BOOK REVIEWS
CHRONIQUE BIBLIOGRAPHIQUE

Eighteenth Century Professorial Classification of English Common Law

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Sir Robert Chambers was the successor of William Blackstone in the Vinerian chair of English law at Oxford. The reviewer surveys the teaching of English law in universities in the eighteenth century. He compares the analytical structure employed by Chambers with those of other lecturers of the era, particularly Blackstone. He concludes by remarking the importance of classification, especially in English law, in the creation of formally rational law.

Sir Robert Chambers succéda à William Blackstone à la chaire Vinerian de droit anglais à Oxford. Le critique examine l'enseignement du droit anglais dans les universités du dix-huitième siècle. Il compare la structure analytique de Chambers avec celle d'autres enseignants contemporains, et plus particulièrement Blackstone. Il conclut avec des observations sur l'importance de la classification pour la création d'un droit formellement rationnel et ce, tout spécialement en droit anglais.

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A Course of Lectures on the Common Law Delivered at the University of Oxford 1767-1773 by Sir Robert Chambers Second Vinerian Professor of English Law and Composed in Association with Samuel Johnson. **2 vols. Edited by T.M. Curley. Madison: University of Wisconsin Press. 1986. Pp. xix, 483 and xv, 445 [$30.00 + $30.00]. Reviewed by John W. Cairns.**

Introduction

Sir Robert Chambers has been virtually forgotten. Yet in his own day he was a well known man — the friend of the remarkable Scott brothers, of James Boswell, and, most notably, of Samuel Johnson. He served in Bengal, first as a puisné judge, and then as Chief Justice, appointments which involved him in the affairs of Warren Hastings. He was Sir William Blackstone's successor in the Vinerian chair of English law at Oxford, and, on the evidence of his lectures, not an unworthy one.[1] Memory of Chambers' tenure of the Vinerian chair was to some extent kept alive by his nephew's publication in 1824 of a part of the lectures as a *Treatise on Estates and Tenures*.[2] Much more recently, Chambers has attracted the attention of scholars because his lectures are supposed to have involved him to some extent in a collaboration with Samuel Johnson. Interest in this led to the rediscovery in the British Library of the manuscript of the lectures now published. This is not the text which Chambers read, but a copy made for George III sometime before Chambers left for Bengal in 1774.[3] That there was a measure of collaboration between Chambers and Johnson in writing the lectures seems clear, and comparison of the texts supposedly produced by their joint efforts with known examples of their respective styles is certainly a possible method of differentiating their contributions. A note of caution must nonetheless be sounded. Recent invigorating debates in the discipline of Roman law have shown stylistic analysis to be a far from simple method to employ in attributing authorship. In the absence of other evidence, it may well remain uncertain whether certain passages should be

[1]H.G. Hanbury, *The Vinerian Chair and Legal Education* (Oxford: Basil Blackwell, 1958) at 52-61.

[2]R. Chambers, *A Treatise on Estates and Tenures*, ed. by C.H. Chambers (London: Joseph Butterworth & Son, 1824).

[3]See E.L. McAdam, "Dr. Johnson's Law Lectures for Chambers: An Addition to the Canon" (1939) 15 Rev. English Stud. 385; E.L. McAdam, "Dr. Johnson's Lectures for Chambers, II" (1940) 16 Rev. English Stud. 159; S. Krishnamurti, "Dr. Johnson and the Law Lectures of Sir Robert Chambers" (1949) 44 Mod. Language Rev. 236; A. McNair, *Dr. Johnson and the Law* (Cambridge: Cambridge University Press, 1948) at 76-79; E.L. McAdam, *Dr. Johnson and the English Law* (Syracuse: Syracuse University Press, 1951) at 65-122; Hanbury, *supra*, note 1 at 56; J.E. Reibman, Dr. Johnson and the Law (Doctoral dissertation in law, University of Edinburgh, 1979)[unpublished] at 188-309; T.M. Curley, "Johnson's Secret Collaboration" in J.J. Burke and D. Kay, eds, *The Unknown Samuel Johnson* (Madison: University of Wisconsin Press, 1983) at 91-112.

attributed to Johnson or to Chambers.[4] This is unimportant. If Johnson suggested, or even himself wrote, particular passages in the lectures, Chambers nonetheless must always have agreed with the opinions expressed. We thus can fairly represent the entire course of lectures as containing Chambers' views on English law, even if some of them were originally generated by Johnson. Furthermore, should Johnson have been indeed a close collaborator on the lectures, it may also be the case that as a whole they generally represent his views, though this is not a point we shall consider further here.

Of much greater interest, however, is the place of these lectures in the history of the development in the eighteenth century of university education in law. In this review I propose to assess the work of Chambers by comparing it with that of other professors of English law. The late Sir Rupert Cross has already contributed a comparison of the treatment by Blackstone and Chambers of some substantive legal topics.[5] Here, therefore, I shall focus on the analytical structure Chambers gave to English law. The first part of the review will briefly discuss the early history of university lectures and, in particular, the adoption of the structure of Justinian's *Institutes*. This will be followed by an account of the problems encountered by professors of English law in setting forth their subject, and of the solutions they adopted. The third section of the review will be a detailed analysis of the structure Chambers used for his lectures in comparison with that used by Blackstone. This will be followed by some general conclusions and observations.

I. University lectures and the institutional pattern

While lectures on civil (or Roman) and canon law had been traditional in most of the European universities since their inception,[6] lectures on national or local laws were a relatively novel phenomenon when the Vi-

[4]On the question of "style" as a means of attributing authorship see B.W. Frier, "Law on the Installment Plan" (1984) 82 Mich. L. Rev. 856 at 858-63. Frier shows that what is important are *quantifiable* indicators of style such as mean length of sentence, word order and the like, rather than the more obvious, showy words and expressions which are more readily imitated by one writer under the influence of another. One could disentangle specific contributions of Johnson to the lectures only with difficulty: more is required than a supposedly Johnsonian "ring" to a sentence, or than the observation that a passage contains views known to have been held by Johnson. But compare McAdam, *Dr. Johnson and the English Law*, *supra*, note 3 at 81-120 and Reibman, *supra*, note 3 at 310-17 (Appendix 1). Curley is commendably cautious in his Introduction to the work under review here: R. Chambers, *A Course of Lectures on the English Law Delivered at the University of Oxford 1767-1773 . . . And Composed in Association with Samuel Johnson*, ed. by T.M. Curley, 2 vols (Madison: University of Wisconsin Press, 1986) vol. 1 at 4-11, and 68-79 [hereinafter *Chambers*]; but compare J.M. Lindsey, Book Review (1987) 60 Temple L.Q. 117 at 119.

[5]R. Cross, "The First Two Vinerian Professors: Blackstone and Chambers" (1979) 20 Wm & Mary L. Rev. 602; see also Reibman, *supra*, note 3 at 188-309 for a sustained analysis of aspects of the lectures.

[6]H. Rashdall, *The Universities of Europe in the Middle Ages*, ed. by F.M. Powicke & A.B.

nerian chair was founded. In France and the Netherlands, such lectures dated from the later seventeenth century, and in Scotland from the early eighteenth century. In Spain and Portugal, lectures on national law only started two decades after the foundation of the Vinerian professorship.[7] The pattern was common throughout Europe. The traditional method of exposition of Roman law was to lecture, in two separate courses, on the *Institutes* and the *Digest*, though from the late seventeenth century it had become the practice to use, as the basis of the course, rather than the originals, textbooks which followed the sequence of the *Institutes* or *Digest*.[8] For those teaching national or municipal laws there was not this obvious expedient recourse.

In the emergent states of early modern Europe, the laws were typically administered in a complex system of overlapping jurisdictions, and were derived from a variety of different sources, such as civil law, canon law, feudal law, and local customs. Applicable rules were to be found not only in costumals, the *Corpus juris civilis*, and the formal decrees of the church, but also in local practice, statutes, and the decisions of courts. To expound a legal system as a whole, it was necessary to synthesize this range of material into a systematic, coherent form. By the late seventeenth and early eighteenth centuries, in many countries this had been achieved in part through the development of institutional literature.[9] Writers, such as Mackenzie in Scotland, had adopted from Justinian's *Institutes* the ultimately Gaian tripartite division of law: that relating to persons, that to things, and that to actions.[10] Though not always ideal, the structure of the *Institutes* provided a general framework within which national laws could be discussed, and professors used institutional texts, or the institutional structure, as the basis

Emden, vol. 1 (Oxford: Oxford University Press, 1936) at 87-125 (civil law) and 125-41 (canon law) and *passim*. On law teaching in early Oxford, see J.L. Barton, "The Study of Civil Law before 1380" in *The History of the University of Oxford*, general ed. T.H. Aston, vol. 1 *The Early Oxford Schools*, ed. J.I. Catto (Oxford: Clarendon Press, 1984) at 519-30; and L.E. Boyle, "Canon Law before 1380" in Catto, ed. *ibid.* at 531-64.

[7]See, generally, C. Chêne, *L'enseignement du droit français en pays de droit écrit* (1679-1793) (Genève: Droz, 1982) at 3-4. See on the Netherlands: R. Feenstra & C.J.D. Waal, *Seventeenth-Century Leyden Law Professors and their Influence on the Development of the Civil Law* (Amsterdam/Oxford: North-Holland, 1975) at 38; on Scotland: J.W. Cairns, "Institutional Writings in Scotland Reconsidered" (December, 1983) 4 J. Leg. Hist. 76 at 94-98; on Spain: M. Peset Reig, "Derecho romano y derecho en las universidades del siglo XVIII" (1975) 45 Anuario de historia del derecho español 273.

[8]See Feenstra & Waal, *supra*, note 7 at 36.

[9]See K. Luig, "The Institutes of National Law in the Seventeenth and Eighteenth Centuries" (1972) 17 Juridical Rev. 193; A. Watson, *The Making of the Civil Law* (Cambridge, Mass.: Harvard University Press, 1981) at 62-82; and Cairns, *supra*, note 7 at 76-88 and *passim*.

