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Constitutional Law (kempo)

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Book Reviews

International Humanitarian Assistance, by Peter Macalister-Smith. Dordrecht: Martinus Nijhoff, 1985. xiv and 244 pp. US \$45.00. ISBN 90-247-2993-9.

The Right to Life in International Law, ed. by B.G. Ramcharan. Dordrecht: Martinus Nijhoff, 1985. xii and 371 pp. US \$57.50. ISBN 90-247-2074-0.

The Right to Food, ed. by P. Alston and K. Tomasevski. Dordrecht: Martinus Nijhoff, 1984. 228 pp. US \$36.50. ISBN 90-247-3087-2.

When the international community first became interested in the problem of human rights during the second world war and then enunciated those rights in a series of international instruments, there was a tendency among writers to deal with the issue as a comprehensive whole. Now, however, it has become increasingly popular for authors to deal with a specific right to the exclusion of all others.

Dr. Macalister-Smith has taken as his subject the question of "disaster relief actions in international law and organization," a matter which, at least on the level of morality, antedates any of the treaty recognitions of human rights. Moreover, a study of the classical writers, such as Grotius and Vattel, shows that in the 17th and 18th centuries, there was much awareness of a duty under the law of God or natural law. Not surprisingly, the author devotes attention to the need for relief during armed conflict, with particular attention to the work of the Red Cross, but in addition to this he reminds us, in chapter 5, that the humanitarian activities of the Red Cross go far beyond this. Article 5 of the Constitution of the League of Red Cross Societies in fact imposes the obligation "to bring relief by all available means to all disaster victims" (p. 80). But the League is not an official or inter-governmental body and what is of more interest, therefore, is the manner in which states may be under an obligation to come to the assistance of disaster victims, disasters being "emergency situations in which there is an urgent need for international assistance to relieve human suffering" (p. 3). Such disasters may be natural, e.g., earthquakes, floods, famine; or man-made, as during armed conflict or as a result of such accidents as those at Bhopal and Chernobyl. However, it is perhaps playing with semantics to suggest that "so-called 'natural' disasters are mis-named essentially because they include a component which reflects mankind's relationship with the

environment. This is increasingly demonstrated as more people become vulnerable to the effects of natural phenomena” (p. 3).

According to Dr. Macalister-Smith, the drive for international humanitarian assistance in the event of disaster springs from the idea that “if the desire to maintain security and develop peaceful relations is the primary motivation of international law, the instrumentalities of cooperation serve to link the realization of this ideal with measures designed to promote the interests of individual people” (p. 5). The chief “instrumentality” for this purpose is, of course, the United Nations, whose work on behalf of refugees is perhaps the best known of its humanitarian activities and is rightly considered a response to disaster, both natural and man-made (c. 3). Equally, in a very generic sense, the activities in the field of human rights at large may contribute to assistance in disaster situations, although it must be remembered that, in the absence of a treaty, there is no legal obligation upon any state to afford asylum or hospitality to a refugee or the victim of any disaster. Nevertheless, none of the human rights instruments pays sufficient attention to the fact that the basic fundamental right, namely that of life, “is threatened by the consequences of disasters” (p. 64). It is interesting in this connection to note that none of the essays in the volume on *The Right to Life in International Law* is concerned with this particular threat to life. Life is clearly dependent on health, food, medical care and the like, and the Universal Declaration of Human Rights and the International Covenant on Economic, Social and Cultural Rights emphasise this. However, one might question Dr. Macalister-Smith’s suggestion that this “guarantee” in any way imposes anything in the nature of an obligation — even moral — to ensure that such necessities are available to any person outside one’s own national borders, despite the fact that Article 11 of the Covenant calls for international cooperation to ensure freedom from hunger “taking into account the problems of both food-importing and food-exporting countries” (p. 65). Producing states, nevertheless, do not hesitate to destroy supplies which may be of fundamental value in feeding the hungry, when failure to destroy might debase prices and profits.

While one may have every sympathy with the difficulties of an economic or similar character facing the developing countries, it is suggested that it is too simple to accept the assertion that “[t]he urgency of the conditions facing many of the developing countries makes it difficult for them to realize all the rights of the Universal Declaration [of Human Rights]. The need to guarantee subsistence to their populations has served to justify for the government of some developing countries the application of relatively permanent restrictions on civil rights and liberties” (p. 66). We cannot overlook the fact that the Universal

Declaration was the product of a relatively small group of somewhat like-minded states with a similar approach to the problem. It is perhaps time that we abandoned the idea that there is any acknowledgement of a *Universal Declaration*, but this does not excuse attempts to explain away political fears of human rights by reference to underdevelopment.

Increasingly, we are seeing instances of acts by more powerful states that tend to be justified in the name of humanitarian intervention, a concept which is by no means universally accepted, and which involves "intervention by force in the name of humanity against a State in order to protect the fundamental human rights of the citizens of that State, the latter being unable or unwilling to do so itself" (p. 69). The author questions the legal validity of such a claim, maintaining that "a convincing application of the doctrine requires a high standard of non-intervention to be maintained in ordinary international intercourse, including in some cases of pressing need" (p. 72). One problem is that humanitarian activity by an outside state may easily be affected by and provide the ideological cover for political pressure. In view of this it may often be better, at least for public purposes, to rely on the activities of the Red Cross movement (c. 5), although even these are now subject to political pressures that may often override their humanitarian purpose. Insofar as organized international humanitarian activity is concerned, we find the same political pressures present when examining the role of the United Nations and its specialized agencies and organs, although when faced with natural disasters the Secretary-General has shown a "readiness . . . to assist in coordination, and also to be at the disposal of non-governmental organizations concerned with relief," although many might consider the budget at his disposal for this purpose somewhat minimal (p. 95). While one cannot ignore the role of such organizations as the World Health Organization (pp. 105-6) or UNICEF (pp. 99-100), it may well be that the efforts undertaken by the European Economic Community consequent upon the Lome Convention (pp. 111-115) and by non-governmental organizations (pp. 117-121) are often more productive.

Dr. Macalister-Smith is among those, like the reviewer, who recognize that in many ways human rights and humanitarian law are more respected and protected during armed conflict, with the Geneva law constituting a major factor to this end. "The extension of such a body of law to the area of humanitarian needs arising in peacetime disasters would require a high degree of international commitment by States, which so far has been forthcoming only to a slight extent. Compared to the humanitarian law of armed conflict, efforts to develop parallel law in time of peace have been inadequate and have yielded disappointing

results" (p. 163). Perhaps it is time we sought to revive some of the concepts of natural law propounded in this field by Vattel and Pufendorf.

The aim of intervention in the name of humanity is the preservation of human life, and the collection of essays edited by Dr. Ramcharan is concerned with various problems relating to the right to life in international law, with the editor pointing out that "in discussion of the rights to life, care is needed as to whether one is discussing its nature and meaning under a particular international convention, or whether one is referring to the concept in general international law. It may be considered that, based on international practice, the provisions of national constitutions and various international instruments, the 'right to life' is a norm of international customary law or a general principle of international law which transcends particular statements of the right in specific international conventions. In examining the nature and meaning of the concept, as a part of general international law, one . . . must have recourse to the totality of the evidence and the practice available within the international community" (p. 3). While this sounds impressive, it is submitted that it says absolutely nothing of the meaning of the "right to life" in international law, and it matters little from a practical point of view that the General Assembly or the Human Rights Commission or Committee have passed Resolutions or issued comments proclaiming the fundamental importance of this right, especially as it is difficult to ascertain its content, as is clear from Dr. Ramcharan's analysis of this (pp. 4-27).

