Guide To Legislation On Restrictive Business Practices (Book)

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Book Reviews


The antitrust and related legislation of fourteen of the OECD member nations, as well as that of the European Coal and Steel Community and the European Economic Community, is detailed, in English, in these four ring-bound volumes. A similar edition has been published in French. The materials on each country were contributed by correspondents, mainly government administrators working in this field; translations of statutory provisions come primarily from national and international official sources. A consulting editor imposed a fairly consistent order upon the materials: an introduction to the legislation, the text of the statutes and official regulations together with explanatory notes, certain agency and judicial decisions, and a selected bibliography. A more general bibliography is appended.

This is a valuable set for some important purposes and the promised supplements will make it more valuable. On the other hand, it seems to me that some easily made changes are in order, and some of the set's objectives are not worthwhile and should be abandoned and left to other works better designed to achieve them.

The antitrust bar should find it of considerable value to have in one collection an English language version of these statutes and ordinances. To anyone who has worked with these materials in their scattered form, when they are available at all, this is a boon worth the price of these volumes. To take merely the EEC group, it is difficult to locate complete translations of the large German Cartel Law, the Dutch Economic Competition Act, the more recent Belgian law, and the more relevant French ordinances and decrees, not to mention the official Italian legislative proposal that has been languishing in Parliament since 1960. All of these are included in this collection. There are other valuable items. One of the more useful bonuses is the so-called Fontanet Circular, the official explanation of the French cartel legislation. The fragmentary law of other OECD members, to my unverified belief practically...
unobtainable elsewhere—e.g., the Portuguese anti-price speculation decree—\(^8\) is apparently fully represented.

Less useful, and in fact only sporadically set forth here, is the peripheral legislation concerning industrial property rights. Unfair competition laws are not set out, nor would they be appropriate. Of particular interest to Common Marketers are the statutes which ratified and the regulatory material which implemented the Treaty of Rome—\(^9\) in the EEC member states. This body of ancillary legislation varies somewhat country by country and should be fully available. At present only the Italian statutes and decrees are even partially abstracted. The Dutch statutes are listed incompletely, but not quoted, while the Belgian, French and German ratification materials are not even mentioned. The same is true of the relevant EFTA ratifications. A future supplement could easily correct this situation and set out verbatim English translations of all these materials.

As to the case reviews, my reaction is ambivalent. First of all, they vary in scope, detail, and quality, which is natural considering the way they were prepared. Some of them are very good, even if that may be in part a reflection of my relative ignorance. Unquestionably, it is helpful to have in one place English language reports of judicial and administrative developments in such countries as Denmark, Norway, and Austria. Too, some of the more active enforcement jurisdictions, such as Great Britain and the Federal Republic of Germany, are given surprisingly full treatment here. On the other hand, the treatment of antitrust problems in the European Coal and Steel Community is disappointing. Only five cases, albeit important ones, are discussed, and those in inadequate and sketchy case notes which only set forth the bare holdings. Because the EEC discussion reaches only to February of 1962, it cannot be evaluated. On the whole, I am not certain that a work like this is equipped to report judicial and administrative developments, even with supplements, especially as to the “busy” jurisdictions for which more specialized services are available.

While the bibliographies, especially the separate “Selected International Bibliography,” contain some interesting tidbits, they are, like many of their kind, useless and unnecessary. Typically, bibliographies of this sort are either too skimpy, as here, or if full are inadequately structured and indigestible.

It seems to me, therefore, that these volumes will best fulfill a valuable function if they concentrate on the official materials—the legislation, including the hard-to-find ancillary statutes of ratification, administrative regulations, and especially an explanation of procedure. Since most of the laws contemplate a registration process to facilitate administrative supervision, an explanation of each such process would be extremely valuable; some have been given here. Textual summaries of the “state of the law,” occasionally brought up to date, rather than case briefs, would also be useful, especially for the lesser known administrations. Full and official citations to all material, easing primary source verification, should also be the rule. It is fairly well honored in these volumes.

\(^8\) Statutory Decree No. 41.204, [1958] 74 Boletim Do Ministerio Da Justica 412 (Port.).