[10]G. Mackenzie, *The Institutions of the Law of Scotland*, 2d ed. (Edinburgh: Thomas Broun, 1688) at 9-10. See J. Inst. 1.2.12; D.1.5.1; and D.R. Kelley, "Gaius Noster: Substructures of Western Social Thought" (1979) 84 Am. Hist. Rev. 619 at 621.

of their lectures, and sometimes, like Serres and Erskine, wrote their own.[11] It is worth stressing that, while an author, such as Serres, might follow *exactly* the Justinianic structure, others, influenced by theories of natural law, could adopt differing schemes, suitable to their subject matter, roughly within the Justinianic framework.[12] In some, the interaction of the institutional structure with natural law theories could result in philosophically sophisticated expositions of the law. The prime example of this is John Millar in Glasgow, who expounded Scots law in a structure derived from Adam Smith's natural jurisprudence.[13]

II. University Lectures in English Law: The Problem of Structure

In the second half of the seventeenth century, Roger North regretted that "[o]f all the professions in the world, that pretend to book-learning, none is so destitute of institution [i.e. formal instruction] as that of the common law."[14] In 1708, Thomas Wood called for the establishment of lectures on English law in the universities.[15] With the initiative coming primarily from private individuals, England followed the general European trend, with the establishment of university teaching of national law in the middle of the eighteenth century.[16] Perhaps aware of the impending Vinerian bequest, Blackstone started to teach privately in 1752, being elected to the Vinerian professorship in 1758, when Viner's will was made effective.[17] Less well known is the establishment in 1761 in the University of Dublin of a Regius chair of Feudal and English Law to which F.S. Sullivan was elected.[18]

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[11]C. Serres, *Les institutions du droit français, suivant l'ordre de celles de Justinien, accommodées à la jurisprudence moderne, & aux nouvelles ordonnances, enrichies d'un grand nombre d'arrêts du Parlement de Toulouse* (Paris: Veuve Cavelier & Fils, 1753); J. Erskine, *The Principles of the Law of Scotland: In the Order of Sir George Mackenzie's Institutions of that Law* (Edinburgh: Hamilton, Balfour, and Neill, 1754) 2 vols.

[12]See Chêne, *supra*, note 7 at 290-307; Watson, *supra*, note 9 at 67-82.

[13]Compare John Millar, *Heads of the Lectures on the Law of Scotland, in the University of Glasgow* (Glasgow: Dunlop and Wilson, 1789; found bound in Glasgow University Library, MS Murray 83 and MS General 181/1) with the structure of A. Smith, *Lectures on Jurisprudence*, ed. by R.L. Meek, D.D. Raphael & P.G. Stein (Oxford: Clarendon Press, 1978). On Millar as the heir of Smith's science of legislation, see K. Haakonssen, "John Millar and the Science of a Legislator" (1985) Juridical Rev. 41.

[14]R. North, *A Discourse on the Study of the Laws* (London: Charles Baldwyn, 1824) at 1.

[15]T. Wood, *Some Thoughts Concerning the Study of the Laws of England. Particularly in the Two Universities*, 2d ed. (London: J. Stagg and D. Browne, 1727).

[16]See J.W. Cairns, "Blackstone: An English Institutist: Legal Literature and the Rise of the Nation State" (1984) 4 Oxford J. Legal Stud. 318.

[17]See L.S. Sutherland, "William Blackstone and the Legal Chairs at Oxford" in R. Wellek and A. Ribeiro, eds, *Evidence in Literary Scholarship: Essays in Memory of James Marshall Osborn* (Oxford: Clarendon Press, 1979) at 229-40.

[18]R.B. McDowell & D.A. Webb, *Trinity College Dublin 1592-1952. An Academic History* (Cambridge: Cambridge University Press, 1982) at 65.

Furthermore, John Millar, Regius Professor of Civil Law in the University of Glasgow from 1761 to 1801, in the late 1790s delivered lectures on English law.[19] Millar arguably was the outstanding law teacher of his day, to whose classes pupils came from throughout the British Isles, and of whom Arthur Browne, Professor of Civil Law in Dublin, wrote in 1797 that, "above all, the learned Professor of Glasgow ... has acquired most deserved celebrity, and has attracted many of the youth of this country, as well as of England within the sphere of his instruction."[20] Millar was an enthusiastic and energetic teacher, lecturing already on the *Digest*, the *Institutes*, Government, and Scots law.[21] His aim, according to a letter of 1798, was to "facilitate the study of the law of England to those who, by an academic education, have become acquainted with the civil law and with the views and ways of speaking adopted by the writers on jurisprudence."[22] Wood wrote, in 1708, that "[i]t is to be much lamented, that we have not any complete *System* of our Laws. We are forced to learn it chiefly by Tradition, and Observations upon the Practice of it in the highest Courts."[23] This was particularly perceived as a problem for English law. In his lectures in Dublin Sullivan said:

> Another great difficulty the study of the law of England labours under, peculiar to itself, is that want of method, so obvious to be observed, and so often complained of in its writers of authority, insomuch, that almost all of them ... are too apt to puzzle and bewilder young beginners; whereas other laws, the civil, the canon, the feudal, have books of approved authority, ... calculated purposely for the instruction of novices; wherein the general outlines of the whole law are laid down, the several parts of it properly distributed, its terms explained, and the most common of its rules and maxims, with the reasons of them, delivered and inculcated.[24]

In 1605 John Cowell had already published *Institutiones Juris Anglicani, ad Methodem et Seriem Institutionum Imperialium compositae & digestae,*

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[19]See J. Craig, "Account of the Life and Writings of John Millar, Esq." in J. Millar, *The Origin of the Distinction of Ranks: Or, An Inquiry into the Circumstances which give rise to Influence and Authority, in the Different Members of Society*, 4th ed. (Edinburgh: William Blackwood, 1806) at xxi-xxii; W.C. Lehmann, "Some Observations on the Law Lectures of Professor Millar at the University of Glasgow (1761-1801)" (1970) 15 Juridical Rev. 56 at 73-77.

[20]A. Browne, *A Compendious View of the Civil Law, Being the Substance of a Course of Lectures Read in the University of Dublin*, vol. 1 (Dublin: R.E. Mercier, 1797) at 17.

[21]See Lehmann, *supra*, note 19.

[22]*Ibid.* at 74.

[23]Wood, *supra*, note 15 at 43.

[24]F.S. Sullivan, *An Historical Treatise on the Feudal Law, and the Constitution and Laws of England; With a Commentary on Magna Charta, and Necessary Illustrations of Many of the English Statutes. In a Course of Lectures read in the University of Dublin* (London: J. Johnson and J. Payne, 1772) at 16.

which was translated into English in 1651.[25] This indicated one method of solving the problems pointed out by Wood and Sullivan. Cowell's treatise, which had several editions, followed Justinian's *Institutes* exactly, title for title. The course of the seventeenth century saw, in England as elsewhere, the growth of an ever-increasing taxonomical interest in legal classification, under the related influences of Grotian natural law and the new science.[26] Outstanding in this respect was the work of Sir Matthew Hale, especially his *Analysis of the Law*.[27] The adoption of the institutional method of exposition of English law was strongly influenced by these developments. Thus, Wood attempted to meet the need he himself had pointed out by publishing *An Institute of the Laws of England: Or, The Laws of England in their Natural Order, according to Common Use*.[28] This work, which went through several editions, was influenced not only by Justinian's *Institutes*, but also by Hale's *Analysis* (which was itself influenced to a certain extent by the *Institutes*). It is against this background that we must place the subsequent work of the law professors of the eighteenth century in order to appreciate the significance of Chambers' lectures.

The elegant and complex analytical table of the divisions of English law in Blackstone's *Analysis* demonstrates his strong taxonomic interests.[29] As I have argued elsewhere, in the Vinerian lectures and the *Commentaries*, Blackstone adopted a structure for his exposition derived both from Hale and Justinian, with appropriate changes to make it suitable for the English law of his day.[30] He stated that "the primary and principal objects of the law are RIGHTS, and WRONGS." Rights are divisible into "*jura personarum*" and "*jura rerum*". Wrongs are divisible into "*private wrongs*" and "*public wrongs*".[31] The class of "private wrongs" is not essentially a category of torts, though they are included, but rather an account of the procedures

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[25]J. Cowell, *Institutiones Iuris Anglicani ad methodum et seriem Institutionum Imperialium compositae & digestae* (Cambridge: J. Legat, 1605); J. Cowell, *The Institutes of the Lawes of England, digested into the Method of the Civill or Imperiall Institutions . . . Written in Latine by John Cowel . . . And translated into English according to Act of Parliament, for the benefit of all. By W.G. Esquire* (London: T. Roycroft for J. Ridley, 1651).

[26]See B.J. Shapiro, "Law and Science in Seventeenth-Century England" (April 1969) 21 Stan. L. Rev. 727; M.H. Hoeflich, "Law and Geometry: Legal Science from Leibniz to Langdell" (1986) 30 Am. J. Leg. Hist. 95.

[27]*The Analysis of the Law: Being a Scheme, or Abstract, or the Several Titles and Partitions of the Laws of England, Digested into Method* (London: John Walthoe, 1713). I have used M. Hale, *The History of the Common Law of England, and An Analysis of the Civil Part of the Law*, 6th ed. (London: Henry Butterworth, 1820). See, above all, Shapiro, *ibid.* at 740-49.

[28](London: Printed by E. Nutt and R. Gosling for R. Sare, 1720) 2 vols.

[29]W. Blackstone, *An Analysis of the Laws of England* (Oxford: Clarendon Press, 1756).

[30]Cairns, *supra*, note 16 at 340-52.