To a great extent the essays in the collection do not really expand on what is meant by the right to life. For the main part they seem to express broad political concepts, relating to issues which may be regarded as life-threatening. Thus, Dr. Tokhonov of the Institute of State and Law of the USSR deals with the inter-relationship between the right to life and the right to peace (pp. 97-113), while Professor Kuper of UCLA is concerned with genocide and mass killings (pp. 114-9) and Professor Weissbrodt of Minnesota considers international measures against arbitrary or summary killings by governments (pp. 297-314). He deplores the way in which international bodies tend to criticise such killings but conclude that nothing can be done. His proposal reflects idealism, but is not necessarily one that states are likely to pursue: "At minimum, international organizations ought to insist that governments pursue the normal procedures they routinely follow in determining the cause of death — even in the army or other governmental entities. There may also be need for elaboration of international norms as to what constitutes an adequate inquest or official investigation of death. In addition, perpetrators should be brought to justice and families

compensated. Governments should provide training and take other measures to help ensure that arbitrary or summary killings do not occur” (p. 307). This comment is reminiscent of the attitude adopted by a “civil war-prone” country during the discussions leading to the adoption of Protocol II 1977, when its senior delegate ridiculed the suggestion that his government should be expected to teach potential rebels their protective rights so that the government’s effort to suppress the rebellion might be limited. Nevertheless, his paper should be read in conjunction with that of Professor Gormley who writes on the right to life and the rule of non-derogability: peremptory norms of *jus cogens* (pp. 120-59). While he maintains that the right to life, including “the right to living”, is covered by *jus cogens*, he concedes “that an attempt is being made to give effect to human rights protection by a norm that has not been clearly defined. Moreover, there is relatively little agreement as to the rubrics that are included within the higher norm of *jus cogens*. Although the norm does in fact exist, . . . it is far from certain what areas of human rights are included. Beyond question, the right to life enjoys the preeminent position within the hierarchy of law. Similarly, the right to life is a right *erga omnes*. But it must be conceded, both rights lack a clearly defined scope” (p. 147).

Other aspects of the problem are considered from the point of view of survival requirements (Menghistu, 63-83); its inter-relationship with the right to development (De Waart, 84-95); the obligations to “respect” and to “ensure” the right to life (Kabaalioglu, 160-81); protection by law (Redelbach, 182-220); arbitrary deprivation (Boyle, 221-44, Nsereko, 245-83); while Dr. Sapienza is concerned with international legal standards of capital punishment (pp. 284-96). He points out that it is difficult for international law to deal with this topic since states habitually consider it a matter of criminal and therefore domestic jurisdiction, while the moral and political aspects tend to put the issue outside a truly legal framework (p. 284). It must not be forgotten, however, that various international instruments concerning human rights have sought to abolish capital punishment by treaty (pp. 291-2, 343) while Amnesty International has made abolition an article of faith. The attitude of states towards this matter, however, illustrates how far practice frequently is from both agitation and even black-letter law.

While the authors of *The Right to Life in International Law* have ignored the issue *ipsa verba* (although Menghistu and De Waart touch upon it), the contributors to the collection edited by Alston and Tomasevski are aware that life depends in the first instance on the right to food. This “right” was the topic of a conference at Utrecht in 1984 convened with the assistance of the Netherlands Ministry of

Development Cooperation. The Conference was held to coincide with the end of the decade which had been foreseen by the 1974 Rome World Food Conference as culminating in “no child [going] to bed hungry, no family [fearing] for the next day’s bread, and no human being’s future and capacities [being] stunted by malnutrition” (p. 7). We have gone beyond that decade and there are probably now more people below the starvation level than there were when the Rome Conference proclaimed this high hope.

Historians of international law will recall that many of the “fathers” asserted that there was a basic right to food, and that those states which “had” were under an obligation to give to those which “had not”. The cartoon on page 168 showing a “coloured” military officer standing by as a “white” entrepreneur presents a starving “coloured” child with a load of armaments, stating, in reply to the question “vous n’auriez pas quelque chose à manger?”, “Tenez! Ça va passer!”, may be a cynical comment on political reality. Nevertheless, it is perhaps indicative of what the “have” states think of any contention, however convincingly it may be argued — and the addresses at the Utrecht Conference were convincing — that there is right to food. Equally telling is the mere mention of the various food “mountains” maintained in Europe and the United States. It is perhaps even more cynical to remark that “the right to food of detained persons, prisoners of war, children and handicapped people is relatively straightforward” (p. 49). This comment supports the contention of the reviewer that respect for human rights is more real under the law of armed conflict than at any other time.

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Le droit dans tous ses états. La question du droit au Québec 1970-1987. Collectif des sciences juridiques de l'UQAM sous la direction de Robert D. Bureau et Pierre Mackay (Montreal: Wilson & Lafleur, 1987) pp. 620.

This book contains 30 essays covering many aspects of Quebec law,¹ divided into five sections: l'État, les personnes, les conditions de vie, les organisations, and a final section entitled l'émergence d'une science juridique. The contributions are united in a formal sense in two ways: their authors are all professors in the department of sciences juridiques at l'Université du Québec à Montréal, and they all focus on developments in the period 1970-1987. Thematically, the pieces are united, according to the preface at any rate, in providing, "une lecture critique de l'évolution des tendances de notre droit" during this agitated, exhilarating and troubled period. Readers with only a passing familiarity with the Quebec legal scene should be warned that reading this book is rather like taking your first ten-countries-in-fourteen-days tour of Europe: you may not be able to tell a Romanesque cathedral from a Gothic one when you return, but at least you will know which areas you want to revisit in order to explore them at leisure.

Le droit dans tous ses états is a remarkable achievement in many ways. It is difficult to think of any other law faculty in Canada which could have produced a collective work of this kind, involving virtually all full-time members of the department. This suggests that the professors at UQAM's department of sciences juridiques, well known for its insistence on collective forms of student participation in legal education, really do practice what they preach. The fact that a certain amount of institutional self-promotion accompanies this effort — the volume was released to coincide with the 15th anniversary of the establishment of the department — does not detract from its significance.

Even more impressive than the bare numbers of faculty involved, however, is the shared commitment to the cause of the less powerful and marginalized elements of society: workers, women, refugees, tenants, welfare recipients. It is this clear identification with those who are and have been disadvantaged by the law that makes this volume so refreshing in the context of our legal scholarship, traditionally couched in terms of neutrality and "point-of-viewlessness". Given that there are about 20 law schools in Canada committed to an ideal of professional/academic "excellence" which implicitly or explicitly supports the societal status

1. There are some contributions on constitutional law, and a few on areas of federal law such as criminal law and immigration.

quo, we desperately need UQAM to maintain its alternative vision, which is rooted in a popular critique of law and a popular and progressive agenda for social change. I admit I was relieved to see that, at least at the level of published work, UQAM has managed to retain some of the spirit which motivated its foundation in 1972, and this in spite of the shift to the right which has become so apparent in the last decade or so.

