

BOOK REVIEWS

AN INDEX TO JAPANESE LAW: A BIBLIOGRAPHY OF WESTERN LANGUAGE MATERIALS 1867-1973, compiled by Rex Coleman and John Owen Haley (University of Tokyo Press, Tokyo, 1975), pp.1-167.

INTRODUCTION TO JAPANESE LAW, by Yosiyuki Noda, translated and edited by Anthony H. Angelo (University of Tokyo Press, Tokyo, 1976), pp.1-253.

FOREIGN ENTERPRISE IN JAPAN, LAWS AND POLICIES, by Dan Fenno Henderson (University of North Carolina Press, Chapel Hill, 1973), pp.1-574.

THE JAPANESE LEGAL SYSTEM: INTRODUCTORY CASES AND MATERIALS, edited by Hideo Tanaka assisted by Malcolm D. H. Smith (University of Tokyo Press, Tokyo, 1976), pp.1-954.

VILLAGE CONTRACTS IN TOKUGAWA JAPAN: FIFTY SPECIMENS WITH ENGLISH TRANSLATIONS AND COMMENTS, by Dan Fenno Henderson (University of Washington Press, Seattle, 1975), pp.1-234.

Japanese law may be regarded, both conceptually and for perspective, as made up of two main components. First, there is the hard core of that non-legal "status" system of hierarchical discipline and group loyalty by which the Japanese have traditionally conducted, and still do for the greater part conduct, their domestic affairs. Secondly, there is that mantle of a western "contract" system under cover of which the Japanese present themselves to the outside world on international occasions, and in terms of which they conduct intercourse and trade with western nations and nationals. This mantle was first thrown over the traditional system, as is well known, in *Meiji* times, for respectability, so that Japan might be accepted into the ranks of the major nations. Japan hoped by this means to bring about the removal of the stigma of inferiority which was felt to be implied in the resolute refusal of the European Powers to allow their nationals to be submitted, even in Japan itself, to the methods then employed by the Japanese in maintaining order and hierarchy in their society. In actual practice today, these two vastly different and basically irreconcilable systems of social organisation and control co-exist in a kind of uneasy symbiotic relationship, where a movement from "status" to "contract" is probably slowly making headway.¹ But a persistence of the duality accords well with the "familial insider-outsider psychology" permeating the group organisation of society in Japan, and its corollary that rules for mutual relationships inside the group are quite different from the rules that govern the relationships of the group with those outside.² The idea of universal rules governing the members of all the groups equally and impartially as individuals irrespective of groupings is incompatible with this type of thinking.

Until recent years (that is until the Showa Constitution of 1947) the interest of scholars in Japanese social control has mainly been that of sociologists and historians, and has been devoted to the investigation and description of the traditional non-legal "status" system of hierarchical discipline. Of later years the major interest has shifted, for practical reasons, much more towards the

1. Something of the kind is remarked by Noda, *op. cit.*, xii, 17-18, 183; Henderson, *Foreign Enterprise*, 162, and Tanaka, *op. cit.*, 262-263, & nn.12-14.

2. The "insider-outsider" complex is an ever recurrent theme in Henderson's work, and one of the hazards of foreign investment in Japan: Henderson, *op. cit.*, 100, and ch. IV *passim*.

study by lawyers of the overlap of the western style "contract" system of justiciable rights, in terms of which international relations and the increasing volume of international trade with Japan are conducted—at least nominally.

Lawrence W. Beer and Hidenori Tomatsu have published an informative and helpful "Guide to the Study of Japanese Law" in western countries.³ They have not omitted to note the participation of Australian scholars, and the facilities offered by Monash University in the promotion of the study of Japanese law. They suggest four reasons why the study should be undertaken in the West, of which the prime reason is said to be because:

"The massive and expanding trade between the U.S.A. and Japan in particular, and in general the enormous and complex web of economic interactions between Japan and most nations of the world, make it a practical necessity that at least some foreign businessmen, lawyers, scholars and government functionaries have a firm grasp of aspects of the Japanese legal system directly or indirectly affecting their relationships with Japan, and that at least a few of these have a good general understanding of Japan's legal system."⁴

Charles R. Stevens in an earlier issue of the same Journal argued that the study of Japanese law deserves more attention in American law schools than it is getting and advances three reasons.⁵ Two of the reasons are directed to the unique value of Japanese law in comparative law studies in the modern (as opposed to the merely western) fields of legal development.⁶ His third reason is the practical one based on the sheer size and economic impact of Japanese trade in world affairs. He says:

"Japan's economic might means that Japanese law or at least an understanding of Japanese legal consciousness will have a very real practical benefit for any American law student who wishes to practise in the international private law field."⁷

These incentives to the study of Japanese law would seem to apply with even greater force to Australia, situated as she is so much closer to Japan, and dependent as she is so much more than America on the good-will of, and on smooth trade relations with, her much more populous and powerful neighbours in Asia. It is hard to escape the conclusion that Australia's future is becoming linked more and more closely with decisions made in Tokyo, Peking, Moscow and Jakarta, and less and less with those made in Washington and Whitehall.

Rex Coleman lists 3,603 items in his complete (to 1973) bibliography of materials in European languages on Japanese law. Of those only sixteen are of Australian provenance, and only one is a book (only one chapter of which is devoted to Japan). Some of the sixteen are so slight (one is only two pages in length) as hardly to merit being counted. Of the others only a

3. (1975) 23 *A.J.C.L.* 284.

4. *Id.*, 285.

5. (1971) 19 *A.J.C.L.* 665.

6. It is interesting to reflect that the whole science of comparative law dates back to Sir Henry Maine's interest in foreign and historical systems, particularly the Hindu and the Roman. Perhaps there is room for a modern scholar here to pioneer work as significant as Maine's by formulating an entirely new understanding of Japanese forensic systems on their own terms and not by reference to any conventional western legal concepts.

7. (1971) 19 *A.J.C.L.* 665, 381.

very few rank as scholarly studies of their subject in depth. Apart from the Australian contribution (or lack of it) a break-down of the national derivations of the items in Coleman's bibliography overall is informative. A check of a sample of 148 items—the section on Private International Law—shows the following: from Japan, 98; from the U.S.A., 23; from Germany, 15; from France, 7; from England, 3; from Canada, 1; from Australia, 1. Glancing through the book one may judge that these figures are probably fairly representative of the position overall, except that there is, here and there, an occasional item from Italy, Sweden, Russia, the Netherlands, Hong Kong, Malaysia, Turkey, Mexico and other places.

In spite of Coleman's 3,603 items and some valuable accretions since 1973, reliable and useful materials in the English language for the study of Japanese law are spread very thin. There is still no authoritative and comprehensive general text book on Japanese law, nor on the history of Japanese law, in English.⁸

Undoubtedly, however, there is developing a more active interest in Japanese law—or at least in the internationally operative, western-oriented, component of it. For example, four of the books reviewed here were published in or after 1975. *Credit and Security in Japan*⁹ was published in Brisbane too late for inclusion in Coleman's *Bibliography*. A book on *International Trade Law* by Professor Ryan of the Queensland University Faculty of Law, published in 1976, has a section on the Japanese trading system. The Australia-Japan Trade Law Foundation is collaborating with Japanese scholars in the production of a book on the Japanese legal system. No doubt this interest reflects in part a growing desire among western businessmen and their legal advisers to study Japanese law. It is not suggested that parties to important transactions involving Japanese law are hoping to conclude their arrangements without specific advice from legal experts practising in Tokyo, but as Dan Fenno Henderson very pertinently points out, the foreign businessman and his home lawyers must have some minimal understanding of the Japanese legal system to be able to frame their questions, address them to the proper Japanese quarter and then understand the answer they receive. Certain general features of the Japanese legal system, its derivation, structure, professional roles and decisional techniques, the formal materials and the ineluctable deficiencies of translation, must first be understood to some minimal degree before a dialogue is possible between the foreigner and his Japanese legal advisers.¹⁰ Japanese law as a system is *sui generis*. The ties that bind society together, even in economic relationships, tend to partake more of social than of legal obligation, and a strict lawyerly approach is inadequate. The five books mentioned at the head of this review constitute a significant widening of the avenues of approach to the study of Japanese processes of social control and dispute settlement by English speaking students.

An Index to Japanese Law, compiled by Rex Coleman and John Owen Haley, aspires to be a complete *Bibliography of Western Language Materials, 1867-1973*. While this is a large claim, it is hard to point to any significant

8. By contrast, John D. Mayne's classic work on *Hindu Law and Usage* was first published in 1878 and went into its eleventh edition in 1950. Of course, there are differences. England had a much greater and more direct interest and investment in India than she ever did in Japan.

9. Hisashi Tanikawa and others, *Credit and Security in Japan*, (University of Queensland Press, 1973).

10. Henderson, *Foreign Enterprise*, 162.

omissions, at least in English. On the contrary it may be thought that the compilers have tended to include too much material of sociological and economic, rather than strictly legal, interest. The 168 pages of the work are organized in sections under subject headings for ease of location of material. Statutes and official texts, books, and articles are separately presented. Notable scholarship and much painstaking work have gone into the preparation. It is encouraging to read that the compilers intend to keep it up to date by annual supplements in *Law in Japan: An Annual*, and by issuing cumulative new editions from time to time. A useful feature is that the compilers have separately itemized every Supreme Court decision in translation. This is important since Supreme Court decisions are not regularly issued in translation but must be searched for, far and wide, in a variety of locations. One might suggest for future editions that the usefulness of the work would be enhanced by an author index and by fuller cross-referencing. For example, Bernard Marks' article, "Choice of Law and Conflicts Avoidance",¹¹ is indexed, quite properly, under Private International Law, but it is hard to see why it is not cross-referenced under Contract which is where one might well go in the first place to find it. The convenience of the table of abbreviations would be improved by including in it the many abbreviations that have been left to the reader to work out for himself. A further refinement of real necessity is the promised work by Rex Coleman critically evaluating the major items cited. Coleman points out (as any student will soon find for himself) that a very significant proportion of what has been written on Japanese law is, as he puts it, "technically inaccurate" and, one may add, of no use at all to the researcher. In passing, one may wonder, when Coleman says that no non-western country has had as much written about its legal institutions in western languages as Japan, how does he regard India and the massive output of whole libraries of books written about its legal institutions, Vedic, Hindu, Islamic, Anglo-Indian and modern, and its voluminous Law Reports over more than a century? Nevertheless, Coleman's bibliography has been very competently done and conveniently presented, and, if supported as promised by a critical evaluation of the material, and kept up to date by periodical revision, it will take its place as the primary reference work and time-saver for the English student of Japanese law, and will become an indispensable item in any library of Japanese affairs.

The principle of rigid, universal, external, rules governing all behaviour equally and impersonally—like the Cosmology that gave it birth and gave it for a time, the sanctity of Godhead in the West¹² was never developed in Confucian nor in Japanese thought.¹³ The East, if it perceived the idea at all, dared not use it, for it abolished hierarchy and that meant the end of order and harmony, not only in society but in the Universe. When the

11. (1970) 44 *A.L.J.* 528, 588.

12. Sir George Sansom in *A History of Japan to 1334* (1958), 74 has pointed out that the western attitude towards law was well expressed by Hooker when he wrote: "Of law there can be no less acknowledged than that her seat is in the bosom of God. All things in Heaven and Earth do her homage . . . both angels and men and all creatures of what condition soever." Richard Hooker, *Of the Laws of Ecclesiastical Polity*, Book I, ch. 18. For the history and the causes of the rise of the idea of "laws of nature" (and consequently of modern theoretical science) in the West and not in the East see Joseph Needham, *Science and Civilization in China* (1956) Vol. II, ch. 18.