[31]W. Blackstone, *Commentaries on the Laws of England*, vol. 1 (Oxford: Clarendon Press, 1765) at 118.

and actions whereby rights are protected and asserted. The class of "public wrongs" deals with criminal law and procedure. The institutional pattern can be detected. Within these four divisions, there is necessarily departure from Justinian; but this is typical of the works of all institutists. Thus, in the class of persons, Blackstone dealt with natural persons and corporations. He discussed the relative rights of natural persons as they stood in public relations with one another, where essentially he dealt with status relationships in connection with the English constitution, and as they stood in private relations as master and servant, husband and wife, parent and child, guardian and ward. In the treatment of *jura rerum*, he discussed the classification of, and modes of losing and gaining title to, "things real" and "things personal".

Richard Wooddeson, Vinerian professor from 1777 to 1793,[32] published in 1783 *Elements of Jurisprudence Treated of in the Preliminary Part of a Course of Lectures on the Laws of England.*[33] This contained his six introductory lectures. He wrote:

> I shall adopt the same threefold division which the Institutes of Justinian have taught us, and which appears to me the most clear, and analytically just; considering our laws, first, as referred to Persons, or the several capacities of men in civil life; secondly, as referred to Things or Property; and, thirdly, treating of Actions.[34]

In this work, he also provided an analytical table of his lectures.[35] Given his approach, this table is simpler than that of Blackstone. Thus, he divided persons into magistrates and subjects. Magistracy he divided into legislative, executive, and judicial.[36] His lectures on persons accordingly discussed, first, the Parliament, then the King's executive power, and then judges and courts.[37] He wrote that:

> Having thus spoken of the several kinds of dominion ... we must contemplate the body of the people governed. This will lead us first to consider the clergy ... . This ... will introduce a detail of the legal establishment of the national religion. I shall afterwards discourse of the state of persons (a phrase taken from the Roman civil law) under which I shall include the legal effects of certain distinctions, consisting chiefly in disabilities, as of infants and others.

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[32]See Hanbury, *supra*, note 1 at 61-78.

[33](London: T. Payne and Son, 1783).

[34]*Ibid.* at 111.

[35]*Ibid.* at 115-18.

[36]*Ibid.* at 111.

[37]R. Wooddeson, *A Systematical View of the Laws of England; As Treated of in a Course of Vinerian Lectures, Read at Oxford, During a Series of Years, Commencing in Michaelmas Term, 1777*, 3 vols (London: T. Payne, 1792) vol. 1 at 1-288.

> I shall then consider persons in their private, domestic relations; and shall conclude this first general division, concerning the laws as referred to Persons, with an account of corporations, to which an artificial personality is ascribed.[38]

This plan is followed. In "private, domestic relations" he discussed, in this order: husband and wife; parent and child; guardian and ward; and master and servant.[39] With some variation, here Wooddeson essentially has followed Blackstone. Perhaps the most notable difference is that Wooddeson here has discussed the English courts, which Blackstone postponed to "Of Private Wrongs".

Wooddeson's second division, "Of the Laws as Referred to Things or Property", is divided into two parts, "Of Real Estates", and "Of personal Property".[40] It is closely related to, though by no means identical with, Blackstone's account of *jura rerum*. The third division, "Of Actions", has three subdivisions: first, "Of Criminal Prosecutions", in which Wooddeson set out the classes of criminal offences as well as discussing procedure; second, "Of Private Civil Actions"; and third, "Of Suits in Courts of Equity".[41] It may be noted that, of Wooddeson's sixty lectures, no less than twenty-five were devoted to actions.

Wooddeson published the entire set of his Vinerian lectures in three volumes over the years 1792-1793.[42] In recent years, they have been generally ignored, except for a discussion by Professor Hanbury,[43] and they are scarcely mentioned in the chapter on legal studies in the recent volume of the history of Oxford University devoted to the eighteenth century.[44] Wooddeson apparently revised his lectures after the publication in 1783 of *Elements of Jurisprudence*; but the consciously institutional structure remained.[45]

In Glasgow, John Millar covered English law in forty-eight lectures.[46] The first was devoted to its history. Millar described English law thus:

> Though considered as a practical system of laws, the English is perhaps compleat as any system can be; yet it has in it this peculiarity, that is has not

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[38]Wooddeson, *supra*, note 33 at 112.

[39]Wooddeson, *supra*, note 37, vol. 1 at 416-70.

[40]Wooddeson, *supra*, note 33 at 112-13, 117.

[41]*Ibid.* at 113-14, 118.

[42]Wooddeson, *supra*, note 37.

[43]Hanbury, *supra*, note 1 at 61-78.

[44]See J.L. Barton, "Legal Studies" in *The History of the University of Oxford*, general ed. T.H. Aston, vol. 5, *The Eighteenth Century*, eds L.S. Sutherland and L.G. Mitchell (Oxford: Clarendon Press, 1986) 594 at 605.

[45]See Wooddeson, *supra*, note 37, vol. 1 at 1-2.

[46]See "Notes from Profr: Millar's Lectures upon the Law of England Glasgow College. Session 1800/1801", Glasgow University Library, MS General 243.

> like all other systems, been introduced by the speculations of philosophers and legislators; but has arisen to its present state of perfection, slowly and gradually, assisted in its progress by certain accidents, and completed by long experience and observation.[47]

The second lecture dealt with the "peculiarities" of English law, one of which was its lack of systematic arrangement. Millar commented that "Blackstone has done a great deal in this respect, yet much remains yet to be done."[48] The third lecture was devoted to the sources of English law, and in the fourth Millar explained his proposed method of exposition. He commented that it was difficult to find "a sort of method corresponding with the divisions observed by the English Lawyers" which would "enable us to form a distinct idea of the whole system", because of "the want of method in the writings of the English Lawyers." He decided that "the method followed by the Roman Civilians, and in imitation of them, by the later writers upon Roman jurisprudence, is the radical [i.e. basic] method we wish to follow." He stated that the civilians divided law into "two great classes, the doctrine of rights and the doctrine of actions."[49] Millar considered that only three writers had "attempted an arrangement of the English law": Hale, Wood, and Blackstone. Hale's *Analysis* was, however, both "very imperfect" and "only a sketch", while Wood was also criticised.[50] Millar told his class that "Blackstone, in his well known Commentaries, has certainly improved upon Woods' method, though his arrangement is still liable to faults."[51] After an exposition and criticism of Blackstone's structure, Millar said that he would "adopt a method somewhat different, and ... deviate a little from Blackstone". He continued:

> We shall consider, first, Rights, and then Actions. We shall consider rights as arising from the condition of persons, and things. Rights arising from the condition of persons shall be treated of pretty much in the order of Blackstone: and as to rights arising from the distinction of things, these shall be divided into two great Classes; rights real and personal, or choses in possession and in action, as they are called by the English Lawyers ... . Then, as to actions, having already considered rights independent of actions, the doctrine of actions will be much shorter. Our attention shall upon this head be principally directed to the different Courts of Justice, and their forms of procedure.[52]

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[47] *Ibid.* at 1.

[48] *Ibid.* at 17.

[49] *Ibid.* at 27.

[50] *Ibid.* at 30; see *ibid.* at 29: "[The English writers'] first view seems to have been, to consider the different subjects of law, under the forms of action."

[51] *Ibid.* at 30.

[52] *Ibid.* at 32.

This basic division is derived by Millar from Adam Smith's lectures on jurisprudence.[53] It is evidently institutional, as Millar noted, both in these lectures, and in his lectures on Scots law.[54] By using this scheme, Millar deliberately gave English law a civilian structure, no doubt to facilitate its being learned by those familiar with Roman law, as he had hoped in his letter of 1798.[55] One of the most obvious differences from the institutional schemes of Blackstone and Wooddeson is the exclusion of public law from the discussion of persons. In his fourth lecture, Millar said that "[i]n the systems of the Civilians, the rights of a public nature are passed over; and in this we shall probably follow their example."[56] In any case, Millar gave a separate course of lectures on public law or government.[57] Millar's biographer, John Craig, described as follows the course on English law:

> In this course it could not be expected that he should convey more information than is contained in the best authors; but he greatly simplified and improved the arrangement, and accounted for the various rules and even fictions of English Law, in a manner more satisfactory, than by vague analogies, or that last resource of ignorance, and unmeaning reference to the pretended wisdom of our ancestors.[58]

This meeting of Adam Smith's science of legislation with English common law deserves further study.

Francis Sullivan regretted that the books of authority in England were unsystematic; yet in his own forty-three lectures on English law he dealt with his material in historical, rather than formally structured fashion. This was because his lectures only aimed to show the origins in feudal law of English law and the English constitution. He did not expound the modern law. Sullivan's purposes were, first, to demonstrate that monarchy in England had always been limited, and second, by focussing on the early land

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[53]See Smith, *supra*, note 13 at 7-14, 399-401; see also K. Haakonssen, *The Science of a Legislator: The Natural Jurisprudence of David Hume and Adam Smith* (Cambridge: Cambridge University Press, 1981) at 99-134.

[54]See text accompanying note 49; and, e.g., Glasgow University Library, MS General 1078, at fol. 4 on Scots law for an explicit statement that this scheme is that of the *Institutes*. On the lectures on Scots law, see J.W. Cairns, "John Millar's Lectures on Scots Criminal Law" (1988) 8 Oxford J. Legal Stud.[forthcoming].

[55]See text accompanying note 22.

[56]See MS General 243, *supra*, note 46 at 28.

[57]See, e.g., Glasgow University Library, MS General 289-91; see also W.C. Lehmann, *John Millar of Glasgow* (Cambridge: Cambridge University Press, 1960) at 57-58; H. Medick, *Naturzustand und Naturgeschichte der bürgerlichen Gesellschaft* (Göttingen: Vandenhoeck & Ruprecht, 1973) at 186-89.

