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On Criminal Procedure

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Reviews

On Criminal Procedure. By Pierre Béliveau, Jacques Bellemare and Jean-Pierre Lussier. Translated by Josef Muskatel. Cowansville: Les Editions Yvon Blais Inc., 1982.

Principes de droit pénal général. By Gisèle Côté-Harper and Antoine Manganas. Cowansville: Les Editions Yvon Blais Inc., 1981.

Traité de droit pénal général. By Jacques Fortin and Louise Viau. Montreal: Les Editions Themis Inc., 1982.

Quebec jurists are sometimes want to decry, and justifiably so, the absence of recognition accorded the works of their Quebec colleagues by judges, practitioners and academics in the common law provinces of Canada.[1] In the field of criminal law this situation exists, even though one might have thought that practical pressures to present the latest argument on a general criminal defence or some aspect of criminal procedure would drive English speaking lawyers across linguistic barriers in search of solutions. Irène Lagarde's *Droit pénal canadien*[2] was the standard reference source for the francophone practitioner of Canadian criminal law for years, but went virtually unnoticed and uncited by courts outside Quebec even though it was in many respects superior to similar annotated criminal codes in daily use elsewhere in Canada. The recent arrival in our library of the text *On Criminal Procedure* by Beliveau, Bellemare and Lussier provides a convenient pretext to highlight the encouraging explosion of text writing by Quebec authors in the area of criminal law. It also provides the opportunity to ruminate on the ways and means of ensuring that these important works do not face the anonymity among English speaking criminal lawyers which was the unfortunate fate of their doctrinal predecessors. After all, the general principles of criminal law and procedure are national in scope, and pertinent writings do not lose their relevance merely because they are written in the other official language.

1. See for example, Jules Deschenes, "On Legal Separation in Canada", in his *The Sword and the Scales*. (Butterworths, Toronto, 1979)
2. Irène Lagarde, *Droit pénal canadien* (Wilson et Lafleur, Montreal).

The text by Beliveau, Bellemare and Lussier is one of several recent works on criminal procedure by Quebec authors,[3] and the only one which has been translated into English.[4] This translation provides the English speaking criminal lawyer whose reading ability in French may not yet be up to scratch with an opportunity to see what he or she is missing, and provides a striking incentive to brush up on language skills (or at least hire a bilingual clerk). In a civilian mode, the style of writing is tight and analytical. Unlike some English Canadian texts it avoids lengthy citation of passages from judgments, in preference for a conceptual analysis of the relationship of a particular case to the legal principle under discussion. This is not to say that the approach is "academic", in the worst sense of that epithet, but rather that it is scholarly in the best sense through its clear organization, theoretical insight and rigorous footnoting.

The Bealiveau, Bellemare and Lussier text, in accordance with French canons of structural elegance in legal writing, opens with a short general introduction and is divided into two main parts or "titles" which are further divided into sub-titles containing various chapters. The introduction discusses the general nature of criminal procedure, the constitutional context, statutory and non-statutory sources of law including a valuable section on inherent jurisdiction, and the classification of offences. Title I is styled the "Organization of the Judicial Debate". As such, its sub-title I is called "The Framework of the Prosecution" and deals with the role of the prosecutor in both federal and provincial settings, as well as with the jurisdiction of courts which is given a particularly full treatment in some 65 pages. Sub-title II, "The Preparation of the Prosecution", is devoted to police investigation, the activities of quasi-judicial investigative bodies (with particular reference to commissions of inquiry and the Quebec Police Commission), and the law of search and seizure (including special powers under provincial legislation). The second major part or "title" of the book "The Judicial Debate", relates, in its only sub-title (a surprising imbalance from the French stylistic point of view) exclusively to indictable offences, and covers in its various chapters the compelling of appearance of an accused and procedure relating to informations, appearance or arraignment, judicial interim release, the preliminary inquiry, the process of re-

3. See also, for example, Daniel A. Bellemare, *L'écoute électronique au Canada* (Les Editions Yvon Blais Inc., Montreal, 1981).

4. The original is entitled *Traite de procédure pénale* published by Les Editions Yvon Blais Inc., Cowansville, 1981.

election, the drafting and preferring of indictments, the making of various "pre-trial" motions, and the so-called process of "discovery" in criminal cases.

