are clearly recognized. "Allied to a legal system which exalted process over outcome, ideas of freedom and equality of opportunity permitted empirical evidence of inequality to be ignored" (p. 176). Exactly! Canadian readers will also feel a sense of recognition with respect to the treatment of discrimination on the basis of pregnancy (p. 166-173)[5].

In some ways, the most intriguing chapter is the last one, Reforming the Private: Why Can't a Man Be More Like a Woman? Here is discussed the dilemma for law posed by the feminist understanding that the personal is political. Various possibilities are discussed, such as regulation of the "private" and concern is expressed with respect to informal methods of conflict resolution. The danger is that informality will reinforce existing inequalities as there is no power to enforce change. This is a major concern for feminists, in view of the attraction toward mediation and negotiation as alternatives to the adversary system.

The reader should not look for confident solutions to all our problems, which would be suspect anyway since we know from bitter experience that within "each proposed reform are the seeds of conflict". (p. 159). Rather the Afterword expresses a desire for an "agreement about values"[6] and an assertion that if "equality is to be more than merely formal, if it is to be taken seriously, then we must look at individuals in their particular situation". (p. 208). Such situations are deeply gendered, as this book makes abundantly clear.

I like this book. It is instructive and reinforcing. It contains a satisfying critique of liberal analysis, including the liberal analysis of equality. It emphasizes the ideological content of law including the ideological content of non-regulation. It questions the role of law as a mechanism for conflict resolution and shows an awareness of the historicity of conceptions of privacy.

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4. *Constitution Act, 1982,* enacted by the Canada Act, 1982 (U.K.), c. 11.

5. The idea that discrimination on the basis of pregnancy is not discrimination against women seems to know no national boundaries.

6. A similar plea is made by my colleague, D. Fraser, *Truth and Hierarchy: Will the Circle Be Unbroken?* (1985), 33 Buffalo Law Review 729. See, *e.g.,* at 732-33. "A call is made for the revival of the idea of a redeemed community in which real open debate about truth and value will be possible."

I think that Canadians who are interested in Women and the Law and who are concerned about the pervasive male bias in mainstream courses will find this book useful. If you fall into either category you can obtain it by writing to the publishers at 91 Clapham High Street, London, SW4 7TA.

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