[58]Craig, *supra*, note 19 at xxi-xxii.

law, to allow students to understand Littleton.[59] Rejecting the institutional structure, Sullivan considered students of the common law should start with the land law.[60]

III. Chambers' Approach: The Departure from Blackstone aud the *Institutes*

It is now possible to assess Chambers' approach. His course commenced with four introductory lectures on: first, the law of nature, the revealed law, and the law of nations and the primary sources of the law of England; second, the origin of feudal government and of Anglo-Saxon government and laws; third, feudal law and its effects on the English constitution and government; and fourth, the general division of the laws of England.[61] In the first introductory lecture, he explained the general divisions he imposed upon English law. He noted the necessity in society "of some *governing* power, by which those who are inclined to be happy at the cost of others may be compelled to their part of the general task, — and of a *public wisdom*, by which private judgement shall be directed and controlled." He accordingly deduced that "the first care ... of every new society" was "to select and establish governors" and that "its first law must constitute the power by which future laws are to be made." This was described by the English as "the constitution": "And the modes and forms of its operations may properly be termed the *politic law*." On this basis, he told his class that:

> The legislative power ... is ... to be exerted in the security of its constituents from all those evils which men bring upon one another, or which the care and labour of men, whencesoever they proceed, can divert or remove. We never hurt each other but by error or by malice. To the *errors* of individuals legislative *wisdom* is opposed, and to their *malice* legislative *power*. From our endeavours to secure happiness against error, arise all the forms of conveying and seeuring property ... . To defend us against the malice or wickedness of each other, is the general end of those laws which are enforced by penal sanctions ... .

He thus claimed that "the positive institutions of any state" could be divided into three: "public, criminal and private law."[62] This is rather neat.

He explained further:

> [Public law] is ... that law of government by which the supreme power in a state regulates its own conduct and that of its subordinate officers, which constitutes the existence, and modifies the operations of the supreme legislative magistrates, which directs and limits (where it *is* limited) the agency of the supreme executive, which prescribes the mode of delegation and the authority delegated to all inferior public officers, and consequently comprises all the rules

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[59]Sullivan, *supra*, note 24 at 18-22.
[60]*Ibid.* at 17.
[61]Chambers, *supra*, note 4, vol. 1 at 83-123.
[62]*Ibid.* at 89; see also *ibid.* at 122.

> relating to the public property and revenue, to councils of state and commerce, to public messengers, courts of justice, inferior territorial magistrates, the civil state of men with their various ranks and privileges, the different rights of aliens and native subjects, the territory whose inhabitants constitute the state, and such subordinate governments and societies as are either contained in the state or dependent upon it.[63]

This accordingly was the first division of his lectures. It encompasses what is dealt with in the first book of Blackstone's *Commentaries* with some exceptions. It omits, for instance, the latter's class of relative private rights of natural persons (that is, as master and servant, husband and wife, parent and child, and guardian and ward), and in its ninth and tenth lectures includes the type of material on courts which Blackstone substantially, and deliberately, postponed to this third book.[64] Chambers here departed from Blackstone's (and Hale's) concept of "persons" as a means of organizing this type of material, and relied on the idea of public law. It should be noted, however, that he included corporations as an aspect of public law. In his sixteenth lecture on public law he said:

> In the subordinate parts of our political constitution it is necessary to make particular mention of corporations; which have been scattered by our ancestors over the whole kingdom by the natural tendency of the feudal polity to divide itself into separate jurisdictions, and to make large grants of privileges and immunities.[65]

Under corporations he discussed: corporations sole (the king, every bishop, many of the deans, all rectors and vicars); and aggregate corporations, both ecclesiastical and lay (the chapters of cathedrals and collegiate churches, and the governing bodies of cities and boroughs, seminaries of learning, charities and the management of trade and commerce). Given that, for Chambers, legal personality was not a major organizing category, this classification of corporations makes sense. It is of particular interest in Quebec, where the code of 1866, following the Louisiana code of 1825, has included corporations in its first book, "Of Persons".[66] The Louisiana code has here undoubtedly been influenced by Blackstone.[67] The codification commission noted in its report that, in civilian systems, corporations had been tradi-

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[63]*Ibid.* at 90.

[64]Compare Chambers, *ibid.* at 217-34 with Blackstone, *supra*, note 31 at 327.

[65]Chambers, *supra*, note 4, vol. 1 at 293.

[66]Compare arts 352-373 *C.C.L.C.* with arts 418-438 *C.C.La (1825)*. See *Report of the Commissioners Appointed to Codify the Laws of Lower Canada in Civil Matters* (Second Report), vol. 1 (Quebec: Desbarats, 1865) at 231 [hereinafter Second Report]: "[Title 11 is] in imitation of that to be found in the code of Louisiana, from which, however, [the commissioners] have obtained but little aid."

[67]See J.W. Cairns, *The 1808 Digest of Orleans and 1866 Civil Code of Lower Canada: An Historical Study of Legal Change*, vol. 2 (Doctoral thesis in law, University of Edinburgh, 1980) at 559, n. 218.

tionally regarded as an aspect of public law.[68] Chambers shows that this was also a viable classification for the common law. More work could usefully be needed on the development of the notions of corporations and legal personality in the context of the growth of legal taxonomy.

Chambers' second division is criminal law, the aim of which he regarded as the prevention of "those mischiefs which the depravity of the human heart unawed and unrestrained would frequently occasion." He said that "[i]ts subjects therefore must be the general and special nature of crimes whether against the laws of God, the law of nations, or the municipal laws of the state, the different degrees of guilt, the means of prevention and the degrees as well as mode of punishment." He noted that civil lawyers classed criminal law as "a species of private law"; but he disagreed, arguing that in feudal governments (of which the English constitution was one) crimes were properly considered as public offences. He told his class that he had accordingly chosen in his "general distribution of law, to consider this as a distinct part both from the *public law* of government, and that *private law* by which the particular rights of subjects are protected." This was because crimes were both "very great injuries to him whose natural and civil rights [were] ... invaded" and also "very atrocious offences against the peace and good order of the commonwealth."[69] He structured his lectures on criminal law as follows: the general nature and history of punishment and exemptions from it; offences against the government (high treason, felonies and inferior offences against the crown); offences against the general duties of citizens (against subjects of other states, the persons and property of fellow subjects, and the commonwealth — established religion, public justice, public tranquility and public order); and agents and accomplices.[70]

This classification of criminal law as partaking of the nature of both public and private law is perfectly sensible. Though different, his account is quite compatible with that of Blackstone. The most obvious feature is the departure from the institutional structure.

In his introductory lecture, Chambers said little specifically about the protection of the rights of citizens by the private law, other than to note that it was "chiefly about those rights that fellow citizens contend."[71] At

[68]Second Report, *supra*, note 66 at 229. The commission specifically disagreed with A. de Saint-Joseph, *Concordance entre les codes civils étrangers et le Code Napoléon*, 2d ed., vol. 2 (Paris: Cotillon, 1856) at 477, who described the relevant arts of the Lousiana *Civil Code* as "n'ayant aucun trait au droit civil proprement dit."

[69]Chambers, *supra*, note 4, vol. 1 at 90-91.

[70]*Ibid.* at 305-461; in Chambers, *ibid.* at 304, a printed syllabus for Part II of the Lectures is reproduced which helps explain the structure. See W. Blackstone, *Commentaries on the Laws of England*, vol. 4 (Oxford: Clarendon Press, 1769): "Of Public Wrongs".

[71]Chambers, *supra*, note 4, vol. 1 at 91.

the start of this third part of his lectures, he described English private law as "that which with respect to private rights, *suum cuique tribuit*, examines every man's pretensions, and distributes to every man his own."[72] This appears to be an allusion to one element of Ulpian's famous statement that "[t]he precepts of law are as follows: to live honourably, not to harm another, to give each man his due."[73] The other two parts of Ulpian's tripartite division are never quoted by Chambers; and one should not see it as relating to Chambers' threefold division of English law. He concisely described the scheme of his lectures:

> First I shall treat of the personal rights of men and of the injuries by which those rights are violated, whether man be considered simply as an individual subsisting merely for himself unconnected and independent, or as head or member of that small society supposed to be contained in a single house, and supported by a due reciprocation of domestic offices, or as extending his connection wider through other modes of dependence, and systems of relation. The next great subject of discussion will be the law by which possession is distinguished and secured, by which every man is taught to know his property with certainty, and enabled to use it without molestation. Property is called by the law either personal or real. In treating of the several species of real or immovable property, I shall for the most part follow the order observed by Littleton, and endeavour to make my lectures a continued commentary upon his first book of Tenures. But when we have followed him through the several *species* of real property, it will be necessary to depart from him in the explication of the *conditions* upon which estates are held, whether legal tenures, or arbitrary stipulations. I shall then treat of the various kinds of joint interest as legally distinguished into the rights of *parceners, joint-tenants* and *tenants in common*. I shall show how real property is acquired, lost or transferred, to what injuries it is liable and how those injuries are redressed. I shall afterwards treat more shortly of personal or movable property, of which there are many species acquired and lost by different means, and injured or diminished by different actions, which species it will be proper to enumerate and to show in what manner they are protected by the law. And lastly I shall consider that mode of justice and those kinds of remedies which are administered in courts of equity.[74]

Following this plan, Chambers started with the personal rights of men and the injuries affecting them absolutely as individuals in domestic relations and in particular civil relations. Following Hale, he described the natural rights of men as those of safety, liberty, and name and reputation. The right of safety was that of being protected from violence, and Chambers enumerated various specific offences of violence which could be pursued criminally or made an action for damages before a jury. Under the right of liberty he discussed *habeas corpus*. Injuries to name and reputation he considered

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[72]Chambers, *supra*, note 4, vol. 2 at 3; see also vol. 1 at 122.

[73]D.1.1.10.1.