As the authors state in their foreword to *On Criminal Procedure,* local customs as well as provincial legislation make for occasional differences in criminal procedure as practised in the various jurisdictions in Canada. In this English edition, references to particular Quebec practices were retained on the theory that comments on much of the Quebec legislation will apply, *mutatis mutandis,* to analogous statutes in other provinces and territories. Even were this not the case, the specifically Quebec material in the volume does not dominate and would, in any event, hold the reader's interest for its comparative value. The major regret one has on viewing this book is that it does not address criminal procedure at the stages from trial through appeal and sentencing. However, the authors hold out the promise that a second volume is to be published in French in the near future, and the anglophone reader must only hope that it too will be translated into English.

The general principles of substantive criminal law have also been the subject of two recent works by Quebec authors. The first of these to appear was *Principes de droit pénal général* by Gisèle Côté-Harper and Antoine Manganas, both of the Laval University Faculty of Law. The book is clear, authoritative and well researched. It too follows the French convention of being organized in an essentially two-part structure preceded by a brief introduction. The first main division of the text is entitled "The General Principles of Criminal Law"[5] and contains in its first title a general discussion of the specific characteristics of criminal law, sources of criminal law and the division of legislative authority, before embarking upon a discussion of "the principle of legality" by

5. The translation is the reviewer's. It is to be noted that there is some dissonance in translating the title "principes de droit pénal général" as "the general principles of criminal law". In France, criminal law is known as "droit pénal" and the French Criminal Code is the "Code pénal". The Canadian Criminal Code is known in French speaking Canada as the "Code criminel", and the term "droit pénal" by common usage is wide enough to include non-criminal federal offences and provincial penal statutes. Since many of the general principles of criminal responsibility as traditionally known at common law apply to the prosecution of provincial offences, it might be better if all Canadian lawyers used the phrase penal law rather than criminal law in this general context (the American Law Institute did, after all, draft a Model *Penal* Code), but this would probably run against the cultural grain in English Canada.

which the authors designate the principles of certainty, non-retroactivity and publicity of criminal law in addition to the requirement of a specific legislative text for the creation of offences.

The second title of the first main part covering general principles is arguably the most innovative aspect of this book, particularly in comparison with other recent texts on substantive Canadian criminal law.[6] Title II considers the principles governing the imposition of criminal sanctions. It does so by an examination of the duty to "individualize" the sentence in relation to both the offence and the offender, the objectives sought to be achieved in the sentencing process, the problem of sentencing disparity and the classes of sanctions available to the sentencing court. One is tempted to ascribe this approach to the authors' familiarity with comparative law, but whatever its roots, it is surely valuable. It is trite to say that power of the criminal sanction to potentially deprive the individual of his or her liberty at the behest of the state is the foremost defining characteristic of the criminal law. But how often do judges criticize inexperienced criminal practitioners for concentrating on substantive defences to the neglect of the principles and facts which will govern the extent of a client's punishment when, for all intents and purposes, guilt is a foregone conclusion? How can one possibly over-emphasize the principles of sentencing in a system which disposes of well over ninety percent of its criminal cases by guilty plea? This text by its fundamental organization thrusts the criminal sanction to centre stage in the general principles of criminal liability, where it ought to be. One might make an analogy to the recent common law texts which approach the teaching of contracts from a remedies point of view. Unorthodox though the idea might appear at the outset, it is potentially very fruitful, and it might have been beneficial for the authors to push this "remedies approach" even more rigorously in the subsequent text. However, the placing of the topic of sentencing immediately prior to the discussion of the

6. Some readers may not be aware that prior to 1978 there was no general text on the substantive principles of Canadian criminal law. Canadian lawyers had to be content with using texts from other common law countries and adapting doctrines to suit Canadian statute and case authority. However, since that time, in addition to the two substantive texts in French reviewed here, two treatises have been published in English: Alan W. Mewett and Morris Manning, *Criminal Law* (Butterworths, Toronto, 1978); and Don Stuart, *Canadian Criminal Law: A Treatise* (The Carswell Company Ltd., Toronto, 1982).

presumption of innocence and the Crown's burden of proof beyond a reasonable doubt certainly heightens one's sense of the importance of these latter issues.

The Second half of the book (Part II) is entitled "The Elements of the Offence" and has three titles which deal with actus reus (acts, omissions, consequences, circumstances and causation), the mental element (including responsibility without fault), and attempts and parties respectively. The text represents as thorough and as scholarly an approach to these issues as can be found in any contemporary text on general principles of criminal liability at common law. Moreover, it is organized and presented with a logical rigour which is the hallmark of the civilian approach to legal reasoning. It is regretable that, despite its title, the book does not cover the general defences that one would expect in a work on what Glanville Williams and now the Canada Law Reform Commission call the "general part"[7] of the criminal law. However, we are informed that a second volume dealing with these matters is in preparation, and one hopes that, when completed, an enterprising publisher will consider publication of an English translation of both volumes.