\(^10\) The discussion of United States antitrust doctrine is also an excellent one, considering its brevity and required format.
The improvements here suggested easily could be incorporated by supplements. To a great extent these volumes presently meet my admittedly personal criteria; to that extent, and in the hope of further changes, they are to be recommended as valuable references to anyone concerned with foreign antitrust matters.

Richard M. Buxbaum*

DEATH OF A REPUBLIC: POLITICS AND POLITICAL THOUGHT AT ROME 59–44

Giuseppe Mazzini, the Italian patriot and co-founder of the new Roman republic, once observed that Julius Caesar "did fulfill a mission, but it was an unconscious one. . . . It was the same that was fulfilled at a later period by the conquering barbarians. . . . [H]e did not . . . initiate, . . . [he] concluded, an era." This is an ironic epitaph for Caesar, and for the republic he first dominated and later supplanted. Yet it is a most appropriate statement of the theme of the late John Dickinson's book. For in these pages the hero of classical history becomes unmistakably the villain of a Roman tragedy. And Marcus Tullius Cicero emerges just as clearly as a neglected hero of the last hours of the republic.

If there is any fault to be found with Dickinson's work it is only that the dichotomy between these two principals of the republican drama may be too stark. In freeing himself and his readers from Mommsen's2 and Fowler's3 somewhat myopic images of Caesar, Dickinson may have pushed the pendulum of historical judgment too far the other way. But there are two factors that help to explain and justify such over-compensation.

First is the fact that Dickinson did much of his work on Roman history during the years when Hitler and Mussolini were remaking the map of Europe and throwing the whole future of republican government into doubt and jeopardy. So it is understandable that Caesar's faults loomed larger than they might have appeared in a more tranquil time, and that Cicero's rational efforts to preserve constitutional order seemed more heroic. Indeed today much of the book seems almost allegorical. To Dickinson, Caesar was unmistakably a forerunner of twentieth century fascism as well as of Napoleonic despotism. Cicero, by contrast, was the spiritual father of the rule of law.

The other factor that may explain the stark contrast between Caesar's vices and Cicero's virtues is that the work is the product of prodigious legal prowess as well as a profound sense of history. The combination was bound to create a legal and political chronicle of the first order, which the book unquestionably is. Consequently the contrasts between the methods and motives of the two central figures—contrasts that may have been blurred by the political scientist's

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1 Quoted in Dickinson, Death of a Republic 389 (1963).
2 Mommsen, History of Rome (1887).
3 Fowler, Julius Caesar (1892).
and classicist's lack of legal knowledge—flow much more distinctly from the lawyer's pen.

The central questions posed by this period of Roman history are: why did the republic die and who killed it? On the latter point, Dickinson has no hesitation in laying the blame at Caesar's feet. In so doing he seeks to explain why the republic had functioned so well, or at least appeared to, before Caesar's time, and why the senate is not also to blame for its collapse. Theretofore, "the respect for the time-honored traditional usage and constitutional practice" supplied the requisite stability for republican government. Until Caesar, "no Roman politician . . . had ever been willing to bypass the senate and govern by direct popular action, and . . . no Roman consul had ever undertaken to control the action of the people by mob violence."4

The senate may be pardoned for failing to check Caesar's accretion of power in defiance of the constitution. This is partly because Caesar had already paralyzed the senate by removing all meaningful responsibility and all effective sanctions (earlier, says Dickinson, than most historians have recognized); and partly because "the senate's morale, such as it was, went to pieces" as a psychological consequence of the institutional paralysis.5 So, concludes the author, perhaps the senate can be charged with not having opened its eyes until it was too late, but accusations of venality, or cowardice, or ineptitude, alone are insufficient to explain the senate's default.

This much does not, however, tell us why the republic ended as it did. It is in explaining its demise that Dickinson is at his best as a legal and political historian. There were many factors which made the foundation of the republic increasingly brittle and unstable—notably the loss of personal character throughout the Roman population, and the gradual erosion of that essential ingredient in Roman society that Cicero called "concord"—a kind of balance between classes and interests. The book describes and evaluates these elements in the Roman scene and gives them new meaning. It is in this task of explanation that the work becomes a profoundly moving and illuminating history of three distinct sorts—political, intellectual, and legal. We must take at least brief account of each of these.