The main theoretical preoccupation of most of the essays in the volume's first four sections is, unsurprisingly, the role of the state in the production and administration of law. Theorizing about the relationship between state and law has been a major preoccupation of legal and political theorists in the West for the last two decades, growing out of the assaults on the legitimacy of both institutions during the 1960s. In Quebec, however, this crisis of legitimacy has been delayed until very recently. The rapid modernization of Quebec society which occurred during the Quiet Revolution was accomplished largely through the agency of the state, investing it with a high degree of legitimacy during a period of rapid economic growth. Then, as that very process of modernization provoked a crisis in Quebec culture which led to a renewed form of nationalism, the state emerged once again as the vehicle for the safeguarding of Quebec's culture and the French language, and the promotion of her aims within Canada and the world. The social legislation passed by the Parti Québécois during its first few years in power appealed to a broad spectrum of progressive and nationalist opinion, at a time when governments in Canada and elsewhere had begun to pare down the welfare state and to "free" the market.

But by 1982 or thereabouts the bloom was off the rose. Inevitably, as the government of Quebec moved to tighten its budget following the recession of 1981-82, massive confrontations arose. The enormous battles over the public servants' collective agreement in 1982 may be the best example of the disillusionment with the state which was now beginning to characterize the post-referendum era. The "crisis of legitimacy" was about to hit, and hit hard. Many of the contributors to this volume are still reeling from it, and cast a jaundiced eye over both the past and the future. The subtitles illustrate this in striking fashion: "Droit pénal et sexualité: un pas en avant, deux pas en arrière", "L'égalité des femmes en matière d'emploi: rien n'est acquis", "La protection des droits des usagers du système de santé au Québec: diagnostic inquiétant, pronostic réservé", and so on. Even the gains of the past are revealed as at best limited, at worst illusory. Robert Bureau can agree with Ralph Miliband that in spite of certain reforms,

l'État resta ce qu'il avait toujours été, c'est-à-dire le partenaire du monde capitaliste dans le maintien des structures de propriété, de privilège et de pouvoir existants, et dans la lutte contre toute atteinte réelle à ces structures.²

Meanwhile, the rapid advance of neo-conservative policies and ideologies under the Bourassa (and Mulroney) government(s) seems to threaten the preservation of those aspects of the existing system which truly represented advances for the working class and the poor.

Where do we go from here? For most of the contributors, the prognosis is indeed "guarded". Robert Bureau, in the opening contribution to the volume, is one of the few to suggest briefly where the way forward might lie:

Si on ne peut plus s'appuyer sur l'État qui pourrait bien nous renvoyer à nos familles, aux institutions privées et à nous-mêmes, il y a lieu de s'interroger sur de nouvelles formes de solidarité et un nouveau type de contrat social qui pourraient offrir aux femmes et aux hommes d'ici un modèle alternatif de *démocratie* que les gauches traditionnelles, aussi généreuses aient-elles pu avoir été, mais le plus souvent dogmatiques et sectaires, n'ont jamais réussi à proposer en échange.³

He gives as precedents the formation of community health clinics and legal clinics during the 1970s, which were run by citizens' groups without state intervention until they were later absorbed by the bureaucratic tentacles of the welfare state. The transformation of "les gauches traditionnelles" by a potential "rainbow coalition" of groups representing women, native peoples, immigrants, the elderly, ecologists and peace workers, is also seen as a hopeful sign.

In other words, one should not simply fall into the trap of trying to turn back the clock, by attempting to foist back on the state those functions which it is currently trying to jettison. Rather, we should try to organize as users of various goods and services, in order to exercise our collective power directly against producers in the marketplace, rather than indirectly through urging the state to regulate the market. Implicit in this about-face is a return to private law, and away from a public law redolent of bureaucracy, alienation and disempowerment. Claude Thomasset provides a glimpse of how a revitalized private law might play a role in the area of housing, with a form of collective bargaining, centred on private contracts, operating between producers and consumers of housing.⁴ Speculation about the future, however, is almost entirely absent from this volume; except for the last section, which is about law as a

2. At 3.

3. At 10.

4. "Le logement, entre l'État et l'entreprise: genèse d'un droit en devenir", at 245.

discipline, the emphasis is overwhelmingly on the past. Given the extraordinary changes which Quebec has undergone in the last few decades, this is perhaps not surprising. Still, there is a burgeoning literature in English that examines, criticizes and attempts to reformulate the traditional distinction between public and private which is so crucial to liberal legal discourse, and it is a pity that the authors seem not to be familiar with it. While I am not suggesting that there is "an answer" to this question, perusal of this literature might have helped the authors to provide a more nuanced analysis at times.⁵

There are a few criticisms of a general nature I would make before looking at some of the best essays in more detail. They fall into two categories: the nature of the theoretical framework(s) employed and the coverage of the volume.

This is indeed a work "lourd de convictions", as Dean R.A. Macdonald of McGill observes in his preface to the volume. But convictions are not always enough: it is crucial that they be complemented by rigorous theoretical analysis and a solid grounding in empirical reality. Some of the essays herein are very sophisticated theoretically, but several are quite disappointing in their failure to deliver the "lecture critique" promised in the foreword. Two essays on family law, one on company law and one on the development of accident compensation regimes merely chronicle legislative developments during the period in question, with little or no attempt at critical analysis.

I found Renée Joyal's contribution "La famille, entre l'éclatement et le renouveau" especially disappointing in this regard, given the importance of the feminist critique of the family and family law over the past two decades. She finds it "normal et plutôt réconfortant" that Quebec law now recognizes the juridical equality of the spouses and accords greater respect to the rights of children, and seems prepared to treat these paper gains as representing some corresponding improvement in the real world. While passing reference is made to the plight of "les familles monoparentales économiquement défavorisées" which are mostly female-headed, there is no indication that reforms of divorce law and matrimonial regimes may actually have *exacerbated* this social phenomenon, as recent work by Lenore Weitzman⁶ and Mary Jane Mossman⁷ has tended to suggest. As well, she adopts a textbook

5. See, e.g., N.E. Simmonds, "The changing face of private law: doctrinal categories and the regulatory state" (1982), 2 *Legal Studies* 257 and the symposium contained in (1982), 130 *Pennsylvania L. Rev.* 1289-1609.

6. *The Divorce Revolution* (New York: Free Press, 1985).

7. Mary Jane Mossman and Morag MacLean, "Family Law and Social Welfare: Toward a New Equality" (1986), 5 *Can. J. Family Law* 79. For a more sanguine view of matrimonial

definition of family law which allows her to exclude any reference to domestic violence, surely one of the most contentious issues in “family law”, broadly understood, over the last two decades.

In this context, I was surprised at the paucity of explicit feminist critiques of law in this volume. While one does not sense that the contributors would be hostile to such a perspective, the fact remains that only two essays out of 30 explicitly adopt a feminist critique: Lucie Lamarche’s survey of pay (in)equality and sexual harassment in the workplace, and Johanne Doucet and Lucie Lemonde’s study of sexuality and criminal law. Only eight of 30 contributors are women, and the concept of class dominates the analytical framework almost to the exclusion of gender. Thus the important gender implications of the reform of social assistance law, for example, are left totally unexplored in Yves Bélanger’s analysis of the topic. Similarly, Jean-Serge Masse breaks down by sex the statistics on complaints regarding breaches of the duty of fair representation by unions, but gives only the bare figures: 85 per cent male, 15 per cent female. Even given the low overall success rate, I was still left wondering whether such complaints by women against largely male unions would be treated as seriously as complaints by men.