13. Nor even for that matter in Chinese "legalist" thought either. The *Fa* of the Chinese *Fa Chia* never extended beyond the idea of the immediate command of a human superior to a human inferior. "What was lacking in the Far East was the very idea of Law", says Minear, *Japanese Tradition and Western Law* (1970), 5.

idea was introduced into China after 1911 it failed to take root and today in China it stands specifically and expressly repudiated and denounced.¹⁴ In the case of Japan most observers seem to be agreed, and Professor Yosiyuki Noda concurs, that the idea has not yet been accepted generally into domestic Japanese thought.¹⁵ Japanese society remains very largely organized in hierarchical group patterns but changes are slowly taking place, the importance of which is hard to assess.¹⁶

Professor Noda wrote his *Introduction au droit japonais* in 1966 for readers trained in civil law systems. It has now been translated into English and adapted for appeal to those trained in common law systems by Mr. Angelo. The volume is slim (245 pages) and is written in a simple running style that is very easy to read. The work includes a short history of Japanese law to 1968, and of the reception of western law thereafter, a brief sketch of the constitutional structure, of the judiciary and of the profession, a chapter on Japanese mental attitudes to law, a chapter on the five Codes, subsidiary legislation, treaties, and other sources of law in custom and in *Jori*, and lastly a chapter on law reports and legal theory. Such wide coverage in such a slight volume cannot be expected to go very deep. It must necessarily be sketchy in many parts, and the lawyer and businessman will find some of the details most important for his purposes, e.g., administrative guidance, conciliation, arbitration, contract and conflict of laws, scarcely touched upon at all. The book is written by, and intended for, the academic scholar rather than the practising lawyer, but it is what it purports to be—a short rapid introductory outline of its subject from which the student may gain perspective and direction for deeper studies. Perhaps the most distinctive and personal part of the book is chapter IX, “Japanese and the Law”. Professor Noda stresses the point that:

“Japanese do not like law . . . To an honourable Japanese the law is something that is undesirable, even detestable, something to keep as far away from as possible . . . There is no wish at all to be involved with Justice in the European sense of the word.”

Notwithstanding that Professor Noda has been teaching western law at University level for over thirty years, he confesses to a “complete aversion” to the subject, and says that his interest is turning more and more to socio-cultural disciplines other than law as a mechanism of social control.¹⁷ “The Japanese manner of thinking,” writes Noda, “clearly favours neither the formation nor the functioning of law as a conceptually arranged system of rights and duties,” and he gives considerable space to the traditional hierarchical relationships of *giri-ninjo* in the maintenance of social order.¹⁸ These, as he says, are emotional and non-legal in essence and in sanction. But Noda confuses the issue, as indeed most writers do, by referring to the *rules* of *giri* as substituting for the rules of law. It is misleading to use the term “rules” in the same breath both of law and of *giri*. *Giri*, of course, acts no more in accordance

14. For the situation in China see Professor Alice Tay's articles “Law in Communist China”, (1969-1971) 6 *Sydney L.R.* 153, 355. In the last of the three articles, “Smash Permanent Rules: China as a model for the future”, (1976) 7 *Sydney L.R.* 422, Professor Tay touches shortly upon a comparative evaluation of the two systems—rule of man or rule of law.

15. Noda, *op. cit.*, 103, 109, 179-180.

16. *Id.*, xii, 17-18, 183.

17. *Id.*, xii, 159-160, 168 n.36.

18. *Id.*, 174ff.

with coherent rules, than any other emotions do. The essence of *giri* is that of pattern without rules.¹⁹ On p.221 the rejection of the idea of law in Professor Noda's mind becomes explicit:

"It is quite natural that the courts have often to accept customs *contra legem*, notwithstanding the prohibition on doing so, because a judge is not so much required to apply existing rules of law at any cost as to give a reasonable solution to the parties before him . . ."

This of course is simply a reversion from the rule of law to the ancient Confucian rule of man.²⁰

However shallow may be the penetration of ideas of law into the internal affairs of the Japanese among themselves, Dan Fenno Henderson makes it clear that transactions with foreigners are in fact, and must necessarily be, hung upon the framework of a functioning system of western contract law, even though this law is not always determinative, and may be limited in effectiveness.²¹ It is this system and the limits of it that are of prime concern to western lawyers and Henderson's book *Foreign Enterprise in Japan* revolves around it. The work was commissioned by the American Society of International Law as one of a series on the legal environment for investment in certain foreign countries. It is therefore oriented primarily towards the practical considerations of law in action, and Professor Henderson has had the co-operation and assistance of a panel of Japanese and American lawyers in actual practice in Tokyo as well as scholars and practitioners in the United States. The study is a comprehensive one of 570 pages collecting and collating a vast amount of detail, and including over fifty pages of bibliography, of which approximately half is devoted to English language material. There is a useful glossary of Japanese names and legal terms, a table of cases cited, and twelve appendices of tables, lists, and industrial data. After an introductory chapter on the history and role of foreign enterprise in Japan there follows an exposition of the political, economic, commercial, and legal environment in which foreign interests must operate, and then comes the core of the work—the legal institutions and the substantive law relating to foreign investment entry and control in Japan, joint-ventures, contracts and dispute resolution, in the setting of the non-legal control mechanisms with which the law continually interacts. Special attention is given to the dominant role in the control of foreign enterprise played by the immensely powerful Japanese bureaucracy with its sometimes legally ambiguous methods of "administrative guidance", in theory based upon the consent and voluntary co-operation of those guided.

The book is a very sobering one. Written as an aid to minimising the communication gap, it cannot conceal the immense gulf that separates the two cultures and stands in the way of mutual understanding and co-operation

19. For the distinction between pattern and rules see Joseph Needham, *op. cit.*, (*supra*, n.12) especially the part headed "Order without Law."

20. Cf. the words of Lord Birkenhead in *Rutherford v. Richardson* [1923] A.C. 1, 12, when, in moving the House of Lords to reject a petition for divorce, he said the result would be to "leave Mrs. Rutherford bound in matrimony. It is an unfortunate circumstance that she should thus be tied for life to a dangerous, violent and homicidal lunatic, after having for many years suffered both in body and in spirit from his unfaithfulness and his cruelty. [T]o some this may appear a harsh even an inhumane result, but such my Lords, such is the law of England . . . the true remedy lies beyond the scope of your Lordship's faculties . . . it rests with Parliament . . ."

21. Henderson, *Foreign Enterprise*, 159, 191-192.

even in terms of an artificial structure of law deliberately erected so as to be comprehensible to both. Of course, the widest cultural incompatibility has never proved very inhibiting to commerce where both the parties have wanted to trade, and no one doubts that Australian-Japanese trade is increasing and is likely to go on increasing, whatever the lawyers may do or say. But in the fields of mutual understanding, of social values and of social goals and ideals, cross-cultural communication means something deeper and more fundamental than reciprocity of trade. Henderson's book does not encourage one to believe that the universally valid principles of law, or generalizations about law, envisaged by some writers, for example Pospisil, can ever be found or formulated.²² Pospisil's four "universal attributes of law" are highly unreal and unhelpful as a bridge for inter-cultural communication when applied to the indigenous Japanese system of social control.²³ There is room here for some new work by an original comparativist if only to provide that "comparative analytical system" in terms of which the Japanese "folk system" can fairly be described without the distortion which is inevitable when western legal terms are used.²⁴ Professor Henderson's immense scholarship, his profound comprehension of Japanese thought and society and his practical experience (he is a member of the Japanese bar and was in public practice in Tokyo for a number of years), and the high calibre of his assistants and counsellors make this work an authoritative and timely contribution to better relationships in that sphere which bulks largest in Australia-Japan intercourse and reciprocity, the economic sphere.

Professor Hideo Tanaka of the University of Tokyo conducted a course on Japanese law at the Harvard Law School in the Fall Semester of 1974-75 as Visiting Professor. He has now revised and augmented the materials he used for that project and has published them in book form as *The Japanese Legal System: Introductory Cases and Materials*. In his Preface he pays tribute to the very substantial assistance afforded him in the undertaking by Mr. Malcolm Smith of Monash University Faculty of Law, and acknowledges Mr. Smith's original authorship of several portions of the work.

The book, of over 950 pages, is not a systematic study of its subject in textbook form, but is rather a collection of materials for the student to work upon under the guidance of a teacher. The material includes the text of Japan's two Constitutional instruments, a substantial number of Supreme Court judgments, a number of extracts from books and articles previously published in English, some passages from books and articles previously published in Japanese and now translated into English for the first time, short discussions on the Japanese language, on the form of citation of Japanese legal materials, on the Constitution and on the judicial system, on methods of research in Japanese law, on the foreign lawyer's role in Japan, a number of useful

22. Leopold Pospisil, *Anthropology of Law: a Comparative Theory* (1971).

23. Pospisil's criteria function effectively only in contract-based systems. For example, one of his universal attributes "*obligatio*" connotes reciprocal rights and duties—a concept unknown in traditional China and Japan where society was bound together by duties without corresponding rights. His basic approach that law is to be recognized in, and extracted from forensic decisions is not helpful in societies such as Japan where obligations were enforced by social not legal sanctions, where confrontations and decisions were discreditable abnormalities, where decisional methods were reprobated, and where harmony was sought through consensual processes.

24. Paul Bohannan, *Justice and Judgment among the Tiv* (1968 reprint). Notwithstanding the controversy and criticism provoked by Bohannan's views they are entirely germane to the problems of describing Japanese law in English.

tables of dates, names, events, statutes and cases, a bibliographical section and an index, which also serves as a glossary. There is some necessary connecting text but generally the authors have preferred to let the material speak for itself and not to intrude their own views or discussions. Formal questions on the material are interspersed, here and there, without answers.

The book functions therefore as a student guide and *vade mecum*, a framework upon which an instructor can readily hang a course or programme on Japanese law. The emphasis is on the Constitutional and judicial system, "legal process", judicial review, the profession and the role of law in Japan rather than on the substantive laws of Japan. The authors' avowed purpose is to convey a grasp of the overall structure of the Japanese legal system rather than the detail of its content—or at any rate the structure of that westernized component of Japanese law with which the foreigner is most likely to be concerned.

The main body of Dan Fenno Henderson's work *Village Contracts in Tokugawa Japan* is made up of a selection of fifty surviving specimens of documents kept on record in eighteen scattered villages of Tokugawa Japan dating from 1683 to 1868. The documents have been selected for the superficial resemblance they bear and for their analogical function to contracts in a legal system made between parties mutually agreeing upon some aspect of their relationship. The documents are offered in Japanese *sōrōbun* text, each translated into an English version with comment and explanation. Henderson's introduction is a short, highly informative, discussion of Japanese dispute resolution procedures in Tokugawa times from village up to shogunal level, and of some of the differences between the documents presented and those that are known as "contracts" to a modern western lawyer. The material of this introduction is largely that published in the *Journal of Japanese Studies* under the title "'Contracts' in Tokugawa Villages".²⁵

The work is primarily for the legal historian and comparativist interested in the traditional ways of Japanese dispute resolution and social control, the basic component of Japanese "law", rather than for the practising lawyer interested in the secondary, adopted, western component of that "law". The addition of these fifty documents to the growing body of Japanese documentary resources in English will be received by the research student with relish.

As Henderson points out, while the documents are, ostensibly, agreements or promises, their function is not that of establishing justiciable rights between the parties to them. The concept of justiciable rights was quite unknown in Tokugawa Japan. Enforcement of a claim or redress of a grievance in the shogunal administration of social discipline was granted, if at all, by way of grace, never as a right. The essential thing about the making of these agreements was that they had to be drafted and made, not so as to "stand up" in any Court, but so that they would be acceptable to village opinion and would be "made to stick" by the social pressures of the immediate community.²⁶ Henderson's account tends to confirm the view that the principles by which the Tokugawa villager ordered his behaviour were not primarily those of any "laws" or customs. He did not need to know what the "laws" were or even if there were any. His determinative thought must

25. (1974) 1 *Journal of Japanese Studies* 51.

26. Henderson, *Village Contracts*, 33.

always have been simply: "What will please my neighbours in my group? That I must do or be driven from the herd." It was on this basis that social cohesion and social control were maintained in village Japan. Even today the question may be asked, is this not still the chief ingredient in the complex of influences by which Japanese behaviour is directed?