The book is first of all a brilliant, albeit ominous history of politics and political institutions. Caesar's acquisition and consolidation of complete power is described in detail, accompanied by an astute appraisal of those conditions of fear, unrest and apathy in the Roman populace that Caesar exploited and intensified. From the time of his first consulate to his death, Caesar's program seems to have been shaped by a single-minded ambition for power. The only enduring contribution that Dickinson will concede to him was the conquest of Gaul—and even that was motivated by short-term considerations of political gain. In other areas the author's judgment is unqualifiedly pejorative—Caesar's consistent policy was to make "the republic unworkable and contemptible."6 In this he succeeded completely. The only beneficiary in the end was Caesar himself, and, ironically, having pushed his luck too far, he never lived to reap the harvest of his unprincipled cultivation.

The book is equally an illuminating history of political institutions. As

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4 Dickinson, Death of a Republic 376 (1963).
5 Id. at 377.
6 Id. at 138.
Caesar was a shrewd judge of men and adroit exploiter of their weaknesses, he was also a facile manipulator of institutions and public offices. His creed was a relatively simple one, as Dickinson has described it: to consolidate as many offices as possible in his own name, to fill others with his henchmen, and then to eliminate or debase those that could not be controlled or consolidated. Here again Caesar's strategy was brilliantly successful for Caesar himself, but again the consequence was a vacuum in the Roman power structure—"a kind of political chaos and centrifugality which could only be held together by his own strong hand." In the end there really was no longer any structure, and a bloody civil war was the inevitable legacy of Caesar's strategy.

There is a great deal of valuable intellectual history in this book. Most of us have had some exposure to Caesar through his _Gallic Wars_ and to Cicero in the _Catalinian Orations_. We tend to regard the one mainly as a military tactician and the other as a clever lawyer and rhetorician, knowing neither as a political theorist. Caesar's political creed is to be found in his actions rather than his writings. Above all that creed was pragmatic and flexible. A subtle and skilful writer when he did put his thoughts on paper, Caesar "never expressed in words or exposed for discussion the wellsprings of his conduct or the principles on which he acted." Perhaps this was because he simply "did not think in terms of principles or even of policies, but always of objectives and results."

Thus the intellectual history of the period has for the most part to be drawn from Cicero's voluminous and highly introspective writings. Two aspects of his thought are worth noting here. First there is his theory of republican government, built chiefly upon that element of "concord" or harmony and balance among the elements of a society, the erosion of which hastened the demise of the Roman republic. Second, and essential to the preservation of concord, was Cicero's pervasive assumption that there was some political wisdom and at least the innate capacity for understanding and judgment in every citizen. However much avarice, selfish special interest, or the rhetoric of the demagogue might blur the understanding or taint the judgment, the essential capacity for rational political behavior was never quite lost. What befell the Roman republic was the ascendancy of myriad irrational, anti-democratic forces. It was these forces, as Cicero perceived better than anyone else, that Caesar exploited for his own political ends. Thus, although saddened and disillusioned by what he saw happening about him, Cicero could still reconcile even the worst of reality with the integrity of his political model. The faith and optimism which kept him writing while Rome was burning no doubt largely account for the durability of his political philosophy. Dickinson, brilliantly etching this philosophy against the backdrop of Cicero's own times, has put it in essentially modern terms that are meaningful to the lay reader as well as the expert.