The final treatise which must be brought to the attention of anglophone lawyers with an interest in criminal law is the *Traité de droit pénal général* by Jacques Fortin and Louise Viau of the Faculty of Law of the University of Montreal. This treatise on the general principles of criminal law covers the subject completely and succinctly, with a scholarly approach to detail in both form and content. It moves from a general introduction through chapters on the general structure of criminal law (the principles of legality, classification of offences, court organization, and a glimpse at procedure in federal and provincial matters), criminal responsibility (the regimes of true crime and of regulatory offences whether strict or absolute liability), immunities and incapacities (agents of the state, children and the mentally disordered), excuses (physical constraint and impossibility, automatism, intoxication, necessity, mistake of fact and accident, reasonable diligence), justifications (self-defence, defence of property, lawful authority, necessity), special defences ("without justification or lawful excuse", consent,

7. The Canadian Law Reform Commission has been at the centre of the recent ferment in Canadian criminal law scholarship, and has published Working Paper 29, *The General Part — Liability and Defences,* Ottawa, 1982, among many other studies in its criminal law project.

provocation, entrapment), inchoate offences (incitement, attempts, conspiracy), parties to offences, vicarious and corporate liability, and sanctions (function, range, judicial discretion, etc.). This simple enumeration of the contents of the book indicates its breadth of coverage and the imposibility of engaging in an in-depth analysis of it in the context of this review. However, in keeping with the tenor of the comments concerning the texts reviewed above, certain remarks are in order as to its structure and approach.

The authors avoid the two-part presentation which the two texts discussed above share with many of their civilian counterparts. (Although like many French texts, the table of contents — a detailed one — appears at the back of the book.) However, this does not mean that the work is without conceptual structure. On the contrary, the authors state in their foreword: "This work was not conceived as a collection of references. The cases and legal writings cited are those which to us appeared to be the most significant in relation to our immediate goal: the analysis of the structure of reasoning peculiar to the criminal law".[8] The general framework of this structure is to present the material and mental elements of offences at the outset and to elaborate "general defences" under the carefully defined conceptual categories of immunities and incapacities, excuses, justifications, and special defences. This is followed by the related matters of inchoate offences and parties to offences. While this format uses familiar terminology, the careful conceptual presentation owes much to a comparative approach which is gaining force in the common law world.[9] Such an approach is foreign to even so eminent a common law scholar as Glanville Williams whose *Textbook on Criminal Law*,[10] brilliant though it may be, looks disorganized by comparison. But what is being described here is not merely a matter of style. The authors know full well that the way in which one organizes and presents the general principles of criminal law has an impact on the way in which the law will be perceived by its users and the way in which it will develop. The organizational approach used here has much in common with the Canada Law Reform Commission's Working Paper on *The*

8. The translation is the reviewer's.
9. George P. Fletcher, *Re-thinking Criminal Law* (Little Brown and Company, Boston, 1978).
10. Glanville Williams, *Textbook of Criminal Law* (Steven and Sons, London, 1978).

General Part,[11] which is not surprising, given that Professor Fortin was one of its primary authors. The book forms a useful companion to the Law Reform Commission's document.

The three texts reviewed here are evidence of the fact that criminal law scholarship in Canada has come of age. But taken as a group they represent more than that. They represent a fusion of civilian order and conceptual clarity on the one hand, with the common law respect for practicality and attention to justice in particular cases on the other. The Canadian criminal justice system can only gain by taking this scholarship seriously. One would like to think that it is the embodiment of what Louis Baudouin once called "Le Canada — un modèle vivant du droit comparé". But this can only be the case if English speaking criminal lawyers use these works. Even those whose reading knowledge of the French language is only rudimentary can obtain valuable insights by making the effort to push themselves through them. This may be difficult, particularly since the publishers involved seem understandably reticent to engage in aggressive salesmanship in the uncertain market of the anglophone common law world. (Dalhousie Law Library does not seem to have been sent advertising circulars on the books reviewed here and had to be prodded by the reviewer to search out the publishers and purchase the volumes). The real need is for translation of such texts. Les Edition Yvon Blais Inc. is to be commended for having gone forward with the publication of the English version of *On Criminal Procedure*. The other texts reviewed deserve it as well.

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11. *Supra,* footnote 7.

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