The Joyal essay is by no means alone in its tendency to treat the traditional categories of legal thought as somehow self-justifying and self-defining. While lawyers trained in the common law are certainly guilty of this sin as well, it seems to me that civilian modes of legal thought are especially prone to it, precisely because they are more informed by the dictates of rationality than the common law. Persons, the family, obligations, property — all have their separate books in the Civil Code, all are more or less watertight as legal classifications. Likewise, the distinction between public law and private law is seen as unproblematic — indeed, one is hired to teach either *droit public* or *droit privé* in a Quebec law school, and I always get puzzled glances from colleagues in Quebec when I tell them I teach Property and Administrative Law! I find it ironic that some of the essays in this volume remind us clearly and forcefully that legal ordering should be seen as only one facet of the whole process of normativity which characterises any society. Yet the received pattern of norms within the legal universe itself seems to have gone unquestioned in the parcelling out of essay topics.

As for those essays which are more explicitly “critical” in their analysis, a number suffer from a failure to articulate clearly and

property law in Quebec, see Monique Charlebois, “Quebec Family Property Law: In Need of Reform”, in E.D. Pask *et al.*, eds., *Women, the Law and the Economy* (Toronto: Butterworths 1985).

rigorously their theoretical points de départ. Simple references to “social control” will not do: we need to know the locus of control, its purposes, its exact manifestations and the identity of those being controlled. In Maryse Grandbois’ essay, “Le droit et l’environnement: un couple paradoxal”, for example, we are told three times in two pages that “[l]es territoires voués à la conservation deviennent à la fois espaces de loisirs, espaces de contrôle social et espaces étatiques”, but the author does not elaborate on these themes. She rightly observes that protecting wildlife and natural regions has become a federal-provincial battleground, that “protective” legislation is all too easily set aside when economic development is at stake, and that such legislation is deficient in terms of the mechanisms provided for public participation. Yet how exactly do these factors relate to the social control thesis, or prove that these natural regions are perceived as “espaces étatiques”, whatever they may be, by those who enjoy them? The ideas are tantalizing, but until they are fleshed out they remain assertions rather than arguments.

Passing from legal theory to legal practice, I was surprised at the lack of empirical analysis or socio-legal work in this collection, but this is more of an observation than a criticism. There is really only one contribution that adopts a quantitative methodology in order to determine the effectiveness of a particular legal reform, and that is Jean-Serge Masse’s study of the duty of fair representation of union members, added to the Quebec Labour Code in 1977, which I mentioned earlier. His quite surprising results show once again that there is a world of difference between the law in books and the law in action, and remind us just how narrow our preoccupations have been in the legal academy until recently.

A number of contributions to the first section of the volume — L’État — deal with the *Canadian Charter of Rights and Freedoms*, and I must say I found them disappointing and interesting at the same time: disappointing because they seemed to be content with pointing out that the *Charter* is based on a liberal theory of individual rights, raising the spectre of legal continentalism, and suggesting that the adoption of the *Charter* is going to make the struggle for social justice more difficult. Well, yes — all these observations may contain more than a grain of truth. But if one accepts them as *the* truth, then of course they become self-fulfilling prophecies. I was interested to see that this was the UQAM “line” on the *Charter*, though, because it differs considerably from the way my colleagues and I at Dalhousie discuss the *Charter*. We admit that the liberal rights discourse is of course an important aspect of the *Charter*, and potentially a trap, but we tend to stress the recognition in the *Charter* of various cultural collectivities and group rights. Aboriginal rights,

minority language education rights and language rights in general, are conferred on collectivities rather than individuals as such. The recognition of affirmative action and multi-culturalism also denotes the importance of group rights. The constitutional affirmation of equalization payments (technically, outside the *Charter*) and limitations on mobility rights recognize the importance of regionalism in the Canadian context, while Section 1 — the very first section in the *Charter*! — recognizes that individual rights exist *only* in a social context. We thus tend to reject Pierre Mackay's analysis that the *Charter* simply makes Canada an American constitutional law colony instead of a British one. One doesn't have to look far in the *Charter* (the preamble and section 1 would probably be far enough) to realize that it is a heterodox document from both the British and American viewpoints. In other words, it is classically, irrevocably and unmistakably Canadian. It is not merely liberal, it is certainly not neo-liberal, and it may even be post-liberal if we are lucky.

The irony is that the *Charter* would almost certainly not be as "communitarian" as it is without Quebec's historic contribution to the Canadian Confederation. So why do these professors at UQAM see the *Charter* only as an American-style Bill of Rights? I find this most perplexing, and can only speculate as to why it should be so. Perhaps it is "simply" the political context: given that the *Charter* was foisted on Quebec against its will, I should hardly expect nationalist intellectuals at the people's law school to be in the vanguard of the *Charter*manic cheering section.³ Dorval Brunelle, in a cogently argued essay, goes so far as to suggest that the *Constitution Act* of 1982 was engineered specifically to create the necessary juridico-social climate to soften us all up for the whole neo-liberal agenda of privatisation, deregulation and anti-welfare statism.⁹ Apparently, Trudeau dreamed up this master plan as the recession settled in over 1981-82, and set up the Macdonald Commission on the Economy to legitimate this dramatic reorientation in policy-making.

Now I like conspiracy theory as much as the next academic, and I am quite prepared to attribute the most Machiavellian of motives to our former Prime Minister, but there are limits . . . Something along the lines of the *Constitution Act 1982* had been a pet project of Trudeau's since his political début, and it was the disarray of his opponents after May 1980, coupled with the realization that not even he could be Prime Minister forever, that impelled him in 1981-82. His views on economic policy

8. Yet Pierre Mackay, while deploring the Americanization of our constitutional law, lauds the Canadian *Charter* for providing much more effective protection against arbitrary state action than the Quebec Charter, which can be easily circumvented by the government of the day.

9. The authors use the terms neo-liberal and neo-conservative interchangeably in this volume.

might well have been changing at this time, but the most that could be said is that the *Constitution Act 1982* might be compatible with those new views, not that it was a necessary condition of their actualisation.

While we are on this topic of neo-liberal economic policy and the *Charter*, is it true to say, as all the authors seem to assume, that “la reconnaissance légale des droits et libertés civiles . . . contribue à la marginalisation des revendications collectives et sociales”? The fact is that the *Charter* does not — yet — protect economic interests directly; property is not included, explicitly or implicitly, in s. 7¹⁰ It is worth recalling that the multi-national drug companies fought a pitched battle on both the judicial and the legislative fronts to have restored to them the patent rights which the Trudeau government had restricted in 1969. They succeeded *only* on the legislative front; all their *Charter* arguments were thrown out in the Federal Court.¹¹ Admittedly, economic regulation is now more difficult to enforce given s. 8, but I suppose I can accept that even corporations should enjoy some kind of due process where search and seizure is concerned. Much more troublesome, admittedly, are the victories won by corporations in their offensive to emasculate unions via the *Charter*. I am far from convinced, however, that this trend will continue. Now that labour knows that management is playing *Charter* hardball, it will undoubtedly develop its batting strength. And we have not even begun to explore how the notion of “security of the person” might be used to promote “les revendications sociales” rather than retard them.