[74]Chambers, *supra*, note 4, vol. 2 at 3-4.

to be malicious prosecution and defamation.[75] Chambers has here discussed what Blackstone dealt with in the first chapter, "Of the absolute Rights of Individuals", of the first book of the *Commentaries*; but Blackstone also included the right of property as an absolute right, and grouped together the rights of safety and reputation as the right of personal security.[76] It does not seem, however, that Chambers excluded the right of property because he denied it the status of an absolute right, but rather that he accepted Hale's preference of postponing discussion of it to *jura rerum*.[77]

After considering the absolute rights of men, Chambers turned in the second lecture on private law to what he described as "mingled rights", which might in many instances be infringed without violence to the person, and diminution of property, but which were "necessary to be vindicated for the peace and prosperity of society and the happiness and quiet of domestic life." These were, first, the rights of men in "economical or domestic relations", which were those of husband and wife, parent and child, and master and servant, and second, "*particular* civil relations", which were those of guardian and ward, and landlord and tenant.[78] The terminology and content of these two classes is derived from Hale's *Analysis*.[79] Blackstone, for instance, had here only one class, that of "*private* oeconomical relations", encompassing master and servant, husband and wife, and parent and child, as the "three great relations in private life", to which he added a fourth, guardian and ward, as "a kind of artificial parentage."[80] Chambers differed from Hale in excluding from "civil relations" ancestor and heir, and lord and villein. For Chambers, the distinction between economical or domestic relations and civil relations was that the former were natural and preceded civil society and positive law, societies being assemblages of families, while the latter were creations of positive law.[81] Here there is an important conceptual difference between Blackstone and Chambers, where Chambers has stayed closer to Hale's *Analysis*. Furthermore, while Blackstone postponed discussion of the injuries that could be done to the rights of persons to the eighth chapter, "Of Wrongs, and their Remedies, respecting the Rights of Persons" of his third book, "Of Private Wrongs",[82] Chambers has integrated this type of matter into his general discussion of the rights of persons.

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[75]*Ibid.* at 4-17.

[76]Blackstone, *supra*, note 31 at 119-36.

[77]Chambers, *supra*, note 4, vol. 2 at 4.

[78]*Ibid.* at 18.

[79]Hale, *supra*, note 27 at 29-37.

[80]Blackstone, *supra*, note 31 at 410.

[81]See Chambers, *supra*, note 4, vol. 2 at 19, 26 and 27.

[82]W. Blackstone, *Commentaries on the Laws of England*, vol. 3 (Oxford: Clarendon Press, 1768) at 115-43.

Turning to property, Chambers remarked that the feudal law "is wholly conversant about land and such kind of property as is equally permanent with land." He rated that the nations which overran the Roman empire established laws relating to land, succession, and crimes, but frequently used the laws "they found already prevalent" in "respect to movable property and personal injuries not amounting to crimes." He concluded:

> Hence the great weight which the civil law has retained in most of the countries of Europe; and hence arises the difference which is so remarkable between personal and real property in England.
>
> Our rules respecting real property are almost all feudal, those which concern personal estates are derived (as we shall see hereafter) either from the law of nature or the civil law.[83]

Like Blackstone, Chambers divided his account of property into two main divisions: real (the third through the fourteenth lectures) and personal (the fifteenth through the eighteenth). The first five lectures on real property are a commentary on the first book of Littleton's *Tenures*. He explained that to this treatise "the students of the common law are no less beholden than the civilians to Justinian's Institutes", and that he could not "by any method" give "more easily and efficaciously a general idea of the nature of estates" than by commenting on Littleton.[84] The lectures on real property generally cover the matters Blackstone dealt with in the first twenty-three chapters of the second book of the *Commentaries*,[85] with the differences that Chambers dealt with the history of the feudal system in his introductory lectures, and also included two lectures on the injuries to real property and their remedies, which Blackstone dealt with in the third book of the *Commentaries*, in chapters ten through sixteen.[86] The first three of Chambers' four lectures on personal property are equivalent to chapters twenty-four through thirty-two of the second book of Blackstone's *Commentaries*.[87] The fourth lecture, "Of the Injuries Affecting Personal Property and Their Respective Remedies", is equivalent to the ninth chapter of the third book of the *Commentaries*.[88]

Chambers' comment that English law has followed civil law as regards personal property seems at first rather remarkable; but, though Blackstone did not make a similarly bald statement, his chapters on personal property

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[83]Chambers, *supra*, note 4, vol. 2 at 37.

[84]*Ibid.* at 38-39.

[85]W. Blackstone, *Commentaries on the Laws of England*, vol. 2 (Oxford; Clarendon Press, 1766) at 1-383.

[86]Blackstone, *supra*, note 82 at 167-253.

[87]Compare Chambers, *supra*, note 4, vol. 2 at 189-218 with Blackstone, *supra*, note 85 at 384-520.

[88]Compare Chambers, *ibid.* at 219-27 with Blackstone, *supra*, note 82 at 144-66.

occasionally noted the correspondence with, or derivation from, civil law of some English doctrine. Blackstone, for example wrote that the English courts considered personal property in a way "frequently drawn from the rules which they found already established by the Roman law",[89] and that Bracton adopted into English law the Roman rules on accession.[90] It does seem, however, that Chambers saw more correspondence with Roman law, and in his account of transferring personal property by contract he made many more allusions to the Roman law of contracts.[91]

Chambers concludes his lectures on private law with four lectures (nineteen through twenty-two) on private rights as protected by courts of equity, concluding with a few remarks on the study of law.[92] Blackstone nowhere offers such a full and specific account of the equity jurisdiction, the final chapter of his third book being both procedural in orientation and slight in comparison.[93] It is fair to point out, however, that neither Sir Rupert Cross nor Professor Hanbury were particularly impressed with Chambers' account of equity.[94]

In obvious contrast to Blackstone's *Commentaries*, Chambers' lectures lack any specific account of procedure and actions. Both Wooddeson and Millar dealt with actions in their much more institutional schemes. Why Chambers should have neglected this aspect is unclear. Partly, of course, he has fitted some of the material from Blackstone's third book into his account of private law; but his accounts of injuries to persons, real property, and personal property, and their remedies do not really amount to an adequate treatment, when compared with Blackstone or Wooddeson. Similarly, in his second part, on criminal law, his discussion lacks the treatment of the criminal process, as distinct from substantive law, found in Blackstone's fourth book and Wooddeson's account of criminal prosecutions. Chambers' tripartite division of English law did not really permit a comprehensive treatment of actions. In this respect, it was inferior to the more institutional schemes of Millar and Wooddeson, and to Blackstone's overarching division of English law into rights and wrongs.

Reibman has suggested that "[t]he basic structure of [Chambers'] lectures ... closely parallels that of Blackstone's [C]ommentaries as well as following the scheme of issues and topics covered by Justinian's *Corpus*

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[89]Blackstone, *supra*, note 85 at 385.
[90]*Ibid.* at 404; see also *ibid.* at 390.
[91]Compare Chambers, *supra*, note 4, vol. 2 at 209-17 with Blackstone, *ibid.* at 442-70.
[92]Chambers, *ibid.* at 261-263.
[93]Compare Chambers *ibid.* at 228-61 with Blackstone, *supra*, note 82 at 426-55.
[94]See Cross, *supra*, note 5 at 621; Hanbury, *supra*, note 1 at 60.

Juris Civi[li]s."[95] These claims are both exaggerated and somewhat misleading, as well as vague. Chambers is more original than this. Similarly, McAdam rather misses the point in suggesting that, when Chambers excludes, from his first book, Blackstone's class of "*private* oeconomical relations", this is somehow merely an improvement on Blackstone.[96] Blackstone's book on persons is not just an account of public law, with a few chapters on persons eccentrically inserted. Chambers' stronger use of the division between public and private law ultimately gives his lectures, in some respects, a more "modern" structure; but, of other professors of English law in the eighteenth century, only John Millar also made this distinction, while, in contrast, Sullivan discussed the history of English land law to explain the country's free constitution.

IV. Conclusion

The eighteenth century's concern with classifying law was of great importance. In all legal systems, but perhaps especially in English law, it was a significant step in the creation of formally rational law. The effects of the categorizing activity on the substantive law are hard to specify, but Professor Milsom has argued that Blackstone was important in the emergence of English law as a system of substantive law.[97] In this respect, it is significant that Chambers sought to expound English law without an account of actions. He treated it, insofar as he could, as a system of purely substantive law, in the categories of public law, criminal law, and private law. But it should be noted that Wooddeson, Chambers' successor, and sometime deputy, reverted to a much more institutional structure, with an essentially Blackstonian conception of "persons", which did not favour Chambers' strict separation of public from private law. This suggests that Chambers' scheme was not considered particularly suitable, especially, perhaps, because of its exclusion of actions. The institutional structure continued to dominate thinking about legal categories, as is shown by Millar's institutional approach to English law in the 1790s.

The publication of Chambers' lectures is an important event for legal historians. Though one cannot say, as one can for Blackstone, that the lectures had a shaping effect on the development of the common law in England and elsewhere, they demonstrate how an intelligent lawyer could conceive of English law in the later eighteenth century. That he could discuss it as a system of organized legal principles suggests the extent of the development

[95]Reibman, *supra*, note 3 at 190; see also Curley's introduction to Chambers, *supra*, note 4, vol. 1 at 39: "The basic structure of the course adheres closely to that of the *Commentaries*."

[96]McAdam, *Dr. Johnson and the English Law*, *supra*, note 3 at 75.

[97]S.F.C. Milsom, "The Nature of Blackstone's Achievement" (1981) 1 Oxford J. Legal Stud. 1.

of a view of English law which would facilitate, as Professor Simpson has pointed out, the rise of the legal treatise in the nineteenth century.[98]

This review has focussed on only one aspect of the lectures; but it is not — I hope — an unimportant one. They are, of course, of interest in many other ways. A few examples may be selected. They could be discussed in the context of the eighteenth century historiography of feudalism and Gothic liberty.[99] Study of Chambers' sources would prove very interesting: for instance, the use he made of Thomas Craig's *Jus Feudale* as a source for the history of feudal law.[100] To examine his attitude to Roman law would also be worthwhile. The lectures will also contribute to our understanding of the science of legislation in the eighteenth century. It would also be interesting to compare Chambers' legal philosophy with the views of other eighteenth century writers.