One thing highlighted by Henderson's book is the growing awareness of the methodological deficiency arising from the neglect of comparativists to provide a frame of reference and a vocabulary in which the concepts and institutions of non-legal Asian societies can be described without the confusion and misrepresentation that results from using western legal terms.²⁷ Henderson does nothing to supply this deficiency, but he clearly recognizes it. Thus although he continues to make use of the term "contract" he acknowledges that the word is not at all apt to describe the documents he has translated. He makes it clear that they are really more in the nature of something unknown to western law—manifestos of agreed social policy, records of multi-party promises and agreements performing a quasi-legislative function as instruments of consensual government in small introverted communities.²⁸ Since they are not and cannot be incorporated into any system of law—resting as they do on social, non-legal obligations and sanctions—there is no concept and no word in western legal thought for them. For the same reason when he uses the words Court, Judge, suit, private, public, Constitution, legislation and the like, he often puts them in quotation marks so as to warn the reader of what he acknowledges is "the clumsiness of such conceptual baggage from another sphere."

A second thing highlighted is the pervasive thrust for a system of authoritative decision of disputes by some transcendent power outside the immediate community group, in those societies where settlement by mutual conciliation and agreement under the social pressures of group opinion, and not an impartial enforced decision of rights under law, has been since time immemorial the general method of dispute resolution. Henderson makes the point that notwithstanding the unceasing efforts of shogunal authority to choke off petitions for dispute adjudication, and notwithstanding the dire sufferings, difficulties and discouragements that were put in the way of petitioners, the "floods of claims" became such that whole areas of relief were deliberately denied and closed to petitioners in an endeavour to reduce the pressure on the shogun's administrative and disciplinary officers. The same phenomenon is observable in Chinese and in Indian history. The Chinese bureaucracy took strenuous steps, in *Ch'ing* times for example, to ensure that dispute settlement would *not* be readily available from Imperial authorities, and to compel people to settle their quarrels by agreement between themselves, but to very little effect.²⁹ In India, when the British conquerors introduced a system of dispute resolution by the adjudication of rights and the enforcement of decisions under law irrespective of considerations of local opinion or community harmony, the courts were swamped with claims. Such was the congestion that it took years to get a case heard and the whole system was in danger

27. For example, the Japanese *bugyo* is usually referred to as a "Judge" or "Magistrate", but the considerations that motivate a modern judge or magistrate were simply not within the horizons of his imagination. He might be better called a Disciplinary Control and Orderly Officer, or, perhaps more picturesquely, Imperial Whip.

28. Henderson, *op. cit.*, 11-13, 31.

29. See J. R. Watt, *The District Magistrate in late Imperial China* (1972), 212, 214-215.

of breaking down until corrective measures and reforms were undertaken.³⁰ These considerations give point to the generally accepted view that the Japanese of today are turning more and more to their Constitutional courts for dispute resolution, while the old conciliatory procedures, and arbitration, are becoming, as in the West, merely ancillary, if often very useful, procedures within, and not as heretofore outside, a controlling system of justiciable legal rights.

Professor Henderson's sensitive nose is able to detect a whiff of justiciable law, and consequently true contract, beginning to arise in Tokugawa times, although he restricts it very severely, and mainly to the fringes of a limited area of contention—diversity cases. He insists that there were signs that the law was beginning to become “secreted in the interstices of procedure” as Maine suggested of the common law. But some readers may remain unconvinced. Henderson himself has acknowledged that “the overlap of power by the regularity imposed by law never developed in Edo governance.”³¹ Surely where in public law authority remains free and untrammelled to act according to the ruler's will, regularity of decisions in the administration of private law by the ruler's officers cannot be more than mere convenience of administration—surely not sufficient to found the components of rigidity and inevitability needed for a justiciable law.

Village Contracts in Tokugawa Japan is primarily a work in the field of the history of legal evolution. But every student of modern Japanese law will find it invaluable for the insight it gives into traditional Japanese attitudes towards inter-relationships arising from agreement. It is upon these attitudes that the attempt is being made at present in Japan to engraft the exotic (and often unwelcome) constraints of western contract law.

T. B. Stephens *

DEBT RECOVERY IN AUSTRALIA, by *David St. L. Kelly* (A.G.P.S., Canberra, 1977; for the Commission of Inquiry into Poverty, Law and Poverty Series), pp.i-xviii, 1-167.

In 1975, Mr. Kelly, then Reader in Law in the University of Adelaide, researched, and made recommendations for reform in, a long-neglected area of the law, *viz.*, the legal debt collection procedures used throughout Australia. After long delay, the report was published in 1977 as part of the Law and Poverty Series. This Research Report analyses the State legal machinery for the recovery of debts (by unsatisfied judgment summons, examination as to means, warrants of execution, warrants for sale, garnishee of wages, *etc.*) and the Federal bankruptcy laws as they affect small debtors. It also discusses such extra-legal self-help procedures as repossession of goods subject to security and the cutting off of services by monopolies (Gas Company and Electricity Trust) and the pre-legal procedures of creditors and their mercantile collection agents. In addition, it considers the uses and abuses of stored credit information by credit bureaux and by those in the business of extending and restricting credit, a legitimate ancillary subject matter.

30. See Cohn, *The Development and Impact of British Administration in India* (1961), 35.

31. Henderson, “The Evolution of Tokugawa Law”, in J. W. Hall and M. B. Jansen, eds., *Studies in the Institutional History of Early Modern Japan* (1968), 214.

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The "lowly" procedures of debt recovery can traumatically affect great numbers of unfortunate individuals. Very often, the trauma is unjust and unnecessary because reform in this area has been neither popular nor pressing. Many of the existing laws reflect ideas about the debtor-creditor relationship prevailing in the 19th century, despite the tremendous shifts which have occurred since then in credit-use habits. The most dramatic shift occurred during the consumer credit explosion since 1950. Law reform inevitably lags behind changes in the underlying social realities and debt recovery law is a remarkable example. Changes in social patterns, earning capacity and credit use have rendered obsolete most of the social assumptions upon which our inherited procedures are based.

In 1972, South Australia was the first State to make the necessary giant stride forward into the late-20th-century world of consumer credit. Other States have been slower and more fragmented in their approach. Even so, much remains to be done here, as I pointed out in *Fair Dealing with Consumers* (South Australian Government Printer, Adelaide, 1975). Since the legal issues and policy matters raised therein were complex, my Report has, for good reason, been subject to close examination for the last 18 months by the Consumer Legislation Advisory Committee of South Australia. Professor Rogerson of the Adelaide Law School, author of the historical Rogerson Report (*Report on the Law relating to Consumer Credit and Moneylending*, The Law School, University of Adelaide, 1969) and a former colleague of Mr. Kelly, is a member of that Committee. So is Mr. Noblet, formerly Registrar of the Credit Tribunal, now Director-General of Public and Consumer Affairs. As a result of the work done by this Committee, it is expected that substantive new legislation will be introduced here in the near future to remedy most of the remaining matters pointed to in Mr. Kelly's 1975 Report.

I mention my Report and the further work thereon because Mr. Kelly and I were independently working at the same time along parallel lines. The purpose and emphasis of our Reports were different. He looked at debt recovery and its imperfections through the eyes of poor persons in debt, the appropriate stand-point for the Law and Poverty Series of the Commission of Inquiry into Poverty. I was looking at the problems of debtors generally, and the aftermath of consumer credit use. Not all consumers are poor, but a great many are. They are even less likely to be a match for the mass suppliers of goods, services and credit than the general run of consumers.

Each of us drew upon overseas research, especially in the United States and Canada, and then related it to Australian conditions. It is not without significance that, upon encountering similar anachronisms and disadvantages, we both made rather similar recommendations for improvement.

Mr. Kelly points to the vestiges of 19th century thinking about the unworthy and prodigal poor still deeply embedded in both the substance and the procedure of our debt recovery laws. There is an underlying assumption that debtors are *per se* untrustworthy and need to be whipped into line if they are to be kept honest. The surprising fact is that about 99% of debts are paid, with comparatively rare resort to repossession or court proceedings. Such excellent performance is claimed to constitute proof of the efficacy of existing procedures. Those in the business of providing credit hold the view that loss of the psychological advantage of the threat of repossession, 10-day orders of imprisonment and other stern legal measures would result in a lowering of moral standards and performance by debtors. This glum view

of debtors is not self-evident. In any event, whatever the correct view, it is undeniable that many changes should be made to the existing laws and procedures. Payment performance is not advanced by the obscurity of court forms, which are often couched in language unintelligible to those born and educated in Australia, and a mystery to those who were not. If borrowers are to be imprisoned for contempt of court, the possibility of imprisonment and the alternative courses available should be brought home forcibly first.

Some creditors feel that this is a time of "creditor bashing" at the hands of "revolting" debtors who outnumber them. However, the credit providing industry in general has adopted an objective attitude and co-operated with realism.

Mr. Kelly pointed to the need for much more empirical evidence before reforms could be implemented. Since 1975, considerable further evidence has come to light, both here and interstate. Mr. Kelly himself, as the Australian Law Reform Commissioner in charge of the Consumers in Debt Reference, has been active in the accumulation of such evidence. The report on that Reference is due at any moment. Further evidence has been gathered by the Consumer Legislation Advisory Committee of South Australia, which has not confined itself to academic analysis. Various other committees have been working on evidence as well as legal concepts in the Australian Capital Territory and in the other States. The Standing Committee of the State and Federal Attorneys-General has for two years been investigating a Uniform Credit Bill substantially similar to the 1972 legislation in South Australia. These further studies go a long way towards satisfying his suggestions for further inquiries.

It is appropriate that these Committees should "make haste slowly" because the law and policy is complex. Further, it may be a long time before this area of law reform is examined again. Policy matters include such questions as—should the Government continue to enjoy a preference over trade creditors with respect to income tax, rates and taxes upon bankruptcy? What should be the position of secured creditors when consumer goods are repossessed and the consumer becomes bankrupt? Should credit providers be put to an election between "the money and the box"? Or should they continue to be able to sue for any deficiency? What are the criteria and procedures for distinguishing between honest and dishonest debtors? How can dishonest debtors finally be brought to book? What are the real costs of consumer protection measures? What is a fair maximum rate of interest? Should there be a maximum? What would be the actual losses of credit providers from defaults if losses were written off and no collection procedures enforced? Does it cost more to collect bad debts than to write off the amount outstanding, in terms of staff wages, mercantile collection agents' commissions, legal and court fees and other overheads? What would be the psychological consequences amongst borrowers if credit providers adopted different collection policies? Should the public pay the cost of supporting officials, departments and services? Can they be modernized and more effectively used to both public and private economic advantage? These and other questions have only begun to surface.

Three main groups of debt recovery systems were analysed by Mr. Kelly: (i) State systems for the recovery of debts; (ii) State laws regulating pre-judgment procedures of collection agents and creditors and extra-judgment activities of creditors and monopolies through self-help, and (iii) the Federal

system of bankruptcy and insolvency. He noted that a century had passed since imprisonment for debt was abolished, yet it survives today under the guise of imprisonment for contempt of court. He also noted that the legal structure, in spite of some substantive changes, is still creaking under the pressures of the new credit situation. I think it is fair to say that the pressures are less severe in South Australia because of the 1972-1975 changes. However, the 10-day order for imprisonment spoils our otherwise more enlightened position.

He remarks that, in the last century, the use of credit was viewed as less than honest, but today it is not only accepted practice, but pressed upon consumers through attractive advertising in newspapers, television and radio. Offers of credit are made with what I have called "the smiling face of credit". In times of recession or widespread unemployment, the unfortunates then see "the ugly face of credit". Yet the level of dishonesty is remarkably low, as is the level of default, even in hard times.

Mr. Kelly also turned his attention to the pre-judgment collection activities of commercial agents. Before his Report and since it, legislation has been passed in most States to regulate their activities in a general way. He agrees that the legislation is helpful but says that more remains to be done.

The subject matter of credit information has received much attention since Mr. Kelly's report, but he usefully summarises its relevance in 1975. Since then, there have been a number of important developments. In New South Wales, a voluntary system for the correction of credit reports has been instituted. Mr. Kelly refers to our legislation and to the 1975 decision of the Credit Tribunal (*Commissioner for Prices and Consumer Affairs v. Charles Moores and other stores*, Credit Tribunal, Adelaide, 13th June, 1975) that the major retail stores in the habit of exchanging credit information on a regular co-operative basis fell within the ambit of the Fair Credit Reports Act, 1974-1975 (S.A.), because such exchange constituted "reward" within the test "for fee or reward" in the Act. As recently as July 1977, the High Court of Australia upheld the Credit Tribunal decision with the result that retail stores are credit reporting agencies. This brings to finality a long debate whether such activity is "for reward". The High Court decision will probably have an impact in the United States and Canada as well as in the other States of Australia.