It is difficult to separate the strands of intellectual history from the legal history that runs deep through the book. It is legal history at two levels, though, and these should be considered separately. The first and more important level is that of Cicero's legal philosophy, which is of course part and parcel of his political theory. His basic belief in the rationality of man as a political being

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7 _Id._ at 387.
8 _Id._ at 324.
9 _Ibid._
also convinced him that the dignity and worth of the individual demanded legal protection for human liberty. The concept of natural or constitutional law that had formerly assured the integrity and order of government now assumed a new and more compassionate role, that of guarantor of human rights and liberties. It is in this sense that Cicero may be held to be the founder of modern principles of the rule of law. 10

Yet surely Cicero was not what we would regard today as a "liberal." He did have firm notions about the inequity of ex post facto laws and bills of attainder, but those were anticipated by the Twelve Tables. His ideas on freedom of speech seem bizarre to the modern constitutional lawyer. Much more important was his insistence on the nullity of legal enactments or decrees which violated transcendent principles of natural or constitutional law. While holding that such lawless laws merited neither compliance nor respect, Cicero advanced no formula for accommodation other than the dictates of individual conscience. Yet in his writings were contained the seeds of a theory of judicial review that eventually bore fruit in the early decisions of John Marshall.

The other level of history which has profited from Dickinson's able legal scholarship is the reinterpretation of much of Caesar's legislation. Where many historians have held, for example, that the laws of Caesar's first consulate were enlightened reform measures, Dickinson insists that closer analysis warrants no such approbation. He is equally critical of other major Julian legislation and edicts—those dealing, for example, with fiscal and monetary matters, or concerning municipal government, or defining the rights and duties of Roman citizenship. Other measures cannot be defended on any ground—restrictions, for example, on the right of certain classes to travel abroad, and the harsh and humiliating loyalty oath he exacted of all his public officials. These laws surely cannot be thought enlightened by any standard, but in Dickinson's ledger there is little else to redeem Caesar's legislative record. Thus in the realm of law as well as politics and ideas, this book portrays Caesar as the unscrupulous opportunist, the unprincipled exploiter of human weakness and political instability, and above all the assassin of a benign and orderly Roman republic.

There is one final feature of the book that must be mentioned. Dickinson worked for many years on a massive history of Roman political thought and institutions of which this volume represents only a small part. He died before the work could be completed and published. It was his wish that his colleague and friend George Lee Haskins should pursue the project with the materials Dickinson left behind. Professor Haskins has carried out that trust with care and sensitivity. A few essential changes have been made in the order of the material, and a brief introductory chapter has been added to set the stage. But the

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10 Compare, e.g., HAYEK, THE CONSTITUTION OF LIBERTY 166-67 (1960): "Cicero indeed became the main authority for modern liberalism, and we owe to him many of the most effective formulations of freedom under the law. To him is due the conception of general rules or leges legum, which govern legislation, the conception that we obey the law in order to be free, and the conception that the judge ought to be merely the mouth through whom the law speaks. No other author shows more clearly that during the classical period of Roman law it was fully understood that there is no conflict between law and freedom and that freedom is dependent upon certain attributes of the law, its generality and certainty, and the restrictions it places on the discretion of authority."
ideas and most of the writing are just as Dickinson left them. The reviewer
would be remiss to acclaim the book, as he must, without acknowledging
Professor Haskins' vital contribution in making this work available.

Robert M. O'Neil*

LAW IN JAPAN: THE LEGAL ORDER IN A CHANGING SOCIETY. By Arthur Tay-
706. $15.00.

This volume is a rare accomplishment in legal scholarship. It has achieved
what could not reasonably have been expected.

Law in Japan is very nearly everything that the title implies: Japanese law
in all fields—in action, in theory, in its social evolution, its economic environ-
ment and its political context. Ordinarily, one could not hope to find such vast
coverage in one volume; and, finding it, one could hardly expect uniformly
excellent treatment, yet here it is.

The difficulties in the comparative approach which this volume uses are
well known; the obstacles in applying it to Japan are formidable indeed. The
language barrier is the first usually mentioned, and there is no need to elabor-
ate on the obvious, except only to say that Japan is one of the few Asian nations
without some traditional foreign tongue, used with the native languages, as the
language of the educated. Second, Japan is unique in being the only Asian
country to achieve economic and social standards comparable with the Western
nations. This achievement, accomplished through an immense act of national
will, has imposed demands of rapid adaptation. The rapidity of the moderniza-
tion—less than a century—has produced a superstructure of the new on the
traditional, resulting in contradictions which are not found in more evolutionary
societies.

