Book Notes

Dwight Newman, Book Review Editor[*]

This section continues the new Book Notes feature commenced in the last issue, seeking to offer brief comments on a wider variety of books than has been previously possible in the *Review*. This issue's books span a range of different topics across the spectrum of constitutional issues, thus manifesting the ongoing richness of scholarship available today.

Michael Asch, *On Being Here to Stay: Treaties and Aboriginal Rights in Canada* (University of Toronto Press 2014)

Michael Asch, though coming from a disciplinary background in anthropology, is a long-standing contributor to the legal literature on Aboriginal and treaty rights under section 35 of the *Constitution Act, 1982*. His newest book will make yet another important contribution to this area of constitutional law; he is deeply engaged with the question of the contemporary meaning of Canada's treaty relationships, presenting an important account in Western legal academic terms of why and how to read treaty relationships in ways that respond better to Aboriginal understandings of the treaties.

Particularly engaged with some of the numbered treaties, Asch turns to the record of the treaty negotiations and skilfully addresses some of the questions currently being raised based on Aboriginal oral traditions in relation to the treaty relationships, including such matters as subsurface mineral ownership. This work will not be the final word on such questions, but it is an important work that contributes powerfully to an enriched discussion of the meaning of Canada's treaty relationships with its Indigenous communities.

The work is also deeply rooted in theoretical terms. Before turning to the treaty context, Asch engages in a broader theoretical discussion on the place

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* Professor of Law & Canada Research Chair in Indigenous Rights in Constitutional and International Law, University of Saskatchewan.

of Aboriginal rights in Canada's constitutional order. Particularly interesting here is his extended engagement with the work of Tom Flanagan, whose views (at least in his earlier works) have sometimes simply been assumed outside of the main legal academic discourse on Aboriginal rights. In particular, Asch wants to contest Flanagan's claim that temporal priority of possession should not have the significance attributed to it in the Aboriginal rights context. Interestingly, Asch argues strongly for the universal relevance of temporal priority of possession in allocating property. This engagement between Asch and Flanagan illustrates some of the paradoxes of discussion in this area when underlying premises go unexamined: those most strongly defending property rights generally are sometimes more skeptical of Aboriginal property rights, and those defending Aboriginal rights are sometimes skeptical of property rights generally.

That Asch has entered into these sorts of theoretical issues on Aboriginal rights will also enrich discussions. And in a work relating particularly to treaty rights, there is much here that will contribute to better understandings across a range of Aboriginal and treaty rights issues. Asch has here extended yet again his lifetime of contributing to discussions on section 35 rights, and we should all immensely appreciate his contribution.

Eugénie Brouillet & Louis-Philippe Lampron, eds., *La mobilisation du droit et la protection des collectivités minoritaires* (Presses de l'Université Laval 2013)

Constitutional issues concerning national minorities, Indigenous communities, and religious and cultural diversity raise, to a degree not always fully realized in the jurisprudence, questions related to collective rights. Stemming from a 2010 conference at the Centre de recherche interdisciplinaire sur la diversité au Québec (CRIDAQ), this new collection edited by Eugénie Brouillet and Louis-Philippe Lampron has drawn together an impressive set of Québécois and francophone scholars to comment on such questions.

Ranging from Michel Seymour's argument for a collective moral right to self-determination to Ghislain Otis's examination of possible approaches to the intersection of Canadian and Indigenous law as they affect individuals, from Louis-Philippe Lampron's engagement with the concept of discriminatory religious convictions to a Spanish perspective on the Bouchard-Taylor

Commission from José María Sauca Cano, the collection engages with a set of highly contemporary issues.

As is inevitably the case with an edited collection, there is no single, sustained argument. Yet, throughout the work, the various authors make significant contributions to the discourses surrounding shared matters of interest. Canadian anglophone constitutionalists often miss out on a lot if they do not read French-language scholarship, and this collection is yet another example of that. This is a collection very much worth reading so as to gain nuanced perspectives on constitutionalism, and we are fortunate that the editors have brought the 2010 CRIDAQ conference results forward into print.