There is an interesting section in Mr. Kelly's Report on the possibility of disadvantaged persons avoiding "harsh and unconscionable" terms in contracts. In *Anderson v. Shuttleworth and Anderson* (19th May, 1975), the Credit Tribunal interpreted the word "unconscionable" in s.46 of the Consumer Credit Act, 1972 (S.A.) (which reads "harsh or unconscionable", not "harsh and unconscionable") as meaning "unfair" or "plainly unfair"—in any event, something less than "harsh". Thus construed, our s.46 goes some way towards achieving the recommendations about court powers to avoid unfair terms mentioned in the recent Australian Capital Territory Law Reform Committee Report on "Harsh and Unconscionable Contracts" of September 19, 1975, and in the subsequent Report by Dr. Peden to the New South Wales Government based on the A.C.T. Report. It is true that those two reports were aimed at giving relief against unfair terms in all types of contracts, not merely credit contracts covered by s.46. Nevertheless, the definition of "credit" in the Consumer Credit Act is so wide that most relevant contracts are covered. Any business person who grants any indulgence to any customer (be it for a

week or a month, and with or without interest) is involved in a "credit contract".

Two of Mr. Kelly's recommendations are of special interest, because they affect so many persons. One relates to deficiency amounts remaining after the sale of repossessed goods, usually secondhand motor vehicles; the other to orderly payment schemes for consumers who are unable to pay their debts through unforeseen circumstances. I propose to say a little about each topic.

With respect to deficiency amounts, he points out that the duty to sell repossessed goods at "the best price that [the credit provider] could reasonably be expected to obtain" is not universal, except in South Australia. Deficiency amounts have always been a prime cause of "small bankruptcies" (total debts under \$4,000). Before Medibank, I noted when sitting as Judge in Bankruptcy that about one third of such bankruptcies resulted from inability to pay deficiency amounts; about one third, medical and hospital accounts; and the remaining one third, other types of debts. Since Medibank, medical and hospital expenses have ceased to be a problem, so that deficiency amounts and other debts share the field between them. Deficiency amounts relate, in the main, to repossessed secondhand cars. The amounts tend to be grossly inflated for several reasons: the purchase price is often unrealistically high; too high a trade-in value is usually allowed; on default and repossession, real difficulties are encountered in reselling, because of the weaknesses in the re-sale market. This matter has been subject to much analysis and unfruitful debate. Attempts to ensure a fair price by legislative measures have been unsuccessful. A new dimension has been introduced into the debate by the "link" which has now been forged, by legislation, between credit providers and car suppliers. "The best price that may reasonably be expected to be attained" is said by industry to be the wholesale price. Indeed, that is the claim of the members of Australian Finance Conference who finance the bulk of secondhand car sales.

Mr. Kelly has analysed this problem and the solutions attempted here and overseas, including the solution of election of remedies, which is not as radical as it seems. In 1975, he recommended certain interim measures to obtain more information. Since 1975, he has been heavily involved in seeking further information and solutions. Most of the necessary information is now in the hands of the Australian Law Reform Commission, whose comments on deficiency amounts are awaited with interest. No doubt it will contain a definitive study on this topic, but whether election of remedies will be recommended in the present economic climate is uncertain. In the long run, I think that the case for election of remedies will prove convincing.

With regard to the problems of insolvent small debtors, Mr. Kelly recognized the merits of the moratorium scheme contained in s.38 of the Consumer Transactions Act, 1972 (S.A.), but he recommended that, in addition, there should be a scheme for orderly payment of debts appropriate to consumer needs, that such a scheme should be administered by the Official Receiver free of charge, that counselling advice concerning financial and budgetary management be available, that the Official Receiver have more control than do creditors over the choice between straight bankruptcy and scheme, that a consumer be entitled to choose one or the other, that schemes be limited to three years, that there should be no contributions from future property or income and that discharge should be the shortest time

administratively reasonable. Similar orderly payment schemes are or soon will be in force in the provinces of Canada and I referred to them in some detail in Part 16 of my Report.

I agree with all of Mr. Kelly's recommendations except the last two, about which I have some reservations. This is not the place to canvass them. They may be dealt with fully in the Report on Consumers in Debt.

It is interesting to note that, after independently examining debt recovery and related problems, Mr. Kelly's Report and my own make a great number of recommendations in almost identical terms. Many of the ideas were drawn, of course, from other jurisdictions and adapted to the Australian situation. Nevertheless the conclusions might have been widely divergent.

In conclusion, I turn to Mr. Kelly's reference to the restriction of services by such monopolies as the Gas Company and the Electricity Trust. He found that neither of these authorities acts peremptorily. He did not analyse the policy of the E. & W.S. Department or Telecom. Recently, consumers have reported frequent mistakes in their telephone accounts, errors sometimes running into thousands of dollars on private lines. Glaring errors are less insidious than relatively small ones. There is little danger of debt collection and cutting off of the service in the case of glaring errors. However, where an account is merely double the usual amount, the onus falls on the consumer to show the error. In court, Telecom would have to satisfy the onus. Out of court, the threat to cut off the service takes the place of the onus of proof. I do not suggest that Telecom would cut off service without reasonable investigation of any complaint, but what is reasonable is very much in the eye of the beholder.

Part 20 of my Report recommends a new Consumer Agency. A Bill for such an Agency was introduced into the United States Congress by Congressman Rosenthal, passed by both Houses with bi-partisan support, originally vetoed by President Ford, but subsequently approved late in 1976. Professor Zeigel and Professor Trebilcock of Toronto University, Canada, have both long advocated such an agency, which is a Government-funded research and representation agency, not in competition with the Commissioner for Consumer Affairs or the Ombudsman. It is a small, highly specialist, body of economists and lawyers, who undertake research and act as spokesmen for consumer interests before Government Departments, Utilities, Agencies and Authorities. They represent consumer interests at public hearings concerning rates, charges, errors, etc. Individuals are quite helpless when arguing against rises in rates, airline charges, postal charges, price rises, etc. Such an Agency could assist consumer with complaints about Telecom and other monopolies.

I have spent considerable time in discussing developments since December 1975. I have sought to show how relevant and prophetic Mr. Kelly's researches were, both in relation to debt recovery and peripheral subjects. Mr. Kelly's researches have had and will have a marked influence upon the course of law reform in the much neglected law of debt recovery and related subjects. The problems and disadvantages of consumers are accentuated when those consumers are poor or otherwise underprivileged. Overhaul of the procedures has been long neglected because the subject matter is not as glamorous as other popular major issues. Those adversely affected do not enjoy a strong lobby or strength through association. It required a person of great

compassion for ordinary and sometimes unattractive people, coupled with considerable talent, energy and zeal, to persevere in this undertaking. Mr. Kelly is such a person.

*J. M. White**

THE LEGAL POINT OF VIEW, by *Robert A. Samek* (New York Philosophical Library, 1974), pp. i-xviii, 1-343 (plus index).

This is both a book about jurisprudence and a work of jurisprudence. The major part of it is an account of several well-known theories of law from Hobbes to Fuller and of the criticisms to which they have been subjected. This task is accomplished generally in a clear and interesting way. These pages are, however, to be read in the context of Professor Samek's own theory of the legal point of view which is developed in Part I entitled "Philosophical Foundations". This development is not always easy to follow. Partly this is because the author so often prefers not to set out his arguments directly but only indirectly by way of comparison with or criticism of those of other writers, and partly it is because, although certain key ideas are reiterated, often in identical words, others are left vague and uncertain.

The starting-point is familiar. Traditional answers to the question "What is law?" have foundered because they were thought of as seeking a definition of the true essence of law. Even the technique of conceptual analysis has not freed legal theory from this inappropriate quest because it has involved extracting from the many and varied ordinary uses of the concept a central core which is seen as representing the essence of the concept. Instead, Professor Samek has set himself the task of constructing an evaluative model of the legal point of view. A model is simply "a provisional corrigible construct composed of building blocks of many other models" (p. xvii), but the other two elements of his construction are more complex. The meaning of "evaluative" is explained in a chapter which distinguishes four functions of discourse and in particular the assertive, which is used to make truth-claiming statements, and the evaluative, which is used to express the speaker's attitude to something about which he has a considered opinion. For a statement to be verifiable, there must be standards which are acceptable to the best informed opinion in the world at that time; for it to be true, that body must accept it as conclusively verified according to those standards. But an evaluative expression "is *justified* if it is justifiable according to standards which are acceptable to a body or bodies of informed opinion . . . , and if the justification, were it made according to such standards, would be acceptable to that body, or to any of those bodies as providing a good reason for the use of the expression" (p.25). Thus the question "What is law?" should not be construed as seeking a truth-claiming answer but as requesting an evaluative model, which is "a model consisting of a set of postulates which express the speaker's pro- or con- attitude" (p.26).

The author recognises that a given sentence may be either truth-claiming or evaluative, and also that both functions operate behind an evaluative wall in that, for instance, the selection of AB as the best informed opinion or of XY as a body of informed opinion can only be justified as evaluations. There is however a further problem with this distinction. Samek's references to "pro- or con- attitudes" and his admission that words like good and bad are badges

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of evaluative discourse, are consistent with usual terminology, and there are "Law is . . ." formulations ("Law is an instrument of oppression" and so on) which are thought of as expressing a pro- or con- attitude. Yet none of the traditional jurisprudential theories discussed in this book is based on evaluations of law in that sense. It may be that a writer's "pro- or con-attitude", or rather his assumptions about what virtues a legal system should exemplify, determine his choice of model. This could profitably be pursued. But it is not quite the same as saying that the model expresses a "pro- or con-attitude". At any rate an evaluative model is justified if it is fruitful for the purpose in hand. There is little indication of what purposes there may be or how fruitfulness is to be tested. A common answer will be that the choice delimits for elucidation or analysis a coherent subject-matter about which useful (and sometimes true or verifiable) things may be said. This is a different process from the way in which expressions of "pro- or con- attitudes" are normally justified.

Samek admits that an evaluative model of the concept of law can be constructed, but prefers to construct one of the legal point of view, for which he claims certain advantages. It is common enough to observe that different aspects of a concept may be more prominent or important in different kinds of discussion or, as Samek puts it, from different points of view: but Samek claims to develop that idea further. He does not explain whether there is any limit to what may count as a point of view. He refers at least to the legal, moral, political, religious, scientific and psychological, and there are references also to the legal philosophical, whose relation to the legal and philosophical is uncertain. It may be important to know what points of view there can be, as the purpose of a point of view is to mark out an *exclusive* field of interest. This phrase recurs but is not precisely explained. It cannot mean that what falls within one field of interest cannot also come within another, for this would be inconsistent with much of the argument. The only purpose in insisting on this characteristic of a point of view appears to be to ensure that models constructed from different points of view cannot conflict.

The field of interest marked out by the legal point of view is "that mode of institutional social control which is enforced through the effective application of a norm-system by courts or tribunals acting as norm-authorities of the system. The content of the norms of this system is adapted for the purpose of that social control from a range of values drawn from different points of view and in particular from the moral point of view" (p.88). Thus the theory has close affinities to Kelsen's. However, for instance, the *grundnorm* is rejected as a hollow concept. In following the common-place chain upwards from the individual norms which are the units of a norm-system, Samek opts for a "hydra-headed" model rather than a "pyramid" or "tree" model. Thus the norms of one norm-system may be traced back to more than one highest norm, provided the highest norms are logically consistent. But it is not clear how this logical consistency is to be achieved or how we are to identify one particular norm-system or legal system without a rule for resolving conflicts between the highest norms, which it is the task of the basic norm or the rule of recognition to provide.