Thus, any treatment of the Japanese legal system must deal, sometimes in
great detail, with the past century of innovation and adaptation. Each essay in
this volume, however, exhibits that highest scholarly attribute of unifying the
past, the present, and the future by the careful selection of only the relevant
and the causative and the proper location of each in the continuum of change.
The reader is thus spared the feeling that he is reading "history," in the sterile
sense of the term, just as he is spared that ostentatious effort, sometimes found
in the writings of orientalists, to elevate what is essentially a bare presentation
of facts or a translation. These essays are of a far higher order, so that even one
with considerable experience in Japanese law will feel that he has been pro-
vided a new, or a greater, perspective, and new students will have a valuable
primer for which the rest of us can only envy them its availability at the
beginning of their studies.

This volume is the result—one of the results, I should say—of the Japanese-
American Program for Cooperation in Legal Studies, which was implemented,
with the financial support of the Ford Foundation and the American Educational

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Commission in Japan, by three United States universities, six Japanese universities, and the Japanese Legal Training and Research Institute. The authors, with a few exceptions, are Japanese scholars, procurators, or judges who had the opportunity to study at length in the United States. Each was assisted by an American scholar, most of whom had had previous experience in Japan or had been afforded an extended tour there under the auspices of the program. In the autumn of 1961, at the termination of the program, a four day conference was held at Harvard University. The papers which resulted in this three-part volume were presented there, and the highlights of the ensuing discussions are given by Professor von Mehren at the end of each part.

The length and broad range of the subject matter encompassed by the seventeen essays makes it impossible to discuss all of them within the limits of one review. Thus, the emphasis here on legal-economic relations is the result of the reviewer's need to select only a few of the many excellent papers for exposition, rather than a reflection on the quality of those omitted. For example, the five essays comprising Part I of the book, "The Legal System and the Law's Processes," in their scope of coverage and depth of analysis, represent one of the best treatments of the structure and foundations of the Japanese law to be found in the English language, and are deserving of separate treatment.

This is true also of Part II, "The Individual, the State and the Law," which focuses on the emergence in Japan of concepts of individualism and rights consciousness viewed against historical patterns of consensus and related individual abnegation. In addition to essays on criminal law, the family, and motor vehicle accidents, it includes a paper by Professor Ito on constitutional development which deals with what may be one of the crucial questions of Far Eastern history: whether the implantations into Japanese constitutional law of liberal Western concepts of virtually inalienable individual rights can endure permanently, in what seemed a hopelessly unprepared society at the time of the introduction of the new constitution shortly after World War II.

Professor Hashimoto's essay following, analyzes post-war developments in the protection of individuals against arbitrary administrative action, thus specifically elucidating one aspect of Professor Ito's treatment, and presents as well an excellent comparative analysis of Japanese practice regarding judicial review of administrative findings of fact. Administrative law, of course, can be discussed only where there is law, and this is a much narrower area than in the United States. In the field of Japanese economic regulation, administrative law, in the sense of law relating to powers and procedures against a backdrop of possible judicial review, is almost irrelevant.

In partial explanation of this, Professor von Mehren notes in his commentary on Part II that "In the United States, federal agencies are entrusted with regulatory powers over large sectors of the economy. In Japan significantly less governmental regulation of this kind occurs. The Japanese economy is highly regulated, but regulation tends to take unofficial and informal forms." Certainly it is true that unofficial and informal sanctions are prevalent, and to an extent this is based on Japanese cultural characteristics, but it is also true that the efficacy of informal sanctions derives, to a great extent, from the great range of official, formal, legislatively granted discretionary powers vested in the various ministries, which can be employed as leverage in areas where no formal powers

\[1 \text{ von Mehren, Law in Japan 426 (1963). [hereinafter cited as von Mehren].} \]
exist. I would be reluctant to attempt a quantitative comparison of economic regulation between Japan and the United States; I would rather put it that, far more than in the United States, economic regulatory legislation in Japan does not contemplate the circumscription of administrative discretion by judicial process, by legal norms; and apparently, the issue of unconstitutional delegation of legislative powers has not frequently been raised.\(^2\)

This is why I say that United States administrative law concepts are "irrelevant" to economic regulation in Japan. Moreover, the nature of economic regulation in Japan is of a type less reducible to compatibility with practical legal norms, and I suspect that this is true of any country which maintains pervasive regulation of foreign exchange, foreign capital and export-import transactions.