The University of Wisconsin Press has produced two handsome volumes, and the editor, Professor Curley, has provided, as well as sensitive editing, a useful introduction. This is an excellent addition to the canon of works produced in the eighteenth century by the new university discipline of national law. An edition of the student notes of Millar's lectures on English law would now be a further useful enrichment of the printed literature. Finally, were it possible for a publisher to reprint Wooddeson's lectures, then the works of the first three Vinerian professors would be readily available. Further scholarly advances in the field would thereby become easier to make.

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[98]A.W.B. Simpson, "The Rise and Fall of the Legal Treatise: Legal Principles and the Forms of Legal Literatures" (1981) 48 U. Chi. L. Rev. 632.

[99]See now R.J. Smith, *The Gothic Bequest: Medieval Institutions in British Thought, 1688-1863* (Cambridge: Cambridge University Press, 1987).

[100] T. Craig, *Jus Feudale*, 3d ed. (Edinburgh: Thomas & Walter Ruddiman, 1732).

Richard J. Goossen, *Business Law and Practice in the People's Republic of China.* Hong Kong: Longman, 1987. Pp. xvi, 254 [$55.00]. Reviewed by Gary Nachshen.*

Richard J. Goossen's *Business Law and Practice in the People's Republic of China*[1] fits neatly into two different genres of legal writing.

On the one hand, there is the time-honoured tradition of the practical guide to doing business abroad. The emphasis here is on providing a no-nonsense overview for the foreign lawyer or businessman of a particular country's laws, regulations and legal system. Exemplars of this tradition include *Doing Business in Canada*,[2] a three volume treatise available for perusal in Canadian diplomatic missions around the globe, and the six volume *Doing Business in the United States*.[3]

On the other hand, China being China, the advent of Beijing's open-door policy in 1979 has spawned a much newer tradition, one in which the nascent Chinese legal system is examined as a *cas d'espèce*. During the early 1980s, this remained an essentially theoretical and speculative exercise. But as the codification process has picked up and the new laws have actually begun to be applied, analysts have started to take a more empirical approach. One of the earliest examples of this latter approach was Goossen's own 1985 article, subtitled "A Progress Report on the New Foreign Economic Legislation".[4]

Whether evaluated as a doing-business manual or as a study in Chinese law, the book under review stands as a considerable, though not unqualified, success. The author, a Canadian lawyer previously associated with the prominent Hong Kong law firm of Johnson, Stokes and Master, has managed to furnish all the basic information on how to structure a joint venture, arrange project financing, register patents and trademarks, and the like in just 254 pages. Moreover, he has accomplished this while remaining sensitive to the unique characteristics of China's socialist legal system.

Not unnaturally, Goossen spends considerable time examining specific statutory and regulatory provisions of interest to the foreign investor, such

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[1]R.J. Goossen, *Business Law and Practice in the People's Republic of China* (Hong Kong: Longman, 1987). The book is available in Canada through Edgewood Eastasia Investments Ltd, Vancouver.

[2]H.H. Stikeman and R.F. Elliott, eds, *Doing Business in Canada* (New York: Matthew Bender, 1984).

[3]J.J. Spires, *Doing Business in the United States* (New York: Matthew Bender, 1985).

[4]R.J. Goossen, "Canadian Business Negotiations in Post-Mao China: A Progress Report on the New Foreign Economic Legislation" (1985) 31 McGill L.J. 1.

as those of the joint venture law,[5] the economic contract law,[6] and the arbitration regulations.[7] He avoids the temptation simply to paraphrase these provisions, however, preferring to demonstrate how they have or have not worked in practice. For instance, the chapter on joint ventures contains an illuminating comparison of the merits of the heavily regulated equity joint venture as opposed to the all but unregulated contractual joint venture.[8]

A particular strength of the book is the use it makes of anecdotes from the modern-day China trade. This "inside information" is rarely dramatic; instead, it serves to drive home the importance of attending to niggling details a foreign lawyer or businessman in China might otherwise overlook. For instance, the author cites the instance of Canton's Garden Hotel financing package to illustrate the importance of a mundane concept rarely associated with Chinese law, namely notarization.[9] Similarly, he relates the story of an investor whose putative Chinese partner claimed it was empowered to issue foreign exchange-denominated guarantees. The investor wisely decided to seek an independent opinion on the matter from a reputable Chinese law office. Sure enough, it turned out that the partner had no such power, the moral being that a foreign investor should always obtain an independent legal opinion before going into partnership with a Chinese company or organization.[10]

True to the demands of the how-to genre, the author writes brisk, pithy prose. This style is not without its pitfalls; pithiness sometimes becomes choppiness, which in turn occasionally degenerates into carelessness. Thus, at one point we are told of an "*underlining* unity",[11] which presumably should read "*underlying* unity". A few pages later, Goossen's desire to tel-

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[5]*Law of the People's Republic of China on Chinese-Foreign Joint Ventures* (promulgated July 8, 1979), reprinted in *China's Foreign Economic Legislation*, vol. 1 (Beijing: Foreign Languages Press, 1982) at 1-7, (1979) 18 I.L.M. 1163, discussed in Goossen, *supra*, note 1 at 21-36.

[6]*Economic Contract Law of the People's Republic of China* (promulgated December 13, 1981), reprinted in *China's Foreign Economic Legislation*, vol. 2 (Beijing: Foreign Languages Press, 1986) at 1-27, discussed in Goossen, *supra*, note 1 at 75-83.

[7]*Regulations of the People's Republic of China on the Arbitration of Economic Contracts* (issued August 22, 1983), reprinted in *China's Foreign Economic Legislation*, vol. 2, *supra*, note 6 at 244-55, discussed in Goossen, *supra*, note 1 at 230.

[8]Goossen, *ibid.* at 21-24.

[9]*Ibid.* at 218.

[10]*Ibid.* at 224.

[11]*Ibid.* at xvi (emphasis added).

escope five years of political upheaval into a single paragraph results in his confusing the arrest of the radical Gang of Four with their subsequent trial.[12]

But these are only minor shortcomings which could easily be rectified on the preparation of a revised edition. A new edition would also benefit from the addition of an index and an appendix listing all the regulations cited in the text. Given the fast pace of legal reform in China, Longman would do well, too, to emulate the publishers of other how-to-do-business guides by issuing future editions in loose-leaf format and thereby avoid obsolescence.

Beyond these small additions and modifications, the book under review would benefit from a stronger historical perspective. Goossen's analysis of the socialist legal system, while adequate in itself, reads almost as if the new system had appeared out of thin air since 1979. In fact, many of the points he makes about the predominance of ideology and the populace's unfamiliarity with the notion of the rule of law could just as easily apply to the legal system in dynastic times.[13] In a sense, the only significant change from previous centuries is that the law is taking a back seat to a different official morality: formerly that morality was Confucian, today it is Marxist. Surely this has implications for the current campaign to entrench the rule of law in Chinese society.[14]

These quibbles aside, Goossen is to be commended for his achievement. *Business Law and Practice in the People's Republic of China* deserves a place in the office of any foreign investor aiming to break into the China market.

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[12]*Ibid.* at 5. Goossen writes that Deng Xiaoping and his pragmatic allies did not assume control of the Chinese Communist Party until the trial of the Gang. In fact, the pragmatists had begun to assert their control by the time of the Gang's arrest in 1976, and Deng had essentially consolidated his position by 1978. The Gang's show trial was not staged until much later, in 1980.

[13]For an interesting discussion of the nefarious effects this mindset had several centuries ago, see R. Huang, *1587, A Year of No Significance: The Ming Dynasty in Decline* (New Haven: Yale University Press, 1981), c.7. Huang's discussion should be treated cautiously, however, to the extent that it seems to have been framed at least in part as a series of arguments on contemporary Chinese issues dressed up in the guise of historical commentary.

[14]Indeed, there exists some doubt whether the campaign to entrench the rule of law even constitutes a genuine endeavour.

Micheline Patenaude, *Le droit provincial et les terres indiennes*. Montreal: Yvon Blais, 1986. Pp. xviii, 198 [$18.95]. Reviewed by Peter W. Hutchins.*

Micheline Patenaude introduces her work *Le droit provincial et les terres indiennes* with a question:

> Jusqu'où va le pouvoir fédéral dans chacun de ces domaines [les Indiens et les terres réservées aux Indiens] ? Car, pour savoir dans quelle mesure une loi provinciale peut affecter les Indiens et leurs terres, il faut d'abord déterminer l'étendue de la compétence exclusive fédérale.[1]

François Chevrette wrote recently:

> Faut-il redire combien nous n'avons pas à regretter cette époque où nos ouvrages de droit constitutionnel se limitaient à l'étude du partage des compétences entre Ottawa et les provinces ![2]

Professor Chevrette was rejoicing in the fact that the second edition of Peter Hogg's *Constitutional Law of Canada*[3] had transcended the tunnel vision of legislative competence with which Ottawa and the provincial capitals warily scrutinize each other and which, most unfortunately, seems to mesmerize the Canadian body politic.

Despite the many merits of Micheline Patenaude's *Le droit provincial et les terres indiennes*, the author appears to have succumbed to this Canadian constitutional lethe. This is particularly unfortunate in an area of law that has suffered more than most from juridical amnesia and self-serving constitutional theory. This state of affairs was recently recognized and deplored by Chief Justice Dickson of the Supreme Court of Canada in a significant decision relating to Indian treaties, *Simon* v. *R.*[4]

In the course of that judgment,[5] the Chief Justice reacted strongly to judicial pronouncements from the 1920s, specifically those of Mr Justice Patterson in *R.* v. *Syliboy*.[6] As Patterson J. would have it:

> [T]he Indians were never regarded as an independent power. A civilized nation first discovering a country of uncivilized people or savages held such country as its own until such time as by treaty it was transferred to some other civilized nation. The savages' rights of sovereignty even of ownership were never recognized. Nova Scotia had passed to Great Britain not by gift or purchase from

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*Of the Bar of Montreal.