Though there is much of interest and profit in this book, it leaves the reader dissatisfied. A promising idea is set out and not utilised. Indeed the author's preface concedes that the detailed development of the concept "seems more problematical and less fruitful" than the new orientation which it provides. However it is not always sufficiently integrated into the discussion

of those other theories which it is supposed to illumine. And the two claims which are made for the new model — that we are more likely to avoid claiming truth value for our model, and that we are enabled to look at old problems and puzzles from a new vantage point — are less striking than the hopes which are initially raised.

I. M. Yeats*

STUDIES ON IMPRISONMENT, by the Law Reform Commission of Canada (Minister of Supply and Services, Canada, 1976), pp.1-279, plus 1-46.
COMMUNITY PARTICIPATION IN SENTENCING, by the Law Reform Commission of Canada (Minister of Supply and Services, Canada, 1976), pp.1-177, plus 1-48.

These attractively produced volumes represent a significant contribution to criminological thought even though it is doubtful if their recommendations will gain wide acceptance. Both volumes largely comprise research papers prepared either by the staff of the Commission or by academic consultants followed by one or more working papers in which the Commission expresses its tentative views of the subjects under consideration and calls for public comment. This approach to stimulating informed discussion of difficult and controversial issues is to be commended.

The larger volume, *Studies on Imprisonment*, was apparently prepared after the other, but, in terms of its originality and likely impact, is clearly more important. The first paper entitled "The September Study: A look at sentencing and recidivism" is a detailed statistical analysis of all Canadian offenders convicted of their first indictable Criminal Code offence (excluding motor vehicle offences) in September 1967. They numbered 2071, and their criminal careers were traced over a five-year period in order to calculate relative recidivism rates for different sentencing options. It was found that overall only 548 offenders (26.5 per cent) were convicted of a second indictable offence during the five-year period and that, especially for the large group of non-violent property offenders, lower recidivism rates followed the imposition of non-custodial penalties.

This finding, which reinforces the results of similar research conducted in other countries, does not, of course, *prove* that the imposition of imprisonment causes higher recidivism than non-custodial alternatives. An equally plausible alternative explanation is that the sentencing judges were perceptive enough to impose the more serious penalties on those offenders who were more likely to recidivate regardless of the penalty imposed. Nevertheless, this empirical study provides further ammunition for those who wish to see imprisonment used less frequently, and the Law Reform Commission of Canada is strongly of that view.

The second research paper in this volume, "Release Measures in Canada", presents a provocative review of the theory and practice of the use of remission systems, parole, day parole and temporary absence. Here, the writers point out that "these measures are applied by different authorities, have different goals and purposes and may be applied under different terms and conditions. They may very often contradict each other and even cancel their respective effects" (p.84). In order to introduce some degree of rationality into this complex and little researched field, it is recommended that statutory

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remission be abolished and that parole be available to all offenders and be conceived of as a period of transition, following temporary absence and day parole, prior to the completion of the sentence.

Two further research papers both deal with the vexed question of what should be done with dangerous offenders, and, perhaps surprisingly in view of the long sentences available under the Canadian Criminal Code, do not categorically reject the notion of preventive detention. The familiar problems of identifying dangerous offenders and devising an adequate statutory definition are powerfully presented and a statistical analysis of all persons designated as "dangerous sexual offenders" from 1949 to 1973 is included, but rather tamely it is argued that "a decision as to what should eventually replace the existing provision is one that should be made with the greatest caution" (p.205). A more forthright conclusion might have been expected from the evidence presented.

Studies on Imprisonment concludes with a Commission working paper (identified by separate pagination and coloured paper) on "Imprisonment and Release". This is an important document which deserves careful consideration. While making no comparisons with other jurisdictions, the paper points out that on average 20,000 persons are in prison in Canada every day and that it costs approximately \$14,000 per year to keep each one there. The Commission finds these numbers and costs hard to justify in terms of the protection gained for society, and is adamant that the number of prisoners should be reduced.

The working paper lists three reasons for the imposition of imprisonment: separation or isolation, denunciation and wilful default, and this interestingly echoes the position adopted by the Criminal Law and Penal Methods Reform Committee of South Australia in its First Report, even though the terminology used is not identical. The working paper, however, recommends that different release procedures should apply to the three types of sentences with the emphasis being on graduated advancement by stages subject to review by a Sentence Supervision Board. Theoretically this proposal seems to be neat and logical, but this reviewer, having had some experience working with a similar scheme in Victoria some years ago, would be appalled if it were considered seriously. Graduated release is highly desirable, but advancement towards release by stages can easily result in a tyranny for both prisoners and staff.

The second volume, *Community Participation in Sentencing*, also contains some interesting material but is essentially mistitled as nowhere is it suggesting that sentencing should be the responsibility of anyone other than the courts. The book therefore fails to satisfy the interest aroused by its intriguing title, but its focus is the important area of non-custodial correctional measures and many of these do involve some degree of community participation.

The first of the three research papers in this volume, all prepared by academic consultants to the Commission, is concerned with restitution and compensation schemes for the victims of crime. After reviewing the development and operation of various schemes, the paper raises the question whether these schemes should move in the direction of social welfare, tort law or restitution, and the writer argues that all three approaches are required. Several minor improvements are suggested such as providing compensation hearings without appearance and the appointment of a Victim's Duty Counsel, but the author concludes that "there are no bold or simple solutions that will solve all the problems of restitution and crime victim compensation" (p.48).

The second research paper on the law of probation reviews developments at the federal and provincial levels and raises a number of fundamental questions about the operation of probation systems which have not yet been satisfactorily resolved. For example, "Is the probation officer a social worker, friend of the probationer or an officer of the court who must uphold the strict letter of the law? Is probation a privilege or a right? Is [it] punishment or treatment?" (p.56). Tentative answers are offered to these and other questions.

The final research paper is a straightforward report on community service treatment and work programmes in British Columbia and this is supplemented by extracts from court reports in which judges have expressed their views on community service orders. In at least one of these cases the judge made an order of considerable complexity in which all aspects of the offender's life, including his times for eating, sleeping, working and going shopping, were spelled out in detail, allowing nothing to the discretion of the supervising probation officer, let alone the offender. It is fascinating as an oddity, but hardly a model of progressive sentencing.

The two working papers that conclude this volume deal with restitution and compensation and with fines. Of these the latter is probably the more novel as it recommends the use of a modified version of the Swedish day-fine system together with means enquiries and time to pay. The Commission is above all consistent in its efforts to go as far as possible to keep offenders out of prison.

These two books would be useful additions to any reference list for a university course in criminology, but would also be of assistance to law reform bodies anywhere in the world. The working papers, especially, deserve to be widely circulated and discussed by all who are concerned to create an effective and humane criminal justice system. It will certainly be interesting to see to what extent their recommendations are eventually incorporated into legislation.

*David Biles**

COMMISSION OF ENQUIRY INTO LAND TENURES. FIRST REPORT, (Australian Government Publishing Service, Canberra, 1973), pp. 1-190;
COMMISSION OF ENQUIRY INTO LAND TENURES. FINAL REPORT, (Australian Government Publishing Service, Canberra, 1976), pp.i-viii, 1-121.

The Royal Commission of Inquiry into Land Tenures received its terms of reference by Letters Patent dated the 4th May, 1973 and was required to inquire and report, *inter alia*, upon:

"The most appropriate methods of leasehold administration and management of land for urban areas, consistent with the private rights of lessees and the public interest in the land, being land in the Australian Capital Territory and the Northern Territory and land acquired by or for the purpose of a Land Commission which may be set up in any Australian State to which the Parliament may grant financial assistance on terms and conditions relating to the acquisition, development and use of land for urban purposes".

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In view of the obvious difficulties of considering one system of land tenure without having proper and substantial regard to other systems of tenure existing elsewhere in Australia, the Commission was subsequently required, by Ministerial direction given on the 29th June, 1973, to inquire and report upon additional matters, namely:

“The existing systems of land tenure and the features, including the advantages and disadvantages, of each system that relate to the acquisition, disposal, development, management and redevelopment of land for urban purposes”.

The Commission of Inquiry was constituted by the Honourable Mr. Justice Else-Mitchell, Chairman of the Commonwealth Grants Commission and formerly a Judge of the New South Wales Land and Valuation Court, Professor Matthews, the Professor of Accounting and Public Finance at the Australian National University and Mr. G. J. Dusseldorp, the Chairman of Directors of the Lend Lease Corporation Limited. The Commission has, in fact, produced two reports, the first of which was presented to the Governor-General in November, 1973. The presentation and publication of this report generated widespread public interest and debate, and led to a substantial number of further submissions concerning the first report being made to the Commission. The Commission presented its final report in February, 1976. In determining the form of its final report, the Commission decided against reproducing in full the discussion and recommendations contained in its first report. Instead it chose to refer to the first report only where it was relevant to the issues discussed in its final report, so that if one wishes to get a full appreciation of the views, logic and recommendations of the Commission it is essential that both reports be read.

The Commission says, of its own work, that “[t]he suggestions made in our two reports are, to a significant extent, novel”. These words must surely qualify as the understatement of the year. In executing its task the Commission undertook what must be the first Australia wide, comprehensive and detailed survey and examination of existing urban land tenure and administrative controls and of the extent to which such tenures and controls are fulfilling the community’s needs. The complexity and detail of the Commission’s findings, logic and recommendations is such that it is not possible, in a review of this nature, to set out satisfactorily even a portion of the Commission’s recommendations or to do justice to the work of the Commissioners. Once again, for any person interested in the future of urban land use control and development in Australia a careful study of both reports is essential.

The Commission’s terms of reference were such that its report is directed basically at a consideration of those policies relating to either urban land or land which might reasonably be expected to become urban. The Commission approached its task by first determining what it regarded as desirable goals or policies relating to the use, development and control of urban land. Those were:

- “(a) the provision of residential accommodation and related services for all persons as a matter of right, at a cost within their means;
- (b) the need to provide this accommodation in a variety of forms consistent with the desires of the people for different kinds of life styles and social relationships;
- (c) the provision of adequate employment opportunities, transport

and communication facilities, social services and recreational facilities;

- (d) the effective integration of residential accommodation with all other urban facilities and functions in order to optimise the relationship between living, working and recreation; and
- (e) the achievement of better balance between urban living and the use which is made of the environment, for example, by creating new cities to relieve the pressure on metropolitan regions and by rejuvenating the blighted areas of existing cities.”

The Commission then specified a series of “yard-sticks” against which urban land policies should be measured, namely:

- “(a) increasing the supply of land for urban purposes at a given cost;
- (b) reducing the cost of making land available for a given purpose;
- (c) allocating land in accordance with relative needs at prices which reflect both the needs of users and their capacities to pay;
- (d) stabilising the price of land;
- (e) eliminating the socially undesirable activities of land speculators;
- (f) avoiding premature development and redevelopment;
- (g) preserving buildings of historic or intrinsic merit;
- (h) protecting the environment;
- (i) preventing wasteful or uneconomic forms of land use;
- (j) permitting public discussion and participation in land use decisions;
- (k) providing maximum security of tenure for users;
- (l) eliminating windfall gains and losses as a result of decisions to permit changes in land use; and
- (m) minimising costs of administration and compliance with controls.”

Whether one agrees with these goals or yardsticks may depend, to a certain extent, upon one’s philosophy and point of view. The Commission recognised this, stating that:

“It has been said by some of our critics that the choice of goals and guidelines involves value judgments, so that the strategies derived therefrom are themselves affected by the values adopted. Of course this is so; it is simply not possible to demonstrate by logical process that, for example, residential accommodation should be available for all persons at a cost within their means or that social services and recreational facilities should be adequate”.