Moshe Cohen-Eliya & Iddo Porat, *Proportionality and Constitutional Culture* (Cambridge University Press 2013)

Proportionality analysis of rights limitations is, of course, not a Canadian invention; rather, it has much deeper historical roots in transnational conversations about rights. However, it is pervasive in Canadian constitutional law, with the *Oakes* test playing a dominant role in much *Charter* jurisprudence. General metaphors about "balancing" run all over the face of Canadian constitutional law, and recent Aboriginal rights discourse also reinvests in a concept of proportionality analysis in the context of infringements on rights.

This book by Moshe Cohen-Eliya and Iddo Porat thus comes at a timely moment — along with the edited collection by Grant Huscroft, Brad Miller, and Grégoire Webber discussed below — as a book that will help constitutionalists better come to grips with the important concept of proportionality. Their early chapters offer an exceptionally rich historical account of some of the origins of proportionality analysis, which they show as grounded in German administrative law (although one could likely argue for earlier origins in older scholarship, parts of canon law, and older religious principles). However, the discussion of the origins of proportionality in German administrative law merely sets the stage for a longer engagement between German and American approaches, seeking to show the broader legal and cultural influences on and implications of different approaches to proportionality analysis.

As the authors note, Canadian constitutional law has had a pivotal significance in the global spread of proportionality analysis (p. 13), with Canadian

jurisprudence specifically having influenced such states as New Zealand, South Africa, Australia, and Israel. Canadian legal scholars and lawyers would be most familiar with seeing the Supreme Court of Canada reference American constitutional case law. Or, they may think that Canada developed proportionality analysis on its own through some happenstance in *Oakes*. Moving against these prevailing suppositions, this book implicitly situates Canadian proportionality analysis as part of a larger — and likely European — tradition. Though not specifically focused on Canada (aside from some shorter passages), the book has many lessons for Canadians.

This book is ultimately about a key constitutional law doctrine considered within its deep contexts. It is a superb book for those seeking to better understand constitutional law doctrines of proportionality. Its rich doctrinal detail and its thoughtful placement of doctrine in larger contexts together offer profound insights. In an era when proportionality analysis has become so significant in constitutional law, here is a book that belongs on the bookshelf of every constitutionalist.

David Haljan, *Constitutionalising Secession* (Hart 2014)

As David Haljan notes in his opening chapter, anyone who assumes that secession is not subject to the rule of law makes in the process a statement about that person's sense of the scope of law and of constitutionalism, thereby making certain assumptions about political morality. A book such as his, discussing how to constitutionalize the rules on secession, takes a different tack. His substantial tome is thus ultimately a comment on the scope of legal order, in which he offers the particular theory of "associative constitutionalism" and its implications for secession. In the process, he overviews and engages with all the leading theories on secession, thus offering a timely contribution to an era when the Scottish referendum still leaves various European secessionist movements hard at work — to mention only a few examples of a broader international phenomenon.

Having a constitutional secession clause, as Haljan discusses in later chapters, makes certain assumptions about the state and the nature of political community. But, he argues that these assumptions are better attuned to the community's own existence. Indeed, his closing words are striking: "the public law intervention into national constitutional law via the human rights portal imposes commitments foreign to the associative collection constituting

that state, for the former have no basis in those transformative events hitherto experienced and undertaken by citizens. And by virtue of imposing those commitments upon the populace, public international law necessarily reifies the state apparatus, distancing it from the people and their transformative event" (p. 389). A constitutional secession clause offers an opportunity for agreement about when secession is proper in light of political communities' own values, and it is striking to see the way in which treating secession only in terms of public international law may distance that potential transformation from political communities' own values.

This is a lengthy, challenging book. It is one that challenges key assumptions and makes readers think. It is worthy of attention for those who want to consider secession questions seriously.