[1] M. Patenaude, *Le droit provincial et les terres indiennes* (Montreal: Yvon Blais, 1986) at 1.

[2] F. Chevrette, Book Review of *Constitutional Law of Canada*, 2d ed. by P.W. Hogg (1986-87) 32 McGill L.J. 244 at 245.

[3] (Toronto: Carswell, 1985).

[4] [1985] 2 S.C.R. 387, 71 N.S.R. (2d) 15, 171 A.P.R. 15, 24 D.L.R. (4th) 390, 23 C.C.C. (3d) 238 [hereinafter *Simon* cited to S.C.R.].

[5] *Ibid.* at 398-99.

[6] (1928), [1929] 1 D.L.R. 307, 50 C.C.C. 389 (N.S. Co. Ct) [hereinafter *Syliboy* cited to D.L.R.].

> or even by conquest of the Indians but by treaty with France, which had acquired it by priority of discovery and ancient possession; and the Indians passed with it.[7]

Having quoted this view on the matter of the status of the Indians of Nova Scotia, Dickson C.J.C. observed:

> It should be noted that the language used by Patterson J., illustrated in this passage, reflects the biases and prejudices of another era in our history. Such language is no longer acceptable in Canadian law and indeed is inconsistent with a growing sensitivity to native rights in Canada. With regard to the substance of Patterson J.'s words, leaving aside for the moment the question of whether treaties are international-type documents, his conclusions on capacity are not convincing.[8]

While Madame Patenaude's skilful and detailed analysis of the ownership of and jurisdiction over Indian lands inspires admiration for its thoroughness, it is, nevertheless, flawed in its lack of appreciation and treatment of the constitutional "capacity" of Aboriginal peoples, both with respect to ownership and jurisdiction over lands and resources. One gets the impression that, in this area, a pendulum swings between Ottawa and the provinces "and the Indians pass with it".

As a thesis presented for the degree of Master of Laws at l'Université Laval, the work is divided into two chapters, the first dealing with Indian lands and the second dealing with the application of provincial law to those lands. In each case, the problem lies with the underlying premise rather than the analysis itself.

In the first chapter, the author launches immediately into an interesting and detailed discussion on the manner in which lands could be "set aside" for Indians. However, this approach neglects to establish, at the outset, that the proper backdrop against which this analysis must be viewed is aboriginal occupation of, and title to, all lands in Canada.

As to the issue of jurisdiction, the author concentrates upon the issue of conflict of laws between federal and provincial statutes, relegating aboriginal jurisdiction to the by-law power provided under the *Indian Act*.[9] While our courts have avoided explicit statements on the subject of inherent aboriginal self-government powers, there has been implicit recognition of the fact that Aboriginal peoples were historically self-governing.

As early as 1973 the Supreme Court of Canada had begun to put the lie to two persistent myths of Canadian history and law: that Indian or aboriginal title derived from the European sovereign and that no organized

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[7] *Ibid.* at 313 and quoted by Dickson C.J.C. in *Simon*, *supra*, note 4 at 399.

[8] *Simon*, *ibid.*

[9] R.S.C. 1970, c. I-6 [hereinafter the *Indian Act*].

self-governing societies existed in the northern portion of the North American continent prior to the arrival of Cabot and Cartier. Mr Justice Judson stated the following in the landmark decision of the Supreme Court of Canada in *Calder* v. *A.G. British Columbia*:[10]

> Although I think that it is clear that Indian title in British Columbia cannot owe its origin to the Proclamation of 1763, the fact is that when the settlers came, the Indians were there, organized in societies and occupying the land as their forefathers had done for centuries. This is what Indian title means and it does not help one in the solution of this problem to call it a "personal or usufructuary right".[11]

Madame Patenaude leads off Chapter 1, entitled "Les terres indiennes", with the statement that the jurisprudence has not, to date, supplied a definition for the expression "lands reserved for the Indians".[12] This is not entirely true, as is evidenced by the author's subsequent treatment of the subject. More important, however, is the fact that constitutional provisions are branches of a "living tree capable of growth and expansion",[13] not fossils, silent and frozen. There exist no definitive definitions in constitutional instruments. The courts, in their interpretation of the expression "lands reserved for the Indians", have reflected this desirable flexibility. In referring to section 91(24) of the *Constitution Act, 1867*,[14] Lord Watson declared that "the words actually used are, according to their natural meaning, sufficient to include all land reserved, upon any terms or conditions, for Indian occupation".[15] Dickson J. (as he then was), in a recent judgment, urged an open approach in the determination of the nature of the Indians' interest in land reserved for Indians.[16]

Madame Patenaude gives us a good detailed analysis of pre-Confederation statutes in order to establish the meaning of the expression "Indians and lands reserved for Indians" as found in section 91(24) of the *Constitution Act, 1867*. She concludes, quite rightly, that the expression includes both traditional aboriginal lands and Indian reserves.

However, the author's contention that the courts should have given more weight to this pre-Confederation material, rather than to the common law jurisprudence so often cited in characterizing the Indian interest in

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[10][1973] S.C.R. 313, 34 D.L.R. (3d) 145, [1973] 4 W.W.R. 1 [hereinafter *Calder* cited to S.C.R.].

[11]*Ibid.* at 328.

[12]*Supra*, note 1 at 5.

[13]*Edwards* v. *A.G. Canada* (1929), [1930] A.C. 124 at 136, [1929] 3 W.W.R. 479 (P.C.), Lord Sankey L.C.

[14](U.K.), 30 & 31 Vict., c. 3 [hereinafter *Constitution Act, 1867*].

[15]*St. Catherine's Milling and Lumber Co.* v. *R.* (1888), 14 A.C. 46 at 59, 58 L.J.P.C. 54, 5 T.L.R. 125, 4 Cartwright 107.

[16]*Guerin* v. *R.* [1984] 2 S.C.R. 335, 13 D.L.R. (4th) 321, [1984] 6 W.W.R. 481, 55 N.R. 161.

lands, must be answered. A reading of the early cases[17] certainly does not leave the impression that the courts have ignored the pre-Confederation legislation. Recent judgments of the Supreme Court of Canada have cited and reviewed these earlier cases in some detail.[18]

The author's impatience with the courts' use of common law jurisprudence serves to illustrate the fundamental flaw referred to at the outset of this review — lack of appreciation of the indigenous character of Indian title and jurisdiction. In its pronouncements on these matters, the Supreme Court of Canada has repeatedly cited, with approval, the position of Chief Justice Marshall of the United States Supreme Court in leading cases such as *Johnson and Graham's Lessee* v. *McIntosh*[19] and *Worcester* v. *State of Georgia.*[20] The important Commonwealth cases such as *Amodu Tijani* v. *Secretary, Southern Nigeria*[21] are also consistently invoked. The fact is that there can be no meaningful inquiry into the nature or extent of aboriginal title and interest without full consideration of the early American and Commonwealth cases. As Mr Justice Hall stated in *Calder* (although in dissent):

> The case most frequently quoted with approval dealing with the nature of aboriginal rights is *Johnson and Graham's Lessee* v. *McIntosh* ... . It is the *locus classicus* of the principles governing aboriginal title.[22]

It should be noted as well that there is an increasing appreciation of the importance of the principles of conventional and customary international law in this area. The application of international law principles is ignored by the author in her treatment of the Indian interest in lands. When the subject is broached in the context of the application of provincial laws to Indian lands, the author refers to early jurisprudence[23] denying "Indian sovereignty". We have already seen what the Supreme Court of Canada thinks of certain judicial pronouncements made during the 1920s on the subject of the capacity of Indian nations.[24] It is significant that courts are showing an increased sensitivity towards the historical treaty process and its implications for an enhanced special status for Aboriginal peoples.[25]

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[17]*Ontario Mining Co.* v. *Seybold* (1902), [1903] A.C. 73, 72 L.J.P.C. 5, 87 L.T. 449, 19 T.L.R. 48, aff'g (1901), 32 S.C.R. 1; *A.G. Canada* v. *Giroux* (1916), 53 S.C.R. 172; *A.G. Quebec* v. *A.G. Canada* (1920), [1921] 1 A.C. 401, 90 L.J.P.C. 33, 124 L.T. 513, 37 T.L.R. 125.

[18]See, *e.g.*, *Smith* v. *R.* [1983] 1 S.C.R. 554, 147 D.L.R. (3d) 237, 47 N.R. 132; *Guerin* v. *R.*, *supra*, note 16.

[19]21 U.S. 240, 8 Wheaton 543 (1823).

[20]31 U.S. 350, 6 Peters 515 (1832).

[21][1921] 2 A.C. 399, 90 L.J.P.C. 236.

[22]*Supra*, note 10 at 380.

[23]*E.g.*, *Sero* v. *Gault* (1921), 50 O.L.R. 27, 64 D.L.R. 327 (S.C.).

[24]See above, text accompanying notes 4-8.

[25]See, *e.g.*, *Simon*, *supra*, note 4; *Sioui* v. *A.G. Quebec* (8 September 1987), Quebec 200-10-000137-856 (C.A.).