Although the submissions received by it between the first and final reports led the Commission to the conclusion that there existed, in the general community, support for the goals and guidelines outlined above, the Commission, more as an aside, delivered a gentle reprimand to its critics by pointing out that “our own value judgments are, of course, quite unimportant; those of the community are of overwhelming importance.” The Commission, however, accepts that we live in a democratic society and that if its understanding of community values is faulty its recommendations and strategies are unlikely to be adopted. As the Commission surveyed the Australian scene it found much relating to land tenure and development which it regarded as unsatisfactory. One of the principal areas of concern

was the inevitable increase in the value of rural land with the encroachment upon it of urban uses, and the variations (almost invariably an increase) in land values consequent upon changes in zoning or some other form of development controls. Current forms of tenure in Australia are such that this increase in land value (termed by the Commission the "unearned increment") accrues to the person who happens to be the owner of the land at the relevant time. Almost invariably, the increase in the value of the land has arisen as a result of community action, *e.g.*, a change in zoning, the construction of a new highway, or the normal growth of an urban area, and not as a result of any action whatsoever on the part of the lucky landholder, and the Commission was strong in its views that such a "lottery" is contrary to social equity. The Commission expressed the view that:

"Elimination of private gains and losses from planning decisions is desirable as a matter of social equity. All land cannot be developed to like intensity and relatively arbitrary decisions have to be made as to which land is to be developed to a high degree of intensity, which land is to be developed to a lesser intensity or for a less valuable purpose and which land is to be reserved for some public purpose. Millions of dollars presently turn on those decisions and, as a matter of social equity, this is wrong."

The Commission reasoned that the unearned increment in land values exists only because the development rights to the land repose in the land owner. If the development rights were reserved to the community and the use of the land left in the hands of the land owner, the fluctuations in land values would accrue to the community and not to the land owner. The Commission was of the view that the retention, by the community, of development rights would not only mean an end to the land lottery, but that there would be other advantages, namely:

- (1) Preservation of development rights will improve the planning process: once the prospect of private profit or loss is removed, the land owner has no financial interest in rezoning decisions. "Pressures for self-interested planning decisions will no longer be exerted and the need for planning secrecy will disappear. Plans may be the object of public discussion at all stages of formulation; planning decisions may be made on the basis of public needs, not private interests".
- (2) Removal of speculation is likely to reduce costs and prices, as the financial tribute imposed by speculators on the end user will no longer need to be paid.
- (3) Appropriation by the community of the development value increments will benefit government finances, thereby providing funds to offset the immense demands on public revenues which are imposed by community growth.
- (4) Premature development of land will be eliminated or at least substantially reduced.

Although the retention, by the community, of development rights would involve a significant departure from current Australian practice, the Commission noted that the number of critics of such a proposition was remarkably small. Thus it set about determining a method whereby such development rights could vest in and be retained by the community, and the type of body or organisation in which such rights should vest. It will be

appreciated that the body or organisation in which such rights are vested becomes, in effect, the principal planning authority in respect to the land the development rights of which it holds. The provisions of the Planning and Development Act, 1966-1976 are such that, in South Australia, the development authorities are the State Planning Authority, the Director of Planning and the local councils, so that the adoption, in this State, of the Commission's proposals will involve a substantial change in the present administration of planning and the legislation which effects it. In its first report the Commission was fairly critical of local government bodies as planning authorities, stating that they were often subject to substantial local pressures which frequently resulted in planning decisions detrimental to the community as a whole being made. Furthermore, in many cases they lacked the qualified staff necessary to make proper planning decisions. Thus the Commission took the view that "it is vital to the proposed scheme of development control that local bodies should have no power to make development orders or grant development consents." The Commissioners were also very critical of zoning regulations of the type operative in South Australia and administered by local government bodies pursuant to the Planning and Development Act, saying that:

"Zoning is unsatisfactory as a means of land use control. It is negative or permissive rather than positive or compulsive in its effect, in that it can only prevent particular forms of land use and cannot require land to be developed and used in accordance with planning decisions made in the public interest."

However, it appears that the Commission totally underestimated the deep-seated desire in most Australian people for strong and powerful local government. Although many of the witnesses who came before the Commission after the publication of its first report readily acknowledged the faults of the past performance of local government in the planning field, they considered that, with all their faults, local councils were likely to interpret local sentiment on planning issues more satisfactorily than other, more remote, organisations. The unanimity of the community judgment on this question was such that the Commission thought that to press its original concept would be both unrealistic and counter-productive. In its final report therefore it reassessed the role of local government and recommended that local government bodies be responsible for formulating local planning guidelines and standards (consistent with those formulated at regional levels), the consideration of draft development schemes and the supervision and implementation of development orders.

Consistent with its views that Australia should formulate national urban land policies, the Commission recommended a structure of planning institutions which would not only devise such a policy but implement it at local level. The structure is as follows:

- (a) A national land use council consisting of the relevant Federal and State Ministers, supported by a skilled secretariat, a standing committee of public servants representing the several governments and a citizens advisory committee to formulate national land use policies.
- (b) An Australian Government agency to consider land uses falling directly within the constitutional responsibility of that Government.

- (c) At State or Territorial level a small, expert organisation to advise on major land use matters, collaborate with the national land use council and supervise regional planning commissions.
- (d) Within each region or metropolitan sub-region, a regional commission (partly elective, partly appointed) responsible for planning regional development on the basis of State guidelines; formulation of guidelines for local authorities; implementation of particular regional projects; administration of the development process (including land acquisition and development), and leasehold estate management. The regional commission will thus be the authority with major responsibility for land use planning and development.
- (e) Local government authorities, responsible for formulating local planning guidelines and standards (consistent with those formulated at regional level), considering draft development schemes and supervising the implementation of confirmed development orders.

Whilst the national and state instrumentalities would be responsible for the basic "coarse grain" planning policies and decisions, it is the regional commission which appears to bear the brunt of the administration of the recommended system. It is proposed that the regional commission be responsible for the administration of a metropolitan sub-region, and, whilst the size of such a sub-region was not specified by the Commission, it was clearly envisaged that, bearing in mind the current size of council areas, it would include two or more council areas. Such a concept was not, of course, without its critics, with respect to whom the Commission said:

"Some people . . . may contend that there is no necessity for a regional organisation because State and local authorities between them can perform the necessary planning tasks. The introduction of an additional tier of planning control, these people may claim, is an unnecessary complication and expense. We have considerable sympathy for this view, but we do not share it."

It is envisaged that the regional commission, in addition to playing a substantial planning role, will control the use and development of land by means of the land tenure system. For example, residential lands will be granted by the commission as residential freeholds, *i.e.*, fee simple titles containing covenants requiring the development of the land (usually within a certain time) for residential purposes and restricting the use of such land to such purposes. Commercial and industrial land, on the other hand, may be leased by the regional commissions for a period of years at an economic rental to be subject to periodic reappraisal, the leasehold document stipulating the manner in which the land is to be developed and used. Not only will such a system control the development and use of land, but it will also go some way to reserving to the community the unearned increment in the value of the land. The proposal is that when a landowner desires to change the use of his land to a more valuable use he must pay to the regional commission the increased value of land arising out of that change of use, in consideration for which the regional commission will appropriately vary the covenant in his title or lease. Alternatively, if it is the regional commission which desires to redevelop the land, it may acquire it at the old use value, change the covenants, and resell it at the new use value. The land lottery would therefore cease to exist.

However, such a system is only applicable to land which has "passed through" the hands of either the regional commission or some other government instrumentality, since before the commission can impose such covenants or issue such leases it must own the land. The Commission's recommendations with respect to the reservation of development rights went far beyond land which may be acquired by either the regional commission or some other Crown instrumentality or body. Thus the Commission recommended that legislation be introduced aimed at providing that, on a given date (called the "base date"), the development rights in all land be appropriated to the Crown. The development rights appropriated on the base date would only be those which occur after that date, and not those which have already occurred before that date. As the Commission said:

"... a new attitude is necessary but we cannot overlook the fact that many people have invested considerable sums in properties on the basis of existing laws and attitudes. We have seen that, as a result of expectations about future changes in permitted land use, current market values may already incorporate increments in development value. The investments may have been speculative and undertaken at risk but it would be inequitable not to acknowledge current market values at the time the new policy is implemented. What is essential is that subsequent increments in development value be reserved for the public".

The Commission's concept is that, when land is compulsorily or otherwise acquired by the Crown or the regional commission after the base date, the dispossessed owner will be compensated in full for all development rights and unearned increment which existed at the base date, but not for any rights or increments which may have occurred or accrued after that date. Such a concept may raise difficult but not insoluble valuation problems.

The Commission adequately supports its views and recommendations by recourse to sound logic and a mass of detailed facts. Whether one agrees with its views and recommendations depends, by and large, upon whether one accepts the principles upon which the Commission has based its reasoning. It is appropriate to stress again that the only way to get a full and detailed appreciation of the Commission's recommendations and reasoning is to read both the reports. There is much in those reports which has not been referred to in this review. On reading the reports, it will become apparent that the principal reason why many of the Commission's recommendations are novel is that the primary basis upon which it founds its whole reasoning and recommendations is itself novel. In recommending a comprehensive, and perhaps cumbersome, system of land use and development control in which the Crown retains the "unearned increment", the Commission has acted on the fundamental principle that land, as such, is a community asset which should only be used for the benefit of the community. Individual land owners are, at any point in time, mere transitory beings whose temporary ownership, use and occupation of the land should not be permitted to operate in such a way that it is detrimental to the general interests of the community. This is not to say that the Commission was not acutely aware of the substantive rights of those land owners and of the need to protect and preserve those rights, but rather that those rights should be preserved and exercised in a way which gives the land owner reasonable enjoyment of his land without prejudice to the overall community needs. The Commission's philosophy appears to be that the

position of individual land holders is that of trustees for the community in respect of the land which they hold, and that the days in which a man could say "This is my land: I will do with it what I will" are gone forever.

*M. L. W. Bowering**

UNEMPLOYMENT INSURANCE BENEFIT: A STUDY OF ADMINISTRATIVE PROCEDURE IN THE UNEMPLOYMENT INSURANCE COMMISSION, by P. Issalys and G. Watkins, (Law Reform Commission of Canada, Ottawa, 1977), pp. vi-xvii, 1-342.

Discussion by lawyers of the provision of social services has not been common in Australia, though Professor Sackville has, of course, made some notable contributions to that subject in recent years. This has been in contrast with the flurry of literature in the United Kingdom, the United States and elsewhere, and the publication of this large scale inquiry for the Law Reform Commission of Canada into the procedures of the Canadian Unemployment Insurance Commission both emphasises the distinctiveness of the Australian position and gives an indication of the breadth of the issues to the resolution of which lawyers may make constructive contributions.

The Canadian scheme of Unemployment Insurance is based on the principle of contributions to an insurance fund guaranteeing payments to contributors who become unemployed. It thus resembles the British National Insurance Scheme, rather than the British Supplementary Benefits Scheme or the Australian Social Services Act, both of which provide means-tested benefits and are financed from general revenue. The administrative structures are based largely on the National Insurance Act (U.K.) of 1911, and provide for what Sir Robert Micklethwait (a former British Chief National Insurance Commissioner) has called "an extended-three-tier-plus" system of adjudication (in Canada an appeal from the determining officer to a Board of Referees, and thence to an Umpire; with the possibility of judicial review by the Federal Court of Canada). There is an important difference between the Canadian and the Australian and British systems of administration in that the initial determining officer has often interviewed the applicant for benefit, and this "personal service" is a sought-after objective. A significant feature of the scheme is that in order to deal with difficult cases expeditiously routine cases in which benefit is payable are dealt with by a junior officer. Apart from this many of the problems with which the Report deals are familiar: the amount and quality of the information available to claimants and to the decision-making bodies, the complexity of the legislation and the regulations made under it, the expeditiousness of the administrative process, the detection of abuses of the system, the recovery of overpayments and the general structure of the appellate and review processes, including the availability of legal or other assistance to claimants.