One last observation on this *Charter* business. Could it be that the contributors regard the *Charter* as enshrining only the values of liberal individualism because they genuinely do not see anything else in it? What I mean is something like the following. We in English Canada have actually made some progress in the last few decades in discovering/creating a national identity for ourselves. There are certain concepts, values, themes, modes of expression that we now identify as Canadian — or rather, “distinctively Canadian”, because of our old insecurity about “Canadian” being undistinctive by definition (is anything ever “distinctively Spanish” or “distinctively Burmese”?).¹² We now recognize

10. A Conservative backbencher’s motion calling for constitutional entrenchment of property rights was adopted by the House of Commons on 2 May 1988: *The Gazette* (Montreal), 3 May 1988, p. B-1.

11. *Smith, Kline & French Laboratories Ltd. v. A.-G. Canada* (1986), 34 D.L.R. (4th) 584 (F.C.A.), upholding (1985), 24 D.L.R. (4th) 321 (T.D.).

12. I do not mean to suggest that there is an overwhelming consensus on what constitutes the national identity of English Canada. In a country as regionally divided as Canada, one would have to admit the possibility of at least five distinct English-Canadian identities: British Columbia, Prairie, Ontario, Maritime and Newfoundland. The earlier prophets of the

these traits when we encounter them, whether in conversation, poetry, landscape architecture or constitutional documents. But you had to be there. Quebec was engaged, during this time period, in its own struggle, re-interpreting its own national identity. The idea that "English" Canada might have its own "national" identity is to this day a foreign one in Quebec. Québécois thus do not recognize the elements in the cultural matrix which we in the rest of Canada have agreed to constitute as our national identity; when confronted with individual elements in the matrix, a Québécois would probably label them as American or British. We are just beginning, in the late 1980s, to surmount these barriers to comprehension, but until we have progressed further the type of discourse that we have in English Canada about the *Charter* will be largely unintelligible in Quebec.

A final general criticism relates to the coverage of the volume. There are three sins of omission here, two mortal and one venial. How a volume subtitled "La question du droit au Québec 1970-1987" can be produced without a single paragraph devoted to the language question I find extremely puzzling. Is everyone simply tired of it now? Is there such a consensus among the francophone community about the desirability of the measures now in place that the subject is not worth discussing? Whatever the answer, the omission is extremely disappointing. Equally disappointing was the lack of any contribution on the genesis and impact of the James Bay Agreement on the legal position of native peoples in Quebec. Politically, legally and socially, the James Bay Agreement was innovatory, and the alleged failure of the Quebec government to respect it remains a matter of controversy in 1988. In a volume which attempts to cover the "progressive waterfront", as it were, the omission of any material on the native peoples is noticeable and startling.¹³

The final sin of omission is less important. I found it odd that the reform of the governance of the professions initiated via the Professional Code was overlooked.¹⁴ Professionals are among the most powerful groups in any modern society, and techniques for rendering them accountable among the most problematic. I would have been interested

Canadian identity such as Northrop Frye have recently been criticized as too Laurentian, in that they ignore important aspects of the Western and Eastern Canadian experience. See Janice Kulyk Keefer, *Under Eastern Eyes: A Critical Reading of Maritime Fiction* (Toronto: University of Toronto Press, 1987), 18-32. Yet this whole debate merely illustrates that the fact of an English-Canadian identity is now taken as a given.

13. The omission is not quite total: Katherine Lippel includes a brief account of the 1981 paramilitary operation launched by the Quebec Government against the Micmac of Restigouche over alleged abuse of salmon fishing rights, in her essay in the practice of public interest law in Quebec.

14. R.S.Q. 1977, c. C-26.

to discover whether the structures created by the Code, unique in Canada, have in fact rendered the professions more accountable, or whether their prestige and power has merely been enhanced and legitimized.

Turning from the general to the particular, let me identify those essays which I think deserve a wide audience. Given the number of contributions, I cannot even promise to discuss all those which in my opinion fall in that category. Faced with such an *embarras de choix*, I have decided to single out two essays which I found exceptionally stimulating, and then mention more summarily a half-dozen others which might be of particular interest to readers outside Quebec.

Carol Jobin's essay, "Gestion de conflits, loi de processivité et mentalité québécoise. Essai de réflexion sur les réformes des institutions québécoises d'administration du Code du travail (1969-1985)" promises much and delivers more. It is essentially an analysis of the Quebec legal psyche as seen through the prism of labour relations law, and a hard-hitting, unflinching analysis it is. In a sentence, the thesis is that all parties involved in the labour relations system in Quebec — lawyers, administrative decision-makers and judges, perhaps even clients — share an excessively adversarial attitude to legal process which engenders delays, inefficiency, high costs and poor decisions, and ensures that any structural reforms are consigned in advance to ineffectiveness. He suggests that this is a peculiarly Québécois affliction, and his most telling piece of evidence here comes from the mouth of the then vice-president of the Canada Labour Relations Board, Brian Keller. In an unreported decision quoted in the text, Mr. Keller observed that "labour relations in the Province of Quebec appears to be more legalistic and adversarial than in any of the other provinces", and that "a typical case [*i.e.*, before the C.L.R.B.] will take 50 per cent longer in Quebec than elsewhere . . . because [of] a total absence of cooperation between the parties prior to and during a hearing".¹⁵

Another aspect of this legal environment which further retards progress in labour relations is what Jobin calls "le culte de la différence", which demands that "nous nous fabriquons des choses différentes pour régler des situations qui sont pourtant souvent semblables à celles qui vivent nos voisins nord-américains".¹⁶ Thus the necessity to create an institutional structure which is fragmented, complex and overly dependent on curial rather than administrative procedures.

If the latter point is easily comprehensible — indeed, does English Canada not at times suffer from its own culte de la différence vis-à-vis the

15. At 408.

16. At 414.

United States? — the former is less so, and, if true, a matter of urgent investigation by comparative lawyers, historians and sociologists on both sides of the Ottawa River. First of all, does this “loi de processivité” afflict only labour relations, or does it characterize Quebec legal culture as a whole? Impressionistic evidence from my own research in Quebec law suggests that litigants in ordinary civil cases are likely to experience inordinate delays which to my knowledge do not occur in other provinces. Take for example a few private law cases from Quebec which reached the Supreme Court of Canada in the early 1980s:

Soucisse v. National Bank of Canada

trial judgment 1970; appeal judgment 1976; appeal heard in S.C.C. December 1980¹⁷

Senez v. Montreal Real Estate Board

action launched November 1971; date of trial judgment unknown; appeal judgment April 1979; appeal heard in S.C.C. April 1980¹⁸

Rubis v. Gray Rocks Inn Ltd.

cause of action arose August 1964; date of trial judgement unknown; appeal judgment 1975; appeal heard in S.C.C. March 1981¹⁹

The last-named case must mark some kind of record in Canadian jurisprudence: the plaintiff was 4-years-old when the accident in question happened, and old enough to prosecute the action in her own name as a legal adult by the time the appeal finally reached the Supreme Court of Canada! This is admittedly a small sample but very few cases of “pure” Quebec civil law reach the Supreme Court. What is more to the point, a random search revealed no cases from common law provinces which had suffered such delays.