Grant Huscroft, Bradley W. Miller & Grégoire Webber, eds., *Proportionality and the Rule of Law: Rights, Justification, Reasoning* (Cambridge University Press 2014)

This book originates from a proportionality colloquium held by the Public Law and Legal Philosophy Research Group at Western Law and was compiled with the aim of analyzing rights limitation in various constitutional contexts. The three co-editors have brought together a wonderfully rich set of essays by thinkers at the leading edge of the international discussion of proportionality. The methodology of proportionality has taken on a massively dominant position, and the authors in this collection engage with the different kinds of proportionality analysis, along with their methodological limitations, in a stimulating manner.

The discussion is at a high level, often on a theoretical plane. For example, some of the authors are engaged specifically with the tension between deontological rights and what is seemingly a consequentialist form of analysis. For a number of the authors, such as Martin Laterán, Alison Young, Mattias Kumm and Alec Walen, and George Pavlakos, then, it becomes necessary to reframe theoretically that of which proportionality analysis consists so as to make it fit better with the nature of rights. Others are engaged in a debate on whether an inflated model of rights subject to proportionality analysis — rather than more absolute rights — is an attractive picture of rights, with Grégoire Webber arguing against it and Kai Möller in favour, and Grant

Huscroft offering a sort of cross-cutting comment. Fred Schauer makes an interesting argument, by contrast, for a new kind of empirical research needed to sort out some of these questions.

Some of the pieces contain striking critiques of proportionality analysis. Timothy Endicott powerfully shows how proportionality analysis has various effects of introducing distorted approaches to public policy through the nature of judicial decision-making in the face of incommensurabilities. Brad Miller shows how reified proportionality analysis ends up also reifying, without clear notice, certain political/philosophical commitments over others.

This is an immensely important book. It brings to the general concept of proportionality analysis a deep theoretical rigour that will make a long-term contribution to debates on the meaning, modes, and defects of proportionality analysis in all its constitutional law contexts. Every constitutionalist with any theoretical inclination should read and reread this collection.

Liora Lazarus, Christopher McCrudden & Nigel Bowles, eds., *Reasoning Rights: Comparative Judicial Engagement* (Hart 2014)

This book is an engagement with the transnational jurisprudence of human rights, framed through an attempt to examine comparatively different courts' approaches to judicial reasoning on human rights questions. The co-editors have brought together a fabulous array of contributors from amongst some of the top current and future scholars in this area. The results show it.

Conceptual precision marks out this book. Seldom will one find a more crisp approach to complex human rights concepts. In the first part, several authors engage in bringing real clarification to proportionality analysis, with Kai Möller opening with a conceptual clarification on the debates, David Bilchitz offering a moderate defence of a modified approach to proportionality, Jochen von Berstofff arguing for an approach to proportionality that would eschew judicial ad hoc balancing, and Paul Yowell clarifying similarities and differences between German and American approaches in this context. In the next part, several authors engage with the much more specific topic of comparative approaches to secret evidence in anti-terrorism contexts, offering some very insightful approaches to that debate. The book continues on to two parts covering issues that are emerging in very important ways in different constitutional conversations: religion and human rights, and socioeconomic rights.

In the part on religion and human rights, Christopher McCrudden and Brett Scharffs offer a masterful introduction that frames and situates some of the key dilemmas faced by a liberal legal system in its interaction with religious claims. Carolyn Evans specifically examines some of the changes underway in what she terms a "time of transition" on these questions. Johan van der Vyver examines the increasingly important set of questions around sphere sovereignty for religious institutions. Within a book that generally engages in a profound transnational analysis, a final chapter in this part somewhat incongruously focuses principally on one state, though its close analysis of Australian religious protections may be of some general interest.

The part on socio-economic rights, with pieces by some of the best emerging scholars in the field alongside a look back at South African jurisprudence by Justice Edwin Cameron, compares the caution in states like Canada and the United States with the legal and judicial bravado in states like South Africa and India. Murray Wesson's opening piece admits the part's limitations in its failure to engage with the activism of courts like those in Brazil and Colombia, but there is no doubting that the part makes an insightful contribution nonetheless: Colm O'Cinneide powerfully examines the necessarily contextual features of social rights review, Anashri Pillay shows specific transferable lessons gleaned from the Indian experience, and Jeff King asks questions about American exceptionalism.