The Report is in two parts: a comprehensive survey of the practices of the Commission followed by a series of comments upon them and of proposals for reform. There are some sixty-eight proposals for change, and it would be beyond the scope of a review of this sort to deal with them in detail. Some points may nevertheless be made. First the philosophy of the Report is to

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encourage openness and communication of information, so as to reduce the possibility of a "dialogue of the deaf" between claimants and administrators both intent upon their own positions and the social and institutional pressures imposed upon them. This leads to recommendations endorsing the objective of "personal service", and proposing the rearrangement of the relevant Act so as to bring procedural provisions together; the insertion into the Act of regular practices of the Commission (such as the rule that when a claimant appeals to a Board of Referees the determining officer automatically reviews his case, and the principles governing the occasions when a claimant may be required to accept work at a lower status or of a different kind from that usually undertaken), and the production of a Claimant's Manual along the lines of the British Supplementary Benefits Handbook which would set out in comprehensible language the principles governing both the award of benefits and the procedures employed to assess them but which (unlike the British production) would have the Act and regulations set out as an appendix. A second objective is to ensure greater professionalism and independence from the Commission for the appellate bodies: while the main recommendation here is for the establishment of a Federal Social Security Tribunal in place of the Umpires (who are Federal Court judges), there are many others dealing with the composition of Boards of Referees, the training of referees, the availability to them of the legislation and the previous decisions of the Umpires, procedures before both bodies and the places in which they should sit, time limits for appeals and the periods during which they should be heard and decided upon, and so on. Particularly noteworthy are the recommendations that determining officers and the appellate bodies be required to give reasons for their decisions; that legal representation should not always and automatically be available to claimants, even on appeal, but that the Commission should sponsor conferences on the problems of litigation concerning unemployment insurance benefits; and that the role of the courts be confined to that of administrative review, rather than appeal. A final set of recommendations seeks to discriminate between the imposition of penalties and the recovery of overpayments from claimants who have and those who have not contributed to the error resulting in their being overpaid, and to protect those who have received overpayments as a result of administrative errors of which they knew little or nothing against arbitrary processes of recovery.

In identifying areas in which change may profitably be introduced into any particular system of administering social security benefits it is unusual for commentators to have regard to the experience of other jurisdictions. This Report is no exception, and its second Part makes no reference to the growing literature on the topic: indeed its bibliography lists only one book and one article that are not Canadian in origin, and these are both general pieces on administrative law with comments on the particular problems of the social services, rather than specialist pieces on social security. There are, perhaps, clear reasons for this insularity in the field of unemployment benefits: it is plausible to believe that the problems encountered in each country are so closely interwoven with the political, social and administrative structures and attitudes of that country that help from elsewhere is unlikely. In Australia, moreover, this attitude may be exacerbated by the distinction (long invalid but now decisively exploded by *inter alia*, Schwartz and Wade in *Legal Controls of Government* (1972), Farmer in *Tribunals and Government* (1974), and Calvert in "Appeal Structures for the Future", (published in *Justice, Discretion and Poverty*, ed. M. Adler & A. Bradley (1975), 183-206)

between insurance systems, where the claimant is viewed as having "rights" which require a measure of legal protection, and non-contributory systems where benefits depend on means and need, and the claimant is regarded as having a "privilege", or a "right to be considered", which can safely be left to the discretion of the relevant administrative Department. Yet as one reads the English literature on National Insurance and Supplementary Benefits, the Second Main Report of the Poverty Commission and the Coombs Report on Government Administration in Australia, the Report of the Royal Commission into Social Security in New Zealand and this Canadian Report one cannot fail to be struck by the recurrence of particular problems and the approaches considered for coping with them. Nor is this surprising, since in each of these countries the legislation setting out the rules governing entitlement to and disqualification from benefit is in very similar terms and is administered by single hierarchies of bodies subject to (generally) common principles of administrative law. Ironically enough the analogy which is least useful for all these jurisdictions is probably that of the United States, where for many reasons there have been different attitudes both to the provision of social services and the development of administrative law. Yet that is the jurisdiction to which both English and Australian writers most frequently appeal, though English authors have done so very much less since the publication of Schwartz and Wade in 1972.

What, then, are the features of this Canadian report that may hold out most lessons for Australia? The most striking difference between the administration of unemployment benefits between the two countries is that the Canadian applicant for benefits deals exclusively with the UIC in all matters directly concerning his claim, to the extent that the applicant completes his Canadian Manpower Council registration form at the same time as his unemployment benefit claim, the UIC forwards it to the CMC but keeps a copy on its own file, receives copies of the CMC's lists of vacant positions, can compare the claimant's skills with those required for the vacant positions, and notifies the CMC of any apparent correlations. This is a very far cry from the existing Australian practice whereby it is the CES that issues and receives claim forms and income statements, resolves queries on benefit matters, and advises the Department of Social Security on the work test function. The Canadian position is clearly close to that which the *Review of the Commonwealth Employment Service* (A.G.P.S., 1977) saw as that which would be to the "maximum advantage to the functions, performance and image of the CES", but was compelled to reject on the grounds that "unless an independent work test could be devised, the concept of unemployment benefit would have to be rethought", and that its adoption "was impractical within the present social security framework". Since the wording of the Canadian legislation giving rise to the work test is in all material respects identical to the Australian there is evidence that an independent work test can be devised and administered; whether the advantages of doing so are sufficient to justify considerable changes to the mode of operation of the Department of Social Security is a question to the resolution of which the Myers Committee on Unemployment Benefit and Administration can be expected to address itself.

Secondly, at the level of general administration, it is heartening to find such enthusiastic endorsement of the "personal service" principle. It has been a consistent principle of social services administration in Britain and Australia that the interviewing officer and the determining officer should be different, the reasons in favour of the rule (in Britain, at least) having been

given as to protect the independence of the determining officer and to prevent decisions on the basis of personal dislike at interview. The former reason has never been valid in Australia; the latter offers little protection against the personal attitudes of the interviewing officer being transmitted through his report, and, as the Coombs Committee reported, the whole process leaves the claimant feeling that he is merely a cipher at the end of the line of administrative machinery. The Canadian experience evidently offers support for that Committee's recommendation that the determining officer should be the one to interview the claimant.

Secondly, the principle of openness is one agreed to by commentators in all four countries mentioned above, though its workings out have not been explored in a consistent way in any. The Canadian report, in essence, is concerned with three problems, all of which exist in an acute form in Australia. First, there is the question of *the source* of the rules according to which claims are assessed. In Canada this may be the Unemployment Insurance Act, regulations made under it, and the practices of the Commission as published in their internal memoranda and instructions. (This omits for the present the decisions of, in particular, the Umpires which may serve as precedents on governing the interpretation of particular statutory provisions and regulations). This is the British pattern, too; in Australia there are no regulations and all the rules are contained in the Act and the internal memoranda of the Department of Social Security. The Canadian Report recommends the transfer of certain provisions from the regulations and from the internal memoranda into the Act, but contains no consideration of the principles which might govern the appropriate place for particular kinds of rule. Although there has been some general discussion of the relation between rules, standards and principles in the assessment of social security benefits, to my knowledge the only discussion of the question of the proper source of provisions which in practice affect the very great majority of claims has been a brief and tentative exploration by Calvert (*loc. cit.*). It is suggested, however, that both the Canadian and English experiences have shown that this is a problem worthy of serious analysis, and that the problem is particularly acute in Australia, since (as recent experience has shown) the present structure of the Act leaves the day to day determination of such concepts as "suitable" employment, "good and sufficient reason for refusing employment" and, indeed, unemployment itself to the Minister (not even the Director-General, who is, according to the Social Services Act, "subject to the Minister"). Since these determinations in practice define the conditions a claimant must meet to receive benefits (and thus the scope of the Act) there is good cause for inquiry as to what provisions should require Parliamentary consent, or at least formal Parliamentary scrutiny, for their amendment. It is tentatively suggested that all substantive provisions governing a right to benefit should be embodied in the Act or in regulations made under it. Second, there is the question of the complexity of the statutory provisions and any regulations made under them, and their accessibility to the reader. Sir Robert Micklethwait, in his Hamlyn lectures on the National Insurance Commissioners, has lamented this problem, too, and made some helpful suggestions towards its resolution. The Commonwealth Social Services Act possesses all the inimical characteristics of the English and Canadian legislation, together with the wearisome quality of having been extensively amended since its last consolidation in 1970, and it is probably of little comfort to the potential claimant that he can find an up to date account of the legislation by subscribing to the CCH series on Family Law. Thirdly, there

is the question of the provision of information about entitlement, disqualification and procedures to claimants in a comprehensible form. The last question essentially involved the provision of information to administrators, appeal tribunals and expert advisers, but in many ways this is vastly more important. The Canadian provision of information through pamphlets and displays seems, on the whole, rather better than the Australian provision that the Coombs Report castigated as inadequate, but is subjected to severe criticism as being more appropriate to a general education programme than a claimant seeking to know what he must do. It is hard not to endorse the Canadian Report's recommendation that the administrative body responsible for the Act should publish a Claimant's Manual containing all general information of use to claimants and that migrants be better catered for apart from the pamphlet service. There have been defenders of the view that the full text of internal memoranda and instructions should not be published, but none have gone so far as to assert publicly that proposals such as these are undesirable.

The problem associated with the structure, composition and procedures of appellate bodies seem at first sight to have little relevance for Australia. The "extended-three-tier-plus" system seems a world away from the tribunals, set up by administrative direction in 1975 and which only have power to make recommendations to the Director-General, that are all that exist here. However, the view of the Bland Committee on Administrative Discretions that there should be no other appeals on matters under the Social Services Act has been decisively and properly criticised in the Second Main Report of the Poverty Commission, and rejected in both the Woodhouse and the Coombs Reports. (It is incredible that the Bland Committee thought that decisions "of a character or complexity about which there could be room for serious disputation" would be rare, given the English experience in construing, in the sphere of unemployment benefits, substantially the same legislation *without* the added complexity of means-testing: and its reliance on the benevolence of the determining officers looks brave when one considers that more than 10,000 unsuccessful claimants for social services benefits found that the determining officers changed their minds in favour once they had lodged an appeal, and that these came from fewer than 17,500 claimants whose appeals were finalised during the first twelve months of the operation of the present system.) Moreover, the whole trend of responsible comment in England on the operation of Supplementary Benefit Appeal Tribunals, which have much in common with the Australian appellate tribunals, favours the adoption of the "extended-three-tier-plus" system (see *e.g.*, Micklethwait, *loc. cit.*; Calvert, *loc. cit.*, and Lord Justice Scarman, in his Upjohn lecture for 1976). There is already in existence in the Administrative Appeals Tribunal a body capable of acting as the top level of the three-tier system, and whose independence from the Department might be assured. Experience in Britain and Canada suggests that the intermediate tier will filter out all except relatively complex cases involving questions of general application; and this serves to emphasize the need for members of the tribunal forming it to be properly informed as to the law, given some training, and to have the benefit of adequate procedures. If this situation is ever reached (and Sackville has recently said that it "seems inevitable") there will be much to learn from this Canadian Report, as well as from the English experience. It may perhaps be added that the Canadian experience matches the English in discovering that

it is one thing to require decision makers to produce reasons for their decisions (which is clearly necessary if the appeal process is to have any meaning), but another to receive adequate statements of reasons.