If this “processivité” is indeed a hallmark of Quebec legal culture in general, then a search for its origins is imperative. Jobin himself has little to say on this except to speculate (tongue in cheek?) that it may result from “un atavisme insondable tenant à des racines latines interdisant une approche rationnelle des conflits” (!) He cannot really be saying that the French, Italians, or Brazilians are incapable of resolving disputes in a rational fashion . . . can he? In the area of labour relations in particular, one may wonder whether the inauguration of the collective bargaining system under the Duplessis regime may have created a deep-rooted cynicism about the whole process which poisoned later efforts to reform

17. [1981] 2 S.C.R. 339.

18. [1980] 2 S.C.R. 555.

19. [1982] 1 S.C.R. 452. These are presumably “pathological” rather than “natural” or “inherent” delays: see Y-M Morissette, “Les lenteurs de la justice considérées sous un angle qui les avantage” (1987), 33 McGill L.J. 137.

it. At any rate, a few doctoral theses on this topic would be most welcome.

Jobin's usage of federal decision-makers administering federal law in all the provinces, as sources of evidence for investigating the different legal cultures in Canada, illustrates both its potential effectiveness and its inexplicable under-utilization to date by legal researchers. In this case it also reveals a poignant irony. The traditional distinction made by Canadian historians between French Catholic corporatists and English Protestant liberals seems to be reversed here, with the Quebec participants acting like caricatures of possessive individualists and the English Canadians like model corporatists.²⁰ Whether the historians are wrong, or whether there is an important disjunction between Quebec's legal and non-legal cultures, or whether Jobin's portrait itself partakes too much of caricature, remains a matter for further research.

Jean-Marie Fecteau's essay "L'histoire du droit dans le champ du savoir: légitimation et contradiction disciplinaire" is the first in the final section of the book, "L'émergence d'une science juridique", which is by far the strongest of the five sections. All five essays in this section are excellent: stimulating, reflective, informative, lucid and vigorous in expression; if I single out Fecteau's, it is only because legal history is one of my own preoccupations, and because Fecteau's observations are particularly welcome in this crucial formative period of Canadian legal historical studies.

In a dozen pages Fecteau gives us a brief tour d'horizon of the themes and methods of Quebec legal history to date, then proceeds to reflect on the constitution (reconstitution?) of legal history as an autonomous field of academic activity in recent years. He observes that every field of knowledge "induit une dynamique de *légitimation* qui fonde la pertinence de l'entreprise tout en justifiant son cadre d'opération", and notes that legal history is characterized by a "processus particulièrement puissant d'autonomisation qui tend à en faire davantage une 'branche' du droit qu'une dimension d'un savoir général sur la société". Thus, legal history is automatically legitimated insofar as it is parasitic upon the formal legal world of lawyers, courts, legislatures, legal treatises, *etc.* Fecteau does not note, but is presumably aware, that this tendency is confirmed and accelerated by the eagerness with which actors in the

20. I am setting up an historical straw man here which, to a certain extent, has been battered by more recent work: see, e.g., S.F. Wise, "Liberal Consensus or Ideological Battleground: Some Reflections on the Hartz Thesis", [1974] Canadian Historical Association *Historical Papers*, 1. Yet the battering has taken the form of exploring the strong Tory communitarian streak in English-Canadian "liberalism", more than the liberal-individualist components of the French-Canadian experience.

formal legal world seek to have their own legitimacy enhanced by legal historical studies devoted to them. Thus the Law Society of Upper Canada establishes the Osgoode Society for the furtherance of work in Canadian legal history; Ontario's Attorney-General Roy McMurtry is acknowledged to have been an important promoter of the Society. Judges provide forewords to collections such as *Law in a Colonial Society: the Nova Scotia Experience*.²¹ This latter practice must surely be the last manifestation of the patronage system to be found anywhere in the academic world of the late 20th century. The Prince of Wales is no longer asked to provide prefaces to collections of essays on, say, life in 18th-century England, nor does the president of Mobil Corporation display his imprimatur in books on energy policy. Traditions of deference are apparently alive and well in the legal world, however.²²

This "automatic legitimation" bears a heavy price tag: the isolation of legal history from other disciplines, and the reinforcement of strong positivist tendencies within the discipline itself. Or, as Fecteau succinctly puts it: "ce qui est en jeu est non seulement l'autonomie du champ de recherche, mais l'objet d'étude lui-même." What should this object be? Once again, I can do no better than quote Fecteau. Legal history will only come into its own as a true social science, he says, when it

cessera d'être histoire du *droit* pour devenir interrogation fondamentale sur l'évolution des différents modes de normalisation qui assurent la régulation fragile des sociétés humaines, quand, en somme, son point central de référence sera non pas une *institution* historiquement spécifiée, mais un *questionnement* particulier sur une des dimensions constitutives de l'existence sociale.

The only refinement I would suggest here is that one can never consign law to being "just another" means of imposing norms, because it is the very decision to use the law — as opposed to religion, community opinion or propaganda, for example — to create and enforce norms which is often of interest to the historian. The "law-ness" of the law is a fundamental aspect of Western culture which cannot be wished away or ignored in the quest to make legal history part of a "savoir général sur la société". I suspect that this is merely a difference of emphasis between us, rather than any overt disagreement.

21. (Toronto: Carswell, 1984), and (1984), 8 Dalhousie L.J.

22. And not altogether absent from this volume. Why would it be necessary to have the Dean of Law at McGill provide a preface to a work of this kind? Is this supposed to increase sales? Induce people to read the book who would otherwise have dismissed it as the product of the loony left at UQAM? Does it suggest that the McGill Law Faculty or its Dean has some especial pre-eminence to comment on works of this kind?

For another recent example of this kind, see D.P. Jones and A.S. de Villars, *Principles of Administrative Law* (Toronto: Carswell, 1985) (foreword by H.W.R. Wade).

Fecteau clearly realizes that we need to know what legal norms were at a given historical moment before we can compare them to social norms and reflect on the broader process of normativity itself. But he encourages us never to treat the investigation of legal norms as an end in itself. Implicitly, he chides us for our arrogance — I speak of lawyer legal historians here — in assuming that legal norms are self-justifying and self-defining topics of inquiry, inherently more “worthwhile” or “necessary” or “important” than, say, the attitudes of Micmacs toward the Acadians in the 17th century, or the role of women in the Methodist Church in 19th-century Canada. No wonder our colleagues in other departments get annoyed with us. This essay, in translation if necessary, should be the first item on the syllabus of all legal history courses taught in Canada from now on. It will certainly appear there on mine.