The three specific topics of religion, security, and socio-economic rights allow the book to cohere around some substantive questions, while it also enriches broader conversations on proportionality and on pluralism generally. Asking key questions about pluralistic approaches to judicial reasoning on human rights offers important lessons. At the same time, throughout the book, the scope of that pluralism is limited to states that are more alike than different, with a strong focus on Anglo-American and Commonwealth states. That may be all that is possible in the context of a book of limited length, and the book makes a fabulous contribution, but it also marks out a pre-limit on the pluralism under study in a way that makes one wonder when human rights scholars will more seriously engage with study that goes a bit farther afield. This challenge is, of course, acute in a Canadian context (and not uniquely so) in so far as Canadian law increasingly recognizes its need to engage with not only Anglo-American progenitors but a broader bijural context and, beyond that, an encounter with Indigenous legal traditions as well as a broader pluralism. This book is a marvellous contribution, but we also need more from people who could conceivably help with these yet more complex contexts.

Alison Loat & Michael MacMillan, *Tragedy in the Commons: Former Members of Parliament Speak Out About Canada's Failing Democracy* (Random House Canada 2014)

Although published with a trade publisher rather than an academic publisher, this new book is based on extensive research, with the especially notable feature being the exit interviews with eighty former Members of Parliament (MPs). Alison Loat and Michael MacMillan, the co-founders of the think tank Samara, are engaged deeply with what is failing in Canadian representative democracy. The consistent account that emerges is one of MPs feeling helpless, as if they were pushed to run and then operate under the constant micromanagement of their parties. The former MPs interviewed reflected on feelings of uncertainty about their roles and on their struggles to define and pursue priorities.

The book is a thoughtful account of a general malaise in the political system and is worthy of attention. At the same time, the very fact of its non-academic origins might raise some questions about whether the authors might have more fully explored such matters as whether those they interviewed manifested any selection (or self-selection) bias and thus presented a more negative account than might have been the case with a different group of MPs. The time period from which MPs were recruited also means that those who participated are skewed more in some political directions than others. The list of MPs interviewed also excludes some who devoted much of their careers to parliamentary reform, and it would be interesting to know why the authors were unsuccessful in obtaining interviews with individuals who would presumably have had much more to say on the topic. Still, the book is significant and should be read by those interested in Canadian representative democracy; but it should, as much as anything, be a call to other researchers to generate further work on this topic to explore various facets of the important questions at stake.

Irvin Studin, *The Strategic Constitution: Understanding Canadian Power in the World* (UBC Press 2014)

Starting from the idea held by the likes of Philip Bobbitt and Henry Kissinger that law and strategy affect one another, Irvin Studin offers in this book a unique and tremendously important contribution to Canadian constitutional

studies. The book argues that although the Canadian Constitution was not designed to enable Canada to project strategic power, it is sufficiently flexible that it can help to foster national strategic potential. Interestingly, the first several chapters of the book are in some ways a defence of the royal prerogative and its general flexibility in areas like treaty-making and security and military strategy against restraints increasingly put on it by various jurisprudential developments. Later chapters explore the implications of the division of powers in natural resource, economic, communications, and immigration contexts, offering interesting seldom-heard arguments for a larger national role that could promote Canada's strategic power. Further, the implications of Aboriginal rights on national power, Studin argues, require much future research. The second half of the book consists of a set of case studies of several specific foreign policy engagements, showing how flexibilities in Canadian constitutionalism enhance strategic power and drawing attention to other areas in which rigidities risk weakening Canada.

As a constant subtext in his writings, John Whyte has reminded us over the years that constitutions further both justice and stability. Lawyers engaged with constitutional studies are often focused on the former. Studin's book is a deep piece of scholarship urging additional attention on constitutions' roles in promoting stability or, even more specifically, national strategic power. In offering such a contribution to the literature, Studin will not win universal agreement. However, this book is an immensely important contribution, and the themes it touches should receive much greater attention from constitutionalists than they often do.