Two last points are of some importance. First, the combination of proposals requiring that Ministerial decisions that have the effect of amending the substance of the rules governing entitlement to and disqualification from benefits should be channelled through formal Parliamentary procedures, that claimants be properly informed of rules and procedures germane to their claims, and that appellate tribunals be brought into existence may smack of over-heavy legalistic intervention in an area which requires rapid decision-making and the existence of individual discretion. Yet every one of these proposals is consistent with the views set out in Titmuss's essay on "Welfare 'Rights', Law and Discretion", which is often taken as a paradigm of the administrator's criticism of legalism. In fact there is general agreement that the real problems in this area are (1) the definition of the area within which discretion is to be exercised, and properly exercised and (2) the various techniques of rule-making, adjudication and review which may best assist in this task. All these are areas in which one should expect constructive contributions from persons with legal expertise. Secondly, there is the point made by Titmuss that has caused controversy: that legal representation should not be allowed before appeal tribunals — a view embodied in the rules governing appeals within the Australian Social Services Act and reflected in the views of the Canadian Report and of Micklethwait that legal aid in such cases should not be provided or should be carefully restricted to important cases. These opinions reflect a number of concerns. Titmuss's views seem to have been based on the misconception that all appeals and all procedures required by administrative law require adherence to U.S. models. The work of Schwartz and Wade provides compelling reasons for at once accepting that strenuous efforts should be made to ensure that unnecessarily complex and expensive procedures are not adopted, and for believing that there is no reason at all why they should be. The authors of the Canadian Report and Sir Robert Micklethwait are under no such misconceptions; but the Canadian authors suggest that the effectiveness of representation (as against the mere presence of the claimant) is not sufficient to merit encouraging any increase in representation from appellate bodies. This seems against the weight of evidence that they themselves adduce on the matter, and the objection seems misconceived unless it is related to the administrative problems that might be encountered if it became a matter of practice for all, or even most, appellants to be represented. Micklethwait places his position squarely on that ground: agreeing that legal representation is often valuable and dismissing the view that the tribunal can help the claimant adequately on the simple basis that it cannot help to prepare the case, he nevertheless is concerned at the extra staffing problems for tribunals and manpower needs of the profession that general legal aid might involve. Hence he would permit the chairman of the relevant tribunal to make the decision as to whether legal aid should be granted in a given case. Another recent contributor to this discussion (Calvert) would prefer to do away with legal aid in social security appeals on the general ground of the incompetence of the practising private profession in the area, and to establish a specialised service within an administrative Department devoted entirely to the adjudicative process. All this contains much food for thought, but the following points are relevant to the Australian position. There is evidence from Canada and from Britain that the claimant with assistance from a union, a solicitor or a

social services action group and who attends the hearing has a significantly better prospect of conducting a successful appeal than one who does not. In South Australia at least, and in many other parts of Australia, there are no equivalents of the U.K.'s Claimant's Union, Child Poverty Action Group, Legal Action Group, and so on; the appellate process is barely two years old and few "professional" assistants can have much experience of their operation; the Australian Legal Aid Office is being severely curtailed, and there is little prospect of any solution along the lines of that suggested by Professor Calvert being adopted. In these circumstances to prohibit legal representation before the appellate tribunal must appear a major impediment to the proper preparation and presentation of a claim, and potentially a handicap to the tribunal as well as the claimant. Practical reasons of the kind mentioned by Micklethwait may militate against any general right of representation being granted, but at least where a tribunal feels it would be useful it should be available, and an appropriate liaison established with the guardians of the legal aid fund to ensure the availability of legal aid.

One general point ought to be added to the preceding discussion. Openness and fairness are not inexpensive qualities from the point of view of the administering Department. If Manuals have to be prepared and kept up to date and (more especially) if files have to be prepared for more elaborate hearings and officers have to be available to appear at them in any capacity there will be less time available to them for the routine dealing with claims. The Department of Social Security has been hard pressed of late, and many of the complaints about its services have involved inefficiency in matters of straightforward routine. It may not be enough to design an ideal system to administer social services benefits: a set of priorities for desirable reforms may well be as important as the ultimate scheme.

It is hardly possible for this reviewer to assess the value for Australia of the final set of proposals in the Canadian Report on penalties and the recovery of overpayments. The relevant provisions of the Social Services Act (ss.138-140) suggest that there is no reason why the problems of distinguishing the innocent from the fraudulent recipient of overpayments and of the methods of payment causing hardship on occasion should not arise here, and periodically Press reports tend to confirm this. Whether they do, however, lies in the internal instructions of the Department of Social Services. If they do, the suggestions made in the Canadian Report are humane and appear practicable.

It will appear from the foregoing that this Report is of wide scope and provides much material of interest that deserves reflection. It is obviously a study on a larger scale than was possible for the Poverty Commission, or the Committee on Australian Government Administration. It is to be hoped that the forthcoming Report of the Myers Committee on Unemployment Benefit and Administration will provide us with as much information and analysis of the workings of the Australian system (over an even wider area, including benefit criteria) as Issalys and Watkins have provided about the Canadian. Given also that Australian practices have been subject to considerable criticism of late and that they seem to display rather less advanced thinking on a variety of problems than is common in societies whose development and general social progress and attitudes have much in common with Australia, there can be no doubt that the opportunity exists not only for significant improvements in our existing rules and practices, but for an important contribution to a debate that transcends domestic frontiers. Issalys

and Watkins deserve our appreciation for their response to a similar challenge, and our thanks for their demonstration of the ways in which lawyers can contribute to its acceptance.

*J. F. Keeler**

CONSTITUTIONAL LAW, by *Christopher Enright* (The Law Book Co. Ltd., 1977), pp. i-xlviii, 1-374.

Enright's *Constitutional Law* does not seek to provide any fresh analysis of constitutional issues. The book is directed primarily at "beginning law students" and its avowed aim is to outline constitutional law in general terms as an introduction to further study. Indeed it could hardly be otherwise. The range of material referred to in the twelve-page table of contents and dealt with in only 354 pages is astonishing.

The book's worth as a provider of "background" would seem best assessed by examining it in terms of the two basic ways in which such a book could be used. Students could either read sections of the book as an introduction to further study of particular aspects of constitutional law, or read it straight through as a preliminary reading by which they might absorb a feeling for the structure and nature of constitutional law as a whole.

To achieve the latter purpose a book would need to have a sense of flow and integration. It would need to outline and examine principles and concentrate on carefully considered generalizations. An example of such a book, rather too difficult for beginners, is *Constitutional Theory* by G. Marshall (Oxford, 1971). Unfortunately (for there may well be a place for such a book), Enright's statements of principle tend to be vague or terse, while many apparent generalizations are baldly stated specific conclusions resting on and emerging from highly compressed information.

It is, perhaps, somewhat unfair to illustrate this problem by reference to the chapter on Federation as, along with several other chapters, it is particularly compressed in recognition of existing texts. But the problem is general in varying degrees.

On the complex topic of constitutional interpretation the central problem of intergovernmental immunities is touched on p.293 and said to involve the proposition that "neither the Federal nor any State legislature could lawfully pass laws interfering with the operation of another government". Historically this is broadly accurate and does indicate the nature of the problem. But on pp.307-308 under the heading "Intergovernmental Immunities" the issue is dealt with in only two pages, with the following summation (p.308):

"In the main it [intergovernmental immunities] operates to protect the Commonwealth rather than the states because, broadly speaking, with a few exceptions, the Commonwealth is able to make laws within the scope of its powers to bind the states while by contrast the states have no power at all to bind the Commonwealth. The Commonwealth can invade the area of state prerogative powers acting in pursuance of its express head of legislative power but it seems that it cannot do so relying merely on its incidental power."

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Students must be puzzled by a doctrine which protects the Commonwealth on the ground that the Commonwealth is best able to protect itself, and confused by the vague misleading suggestion of continued reciprocal immunity. What, precisely, the beginner would make of the second sentence is difficult to imagine.

Perhaps the real question is whether such brief glimpses at any complex topic can ever serve any useful purpose, especially when dealt with through generalizations of this nature. It can hardly profit detailed study and can only confuse and mislead the beginner.

Moreover, the book's lack of both flow and integration would deter all but the persistent, assured student. This problem is apparent in the extent to which (nearly 600) headings provide constant interruption and in the extent to which one is referred back and forth within the book to matters previously or subsequently dealt with. For example, conventions are briefly described on p.23, where it is said they will be dealt with more fully later on. On p.28, under a separate heading "Conventions and Separation of Powers", five lines are devoted to saying that each has been discussed. In fact the major discussion of conventions is on pp.87-89, while on p.115, under a further heading "Conventions", some eight lines again outline conventions and refer the reader specifically above and unspecifically below. Numerous detailed illustrations of conventions are dotted about the text. I found it frustrating. A beginner must find it confusing.

A variation on both these problems exists in the chapter on Courts where, early in the chapter, a student is faced with a detailed yet brief glimpse of Federal original and appellate, and Privy Council appellate, jurisdiction. Even advanced students aided by careful instruction find these matters difficult. Uninstructed beginners could only find them incomprehensible. However, several pages later paradigm beginners material, the general idea of precedent, is discussed. Unfortunately it, too, shows signs of the conflict between Enright's aim of outlining general principles and his method of compressing detail.

The book's style and organization seem to preclude it as general preliminary reading. Is it, then, taken in sections, useful as an introduction to particular aspects of constitutional law?

The treatment of conventions is again instructive. They are (p.23) rules of "Constitutional" (p.87 "political") "practice". Later (p.87) the student finds that they are "a distinct source of law" and (p.88) "the products of history forming part of unwritten constitutional law". (The "unwritten" notion itself is highly misleading.) Subsequently conventions are referred to (p.115) as "unenacted rules of constitutional practice" and as "a type of law" though operating only in the constitutional law area and not enforced by, although recognized by, the courts. These confusing generalizations are not assisted by the further general observation (which is also misleading) that the purpose of conventions is to restrain or regulate the exercise of power. The specific examples of conventions dotted about the book do not help. A typical convention is given as the invariable assent to legislation. Yet, of course, the Crown may legally refuse assent. The beginning student is thus faced with the possibility that the Crown may, in the one motion, act both lawfully and unlawfully. The consequences for the "unlawfulness" of breaking a convention are dealt with as follows: "because conventions are not enforceable any sanctions which attach to them are obviously of a

non-political nature". One presumes that this should have read "political". That being so, in what sense are conventions laws and in what sense recognized but not enforced by the courts?

All this hardly provides a clear outline for further study. It indicates that the book is too concerned to put issues in numerous contexts and that the generalizations tend to vary with the context. In the result the broad outline of basic constitutional principles is hard to find and confusing when found.

Similar difficulties arise in relation to, for example, sovereignty. This concept, along with "manner and form", separation of powers, rule of law (and conventions), is largely dealt with in chapter four, headed simply "Power". It is clearly central to the book. Unfortunately the heading and subsequent use of this awkward term give rise to serious misconceptions. To begin with the initial definition of power (p.60) as "the capacity of the state, including all its organs and representatives, to act", is hardly clarified by the five line definition of a state on p.62. Nor is it clarified by a closing remark in the chapter (p.101) under the heading "Quest for Ultimate Authority", that it is "straightforward enough to assert that government exercises legislative, executive and judicial powers".

Power, in a legal context, is, of course, a complex term. Lawyers speak of separation of the three powers but they know that the nature of each is different. Legislative power, perhaps the central issue of the chapter, involves a matrix of concepts such as authority, validity and legitimacy. It is intimately associated with the issue of sovereignty. In both contexts a beginner's work should clearly examine and distinguish legal power from, although resting ultimately upon, political power.

The beginner cannot be aided in his quest for basic understanding by the section in chapter four headed "Power—Sovereignty of Parliament" under which sovereignty is distinguished from supremacy of Parliament and it is said (p.73) that ". . . where the term supremacy is used, it includes in its ambit the executive as well as the legislative supremacy of Parliament". The explanation for this misleading statement is responsible government.

Under the further heading "Quest for Ultimate Authority" it is said (p.75) that "all authority must be lawfully exercised except the Sovereignty of Parliament". That confusing introductory statement of principle seriously hinders the subsequent attempt to point out, as many cases and authors have done, that sovereign authority can only be exercised by an institution defined by, and acting as required by, law. A beginner's understanding of the discussion of sovereignty in the Australian context is not assisted by a further general remark (p.75) that "it is impossible to conceive of" "a Sovereign Parliament" "as having derived authority because the fact of its being derived would be a limit on its authority". Neither *Centlivres v. C. J. in Harris v. Minister of the Interior* (1952 (2) AD 428) nor Lord Pearce who delivered the opinion of the Privy Council in *Bribery Commissioner v. Rasinghe* ([1965] A.C. 172), both landmark cases on fundamental questions of constitutional principle, appeared to find such a conception impossible. But neither case is dealt with in the book.

Again, a rather extreme example is used to illustrate the general problem that, even when used in sections, the book tends to be confusing and misleading.

These comments do not for a moment deny the enormously difficult task the author set himself, nor the need for introductory constitutional material nor the remarkable effort that has gone into the book. It contains much information that is relevant to its purpose and many useful statements of principle.

But, bearing in mind the book's intended purpose and possible use its development of principles and generalizations is inadequate, its use of detail excessive and misleading and its capacity to create misconception too high.

It is hardly relevant in these circumstances to deal at length with omissions, with one exception. A general work intended as an introduction to deeper study should provide adequate guidance to such further study. This book does not. The Bibliography is sparse and the offering of references leading to further reading is meagre.

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