Academic research and writings reveal a history of "nation to nation" dealings between French, English and Aboriginal peoples that courts simply cannot ignore.[26]

The author's treatment of the creation of pre-Confederation Indian reserves is sound. This reviewer does, however, have considerable difficulty with her contention that lands that were not "Indian lands" as of 1867 cannot now be acquired by the federal government and set aside as "lands reserved for the Indians". The author appears to rely rather heavily on a narrow reading of the reasons of Mr Justice Idington in *A.G. Canada* v. *Giroux*.[27] Although there clearly exist restrictions on unilateral federal action in the creation of new Indian reserves in lands not contemplated by section 91(24) of the *Constitution Act, 1867*,[28] such reserves may be, and have been established through a variety of techniques.[29]

A section of the first chapter is devoted to examining the characteristics of Indian land. Quite appropriately, emphasis is put on the collective character of the Indian interest. It would also have been appropriate here, however, to mention the growing concern for individual rights, both in Canadian constitutional law generally and, more particularly, in the law applying to Aboriginal peoples. A recent judgment of the Federal Court of Appeal in *Boyer* v. *R.*,[30] which dealt with an Indian reserve land tenure issue, illustrates the courts' tendency to favour individual rights over collective rights in the absence of specific legislative direction to the contrary.

Other conclusions in respect of the characteristics of Indian land are quite accurate. The author correctly concludes that reserve status does not depend upon who owns the land and seems to reason that the Indian interest in reserve lands goes beyond a pure usufruct, that indeed it may extend to ownership. It would have been interesting here for the author to refer to recent examples of legislative initiatives recognizing substantial Indian interest in Indian reserves or equivalent lands. The *Cree-Naskapi (of Québec) Act*[31] recognizes that Cree and Naskapi Bands enjoy, in their Category IA and Category IA-N land, rights practically equivalent to those of an owner.[32]

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[26]J.D. Hurley, *Children or Brethren: Aboriginal Rights in Colonial Iroquoia* (Saskatoon: Univ. of Sask. Native Law Centre, 1985).

[27]*Supra*, note 17.

[28]See *Ontario Mining Co.* v. *Seybold*, *supra*, note 17.

[29]*Rapport de la Commission d'étude sur l'integrité du territoire du Québec: Le domaine indien*, vol. 4 (Quebec: Éditeur officiel, 1971) (Chair: H. Dorion).

[30][1986] 2 F.C. 393, (*sub nom. Re Boyer and R.*) 26 D.L.R. (4th) 284, (*sub nom. Boyer* v. *Canada*) 65 N.R. 305 (C.A.).

[31]S.C. 1984, c. 18 [hereinafter *Cree-Naskapi Act*].

[32]*Ibid.*, s. 109(2). However, note that s. 109(1) clearly states that the province of Quebec retains the *bare ownership* of Categories IA and IA-N land.

The *Sechelt Indian Band Self-Government Act*[33] transfers lands, formerly constituted as Indian reserves, to the Band in fee simple.[34]

On the question of extinguishment of Indian or aboriginal title, Madame Patenaude again seems to give too much attention to an analysis of the respective powers of the federal and provincial governments and not enough attention to the constitutional and common law limitations which apply to these powers. As between the federal and provincial Crowns, the author quite correctly favours exclusive federal authority in this area. The author, however, does not sufficiently distinguish Parliament's recognized authority to limit the *exercise* of the aboriginal right through valid federal legislation and its authority, if any, to extinguish that right. For example, the protection now afforded aboriginal and treaty rights by section 35 of the *Constitution Act, 1982*[35] is significantly underestimated. While the courts have held that section 35 does not necessarily effect a limitation on the ability of Parliament to modify the exercise of the right through valid legislation, they have been far more reluctant to hold that this section means absolutely nothing and that the rights therein referred to may be extinguished. The British Columbia Court of Appeal recently dealt with this "dual issue" in the case of *Sparrow* v. *R.*,[36] where it stated:

> It is clear from the *Derriksan* line of cases that before 17th April 1982 the aboriginal right to fish was subject to regulation by legislation, and that it was subject to extinguishment. The question whether there is now a power to extinguish does not arise in this case but it is relevant to observe that extinguishment and regulation are essentially different concepts. Even if there cannot now be extinguishment, it would not follow that there cannot be regulation. It may be that a power to extinguish is necessarily inconsistent with the recognition and affirmation of aboriginal right [sic] in s. 35(1). There is no necessary inconsistency with a power to regulate.[37]

The shorter second chapter of Madame Patenaude's work deals with the application of provincial law to lands reserved for Indians. The chapter opens with the contention that claims to "Indian sovereignty" have received no support in the jurisprudence.[38] The examination is consequently narrowed once again to a federal/provincial issue, in this case conflict of laws. The approach is once more chronological. The period prior to the adoption of section 87 (now section 88) of the *Indian Act* in 1951 receives the thorough treatment we have by this point come to expect of the author. Concise conclusions assist in a comprehension of this section.

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[33]S.C. 1986, c. 27 [hereinafter *Sechelt Indian Band Self-Government Act*].

[34]*Ibid.*, s. 23.

[35]Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11.

[36](1986), 9 B.C.L.R. (2d) 300, [1987] 1 C.N.L.R. 145 [hereinafter *Sparrow* cited to B.C.L.R.].

[37]*Ibid.* at 323.

[38]*Supra*, note 1 at 87.

With respect to the period following the adoption of section 87, one is inclined to agree with Madame Patenaude when she writes:

> Si le premier objectif recherché par le législateur, en 1951, — soit imposer des limites à l'application du droit provincial aux Indiens — a été atteint, du moins en partie, nous pensons que le deuxième visant à clarifier le droit a été raté. Les tribunaux, à notre avis, se sont servis à souhait de l'article 88 de la *Loi sur les Indiens* pour compliquer d'une façon extraordinaire la question de l'applicabilité des lois provinciales sur les terres réservées aux Indiens.[39]

The principal cases on this subject are discussed by the author and this section provides a concise and factual account of the complex jurisprudence on section 88 of the *Indian Act*. The conclusions drawn by the author, however, must be questioned.

Madame Patenaude takes exception to the line of cases and doctrine which supports the view that provincial law relating to the use of land should not apply to lands reserved for Indians on the grounds that it affects the pith and substance of a subject-matter of exclusive federal jurisdiction. The author contends that this is yet another manifestation of the "enclave theory", propounded by Chief Justice Laskin, which postulates that Indian reserves are enclaves shielded from the application of all provincial law, unless such provincial law is incorporated into federal legislation.[40] While it is true that the enclave theory has not fared well in the Supreme Court, it is not accurate to state that challenges to provincial laws affecting the use of lands reserved for Indians are manifestations of the theory. If exclusive federal legislative competence over lands reserved for Indians does not preclude the application of provincial law affecting the Indian interest in or use of those lands, it is difficult to understand the purpose of section 91(24) of the *Constitution Act, 1867* as it relates to such lands. The prospect that this may exclude the application of certain provincial legislation to extensive tracts of traditional lands may be daunting, but it does not justify ignoring or torturing the true sense of section 91(24).

The author identifies three tests respecting the rules for the application of provincial law to lands reserved for Indians: (i) that a provincial law cannot relate directly to lands reserved for Indians, (ii) that a provincial law cannot extinguish the Indian or aboriginal title in lands, and (iii) that a provincial law cannot conflict with a federal law which validly regulates the exercise of the Indian interest in those lands or which authorizes such regulation. Although these tests are accurate in and of themselves, they do not go far enough.

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[39]*Ibid.* at 111.

[40]See, *e.g.*, *Cardinal* v. *A.G. Alberta* (1973), [1974] S.C.R. 695, 40 D.L.R. (3d) 553, [1973] 6 W.W.R. 205, 13 C.C.C. (2d) 1.

Particularly with respect to the third test, it should be noted that recent federal legislative initiatives tend to limit the application of provincial law with the primary purpose of permitting a full exercise of aboriginal jurisdiction. For example, both the *Cree-Naskapi Act* and the *Sechelt Indian Band Self-Government Act* recognize substantially increased jurisdiction for Indian bands over their lands. Section 4 of the *Cree-Naskapi Act* reads:

> Provincial laws of general application do not apply to the extent that they are inconsistent or in conflict with this Act or a regulation or by-law made thereunder or to the extent that they make provision for a matter that is provided for by this Act.

This provision reverses the presumption in favour of the application of provincial laws established in section 88 of the *Indian Act.*

In 1984, the Penner Committee Report on Indian Self-Government in Canada[41] recommended that Indian self-government be encouraged through legislation adopted under the authority of section 91(24) of the *Constitution Act, 1867* . Such laws would be designed, in the words of the Committee:

> [T]o occupy all areas of competence necessary to permit Indian First Nations to govern themselves effectively and to ensure that provincial laws would not apply on Indian lands except by agreement of the Indian First Nation government.[42]

Madame Patenaude concludes that her three narrow tests for the exclusion of provincial law on Indian lands will help to clarify the issue. This reviewer does not share her optimism. The author appears to be begging the issue. As Aboriginal representatives never tire of telling their provincial counterparts, the corollary to reduced provincial jurisdiction over Indians and lands reserved for Indians is not increased federal jurisdiction but rather increased aboriginal jurisdiction. On this essential point, *Le droit provincial et les terres indiennes* is silent.

The conclusion to this work is useful in many specific areas of the subject-matter. The footnotes, list of jurisprudence consulted and bibliography attest to prodigious research. On specific issues, one may quibble with part of the analysis, but in many instances the research and the conclusions are sound.

It is in the broader historical and constitutional context that *Le droit provincial et les terres indiennes* must be considered wanting. Madame Patenaude should have been examining a constitutional tripod rather than the tired old Canadian constitutional bipod of federal/provincial ownership

[41]Canada, House of Commons, *Report of the Special Committee on Indian Self-Government* (Ottawa: Queen's Printer, 12 October 1983) (Chair: K. Penner).

[42]*Ibid.* at 59.

and jurisdiction. Gone is the era when lawyers could treat Aboriginal peoples and their lands as mere objects of jurisdiction and, it is hoped, much outmoded jurisprudence and doctrine will "pass with it". Aboriginal peoples are actors on the constitutional stage, a stage whose increasingly illuminated backdrop shows Aboriginal peoples "organized in societies and occupying land as their forefathers had done for centuries."[43]

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[43]*Calder, supra*, note 10 at 328.