As I mentioned, the other essays in the book’s final section are also excellent. René Laperrière’s “A la recherche de la science juridique”, one would not guess from the title, is a trenchant and well-reasoned critique of the Arthurs Report’s views (or lack thereof) on the goals of legal science and the fundamentals of law. Until I read this essay I had not realized that no representatives from Carleton’s Law Department or UQAM’s sciences juridiques were invited to sit on the Consultative Committee, a fact which speaks volumes in and of itself. Pierrôt Péladeau’s “Essai de définition méthodologique d’une recherche juridique sur la problématique informatique, pouvoirs et libertés” is a model of the kind of rigorous attention to methodology which is taken for granted in good sociological work but very under-developed in Canadian legal scholarship. I was pleased to see references in this piece to work in the first volume of the Canadian Journal of Law and Society, which suggests that this new journal may be a fruitful point of contact for work from Quebec and English Canada. English-Canadian sociologists of law will be extremely grateful to Guy Rocher for his “La sociologie du droit au Québec: une nouvelle discipline en émergence?”, which provides a critical and comprehensive look at the development of the field in Quebec, its themes and methods, and suggestions as to where it is headed.

The final essay in the volume, Katherine Lippel’s “Les pratiques alternatives du droit”, is in a class by itself. It provides an inventory and analysis of various political-action-through-law campaigns, from the Micmac response to “la guerre du saumon” of 1981, to the civil disobedience of welfare recipients whose heating was cut off in the winter of 1977, to class actions alleging human rights abuses launched by inmates of Archambault Penitentiary. As an informative and thoughtful primer on radical lawyering, Québec-style, this essay could hardly be bettered. It made me realize how crucial it is to have someone who is

involved in these developments, devote the time to chronicling and reflecting on them, and making the results *accessible* through publication. As it is, these campaigns receive a few columns in the popular press, if that, and survive only in the oral culture of a small coterie of lawyers in a particular community. As Lippel observes: “Pas étonnant qu’il y ait peu d’écrits là-dessus, les gens qui auraient quelque chose à dire n’ont pas le temps d’écrire.” Perhaps one of the provincial law societies will launch a well-funded society to help further the study and practice of radical lawyering in Canada.

So much for the book’s final section. I would be remiss, however, if I did not point out a few essays elsewhere in the volume which I found particularly meritorious. Pierre Robert has contributed a strong critique of the criminal law work of the Canada Law Reform Commission, arguing that the absence of any fundamental philosophy of penal reform has allowed the Commission to be “captured” by the state in order to legitimate its own discourse on penology. “La Charte et la sécurité nationale” has nothing to do with the *Charter* (Canada’s or Québec’s), but Gaétan Nadeau provides a good, and frightening, overview of an area often ignored by Canadian legal academics (did the McDonald Commission really report that it suspected the R.C.M.P. of having engineered a murder?).

Normand Marion takes up the same theme, *inter alia*, in “Le droit pénal à l’ère néo-libérale: le danger croît avec son usage”, and argues that most criminal law reforms of late are preoccupied with reducing costs and increasing efficiency. This seems to be the case with corrections reforms, as prison inmates join the ranks of the de-institutionalized: psychiatric patients, the handicapped, the homeless. The thesis seems to be difficult to reconcile, however, with the vastly increased police budgets of recent years, which Marion indicates constitute two thirds of the cost of the entire penal system. It is in the interests of the police to portray the “amount” of crime as constantly increasing — in particular, the “war on drugs” must be fought on ever more numerous fronts against criminals whose ingenuity mutates exponentially from year to year, rather like mosquitoes becoming immune to DDT. All, of course, requiring more and more resources devoted to police work.²³ Are we really getting more bang for our buck? Happily for the police, it is impossible to tell. The point is simply that the police and the state cannot be assigned a total congruence of interests, as Marion seems to do. Finally, Katherine Lippel’s second contribution to this volume contains some fruitful

23. See, e.g., R.V. Ericson *et al.*, “Punishing for Profit: Reflections on the Revival of Privatization in Corrections” (1987), 29 *Can. J. of Criminology* 355.

analysis of recent changes in workers' compensation, ominous in its suggestion that the 1985 Act is based on a new philosophy of income security similar to that upon which social welfare benefits are based, rather than a philosophy which considers the injured worker as the creditor of an insurance scheme.

If the department of sciences juridiques at UQAM wished to make a splash on the Canadian legal academic scene with this volume, I think it can fairly be said to have done so. I cannot think of a single law faculty in Canada which would not be proud to have produced such a volume. Particularly in the book's closing section, the contributors have given us much to reflect on — and by "us" I mean anyone interested in the law, right across Canada. If we have not already done so, it is high time that we — the "established" (establishment?) law schools — started including UQAM (and Carleton, but that is another story) in our mailing lists, inviting its faculty to conferences, having them as guest professors, and going there on sabbaticals (if they want us).

If the overall tone of this volume is somewhat sombre, we might do well to remember its final sentence, penned by Katherine Lippel:

Il y a quelque chose à faire avec le droit, à condition qu' on ne permette pas au droit de faire quelque chose avec nous.

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International Law and the Developing Countries, by R.P. Anand. Martinus Nijhoff Publishers, 1987. Pp.xii, 274. £ 48.00.

Professor Anand over the past two-and-a-half decades has established himself as one of the leading Third World publicists of international law. Less rhetorical than some, but just as vigorous, he has championed the development of a new international law based on cooperation in rejection of the old traditional and "Eurocentric" international law. In *International Law and the Developing Countries* Professor Anand brings together a collection of his previously published essays and wields them into a book for the purpose of evaluating "the traditional law and the process of change that it is undergoing to become a communal law of mankind".

The first two essays are pure history. The first concerns the impact of history on the literature of international law, though the essay in its latter part makes little attempt to distinguish between the impact of history on international law in contrast to its impact on the literature. The second essay is concerned with the development of the law of the sea in South East Asia. Both essays are characteristic Anand: always interesting, sometimes provocative, and often enriching. Both essays rely on Alexandrowicz's pioneering work though, unfortunately, both were written before Gong's onslaught on Alexandrowicz so we do not possess Anand's view. One suspects that he would well agree with Gong.

In three essays the primary thrust is economic. The first is concerned with the establishment of a New International Economic Order. The second is concerned with the role of the General Assembly in bringing about a fairer distribution of the world's resources and the third raises the question of how the southern hemisphere can reach a level of economic order comparable to that enjoyed by the northern without bringing ecological disaster upon all. These essays constitute the heart of the book.

Two essays on the law of the sea follow. The first traces the development of fishing zones in international law and considers the extent to which they may provide a solution to the shortage of protein in the Third World. Somewhat surprisingly, given his grasp of history, Anand fails to expressly point out that the concept of fishing zones for conservation purposes is exceedingly old: Welwood at the turn of the 17th century argued for such a zone on the basis that the Dutch fishermen had exhausted the herring fishery off the east coast of Scotland. The second essay looks at the development of the concept of mid-ocean archipelagoes, a concept the origination and development of which may justly be attributed to the Third World.

Concluding the collection is an interesting analysis of proposals in respect of an international police force and interposed between the essays of a historical nature and those concerned with the economic world order is a very helpful analysis and summary of that most troublesome of concepts, sovereignty and its practical application in the world today.

The golden thread running through the essays is what Anand perceives as the historical inevitability of an international law based upon the principle of cooperation with the elimination, ultimately, of poverty in international society. In arguing this thesis Anand avoids the natural temptation of succumbing to sentimentalism and he recognises the difficult challenges such a re-orientation presents to the existing world order. Pragmatic as always, he rests his case ultimately on the need to avoid confrontation and tension between rich and poor nations in an interdependent world overshadowed by the threat of nuclear holocaust.

As pragmatic as his arguments may appear, he fails to face many of rocks upon which noble principles may break, and indeed his arguments throw up sharp edges which cut deep into his views. For instance, he points to the declining returns on raw materials produced by Third World states as an example of the unfair treatment of the Third World but fails to note that the falling real prices of food stuffs and raw materials is a world-wide problem from which many sectors of the economies of industrialised states have suffered. Also, he rightly points to the affluent West's excessive use of raw materials and the pollution industrialisation has created. Yet he urges the industrialisation of the globe, and as an antidote to the horror which he leaves us feeling must result from such a course concludes, and in no more detail, that "International lawyers should develop a law of cooperation and co-ordination in this field".

More importantly, however, he fails to face up to the question of cost to the industrialised world if the type of world he desires is to come to pass. Recognising the intractable tendency of human nature towards selfishness, and its capacity to feed upon rather than shun bitterness, he fails to recognise that the achievement of his aspirations will require a more inspiring call to mankind than the emotionless and somewhat formless principle of cooperation. World-wide disaster may otherwise face us, but that has not prevented the arms race. Reason alone is not enough.

Finally, one must comment on the presentation of the work. Professor Anand has not been well served by at least one of his publishers, printers or proofreaders. Elementary errors abound and are too numerous to list. Particularly atrocious, though, is the spelling of "Welwood" as "Elswood" and the failure to ensure that each page is paginated. For a

book of its retail price and length, and considering the fact that the essays were already in publishable form, these failings are worthy of censure.

Nevertheless, *International Law and the Developing Countries* remains a useful systematic presentation of the thoughts of one of the developing world's leading publicists on an issue of interest to every international lawyer.

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Constitutional Law (kempo), by Miyazawa Toshiyoshi, translated into German by Robert Heuser and Yamasaki Kazuaki. Original title in German: *Verfassungsrecht (kempo)*, Schriftenreihe Japanisches Recht Vol. 21. Köln-Bonn-München: Carl Heymanns Verlag, 1986. 348 pp.

In 1976 Carl Heymanns Verlag published the first volume of a series on Japanese law. A recent addition to this collection covering areas as diverse as civil and criminal procedure, labor law, nuclear energy law, and international law, is Miyazawa Toshiyoshi's (1899-1976) book on constitutional law. With this German translation, Robert Heuser and Yamasaki Kazuaki provide their readers with the first systematical overview on Japanese constitutional law in a western language.

Their choice was an appropriate one since, as Heuser points out in the introduction to the translation, Miyazawa's book is Japan's most widely used textbook on constitutional law. Its first edition was published as early as 1949, only two years after the entry into force of Japan's post-war constitution. As one of the most influential experts on constitutional law in his country, Miyazawa was among those invited to take part in the deliberations on the new constitution. This experience and insight, as well as Miyazawa's visits to Europe and North America, are mirrored in the author's concise account of Japan's constitutional history and in the chapters dealing with the constitution of 1947.

A main feature of the book is that it is an introduction to both constitutional principles in general and Japanese constitutional law in particular. In fact, it uses the former to make the latter accessible to the reader. In each section of his study Miyazawa gives an overview of relevant historical aspects as well as various possible constitutional approaches before he describes the path chosen by the Japanese constitution. This serves to elucidate the extent to which the present constitution is a synthesis of Japan's own constitutional experience, its openness to well-established models in France, Germany and the United States, and the striving for compatibility between Japanese tradition and the needs of a modern society.

Before highlighting Japan's constitutional history, Miyazawa analyses basic elements of constitutional law, such as the notions of "state", "people" and "sovereignty". Only after sketching the major steps in the development of constitutionalism in Europe and North America does he proceed to outline the evolution of Japan's political system from an extremely hierarchical society headed by a God-like Emperor (*tenno*) to the adoption of the first Japanese constitution in 1889 (*Meiji* constitution). Showing parallels with the content and purpose of the

German constitution of the time, Miyazawa explains how the *Meiji* constitution was designed to accommodate some liberal ideas while preserving the imperial rule. The resulting dualism between liberalism and absolutism made this early constitutional system vulnerable to the totalitarian and militaristic powers to which it eventually fell victim.

According to Miyazawa, Japan's capitulation in 1945 was the turning point for Japanese constitutional development. He underscores the fact that the new Japanese constitution was more than merely a revision of its predecessor. While the *Meiji* constitution provided for the possibility of certain revisions it did not permit the abolishment of the imperial system, which was considered eternal. Thus constitutional change had to be effected by external factors. Japan's capitulation brought about the end of the imperial rule and the beginning of an era under the sovereignty of the Japanese people as entrenched in the new constitution.

This fundamental difference between the two constitutions is evident in their preambles. The *Meiji* constitution's preamble mirrors the Emperor's strong position:

By enjoying the Glory which was left behind by My ancestors, and occupying the throne, which at all times belonged to the same house, I remember that My beloved subjects are the same to which My ancestors directed Their love and assistance, wish their well-being may increase and their ability and capacities may develop and hope to enhance State's striving for development with their support and participation.

As Heuser and Kazuaki point out, the old constitution considered that objective rules were orders of the Emperor while (subjective) rights were seen as his gift to his subjects. Under the new constitution, the Emperor no longer is the state's personification. His position is reduced to that of the state's symbol retaining only ceremonial and declaratory functions. Accordingly, the new Japanese constitution's preamble begins with the following passage:

We, the Japanese people, acting through our rightfully elected representatives in Parliament and determined to secure for us and for our descendants the fruits of peaceful cooperation with all peoples and the blessings of freedom everywhere on the soil of our country so that never again the horrors of war result from the actions of the government, herewith declare that the sovereign powers belong to the people and adopt this constitution.

This passage puts in a prominent position the two concepts which are the cornerstones of the 1947 constitution: the achievement of democracy within Japan, and pacifism as the supreme value in Japan's external relations. These elements are recurring themes in the chapters of Miyazawa's book in which he surveys the structure and content of the constitution.

Much attention is devoted to the Charter of Rights in the constitution. Interestingly, the Charter is much more detailed than many of its western counterparts. Not only does it include detailed procedural rights but it also stresses that the citizen's rights are tied to certain duties. The right to work, for example, entails a corresponding duty to work. Always drawing on comparative aspects, Miyazawa then surveys elections, the Emperor's functions and rights, the parliament's and the cabinet's structure and powers, the court system, and many other aspects of the Japanese constitution.

Miyazawa's book is an important and interesting addition to the literature on comparative constitutional law. At the same time, it is a useful overview for non-specialists and for those interested in Japanese affairs. Being a well-crafted combination of an introduction to general constitutional law and a study of the application of general themes to the case of the Japanese constitution, the book generally dispenses with references to court decisions and academic debates.

For German readers, Miyazawa's book is of particular interest. The post-war constitutions of Germany and Japan both share the context of pre-war constitutional experience and failure, capitulation, external supervision of the drafting process, and its results. Finally, the international lawyer will find interesting details on the "internationalist" outlook of the new Japanese constitution. Not only is pacifism one of its premises, but the constitution also explicitly states the supremacy of international law.

All these features, together with a bibliography, a glossary of Japanese terminology, and annexes containing a German translation of both constitutions, make Miyazawa Toshiyoshi's "*kempo*" highly recommended reading.

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