The scope of the volume is such that it has something for everyone, and subjective factors will no doubt lead most readers to prefer one part to the others. Part III, entitled "The Law and the Economy," composed of five essays will no doubt be of special interest to many businessmen and foreign attorneys. The first essay in this part, by Professor Ishikawa, portrays Japan's troubled years of labor union growth and experimentation with United States-style labor relations laws, which were enacted during the occupation. Certainly the wisdom of our own law was not unchallenged at the time and the deviations or excesses to which it has been carried in Japan have made the introduction of our statutes appear less of a beneficent act in some eyes than it was intended to be.

Professor Ishikawa has described some of the aberrant labor union tactics that have developed, but the economic effects of these practices are greater than appear from mere description. For example, the effect of the "time strike"\(^8\) is not merely that workers "cease productive activity for an agreed period . . . then resume work . . . ." If the "agreed period" is two hours, much more than two hours work is lost. Workers begin slacking off somewhat before the agreed time and afterward never fully resume efficient activity. Moreover, some simply do not return to their stations at all afterward, either because of the attendant holiday spirit or in order to avoid attending the labor rally to be held after working hours, so that production is in fact disrupted for a half of a day or more, while full wages are being paid. Other types of strike activity, the law relating to lockouts, union jurisdiction, and the administrative labor boards are discussed in enlightening, comparative fashion.

On balance, what has been achieved by the introduction of our labor relations laws into Japan? This is too much to handle in the present context, but some superficial observations might not be amiss. First, one can say that it has hardly succeeded in harmonizing employer-employee relations. If anything, as Professor Ishikawa's exposition illustrates, it has been interpreted so as to give license to irresponsible elements. Second, it would be stretching quite a bit to find a causal connection between the new labor laws and Japan's fantastic post-war economic growth. The rapid improvement in the lot of the worker, particularly the steep increase in wages over the past four years, appears to be the result of beneficent economic forces and astute public and private planning, and is in no way related to enlightened labor laws. Third, as Professor Ishikawa notes, unionism has not succeeded in establishing an industry-wide union pat-

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2 Professor Kanazawa raises it, however. Id. at 499-500.
8 Id. at 450-51.
tern as it has in the United States, so until recently Japan has been spared wage increases in excess of productivity gains. This is most fortunate because Japan did not enjoy the relative economic advantages which World War II bestowed upon the United States, and excessive demands by labor undoubtedly would have derailed the Japanese "economic miracle," which has made real, unartificial benefits available to the whole populace. Ironically, then, perhaps the most gratifying aspects of post-war Japanese labor relations are that almost no strong, industry-wide unions have emerged, and that union leaders have not concentrated their efforts on the securing of immediate economic benefits for the workers—two aspects most often deplored by commentators.

In the next essay, Professor Kanazawa, in discussing the twists and turns of anti-monopoly law and practice in post-war Japan, raises two vital, overriding issues: government regulation of business and the reemergence of dominant economic groupings resembling the former zaibatsu. The extent and nature of government regulation of private business activity, adverted to briefly previously, is a matter which is perhaps just now at the crossroads. As described by Professor Kanazawa, many cartel-type voluntary associations have been exempted from the restrictions of the anti-monopoly law, but in some types an interesting aspect of compulsion is present. For example, a company which is not a member of the exporters' association, but which exports the same specific merchandise to the same destination as that shipped by members, can be ordered by the Ministry of International Trade and Industry to observe the rules set by the association. Another example is that of the Law Concerning the Organization of Medium and Small Enterprise Organizations in which, as contrasted to the exporters' associations where outsiders can be compelled to abide by certain association rules, outsiders can in fact be ordered to join the association for the effectuation of certain measures.

In 1963, a major stride toward further government-directed cartelization and merger in Japanese industry, including big industry, was attempted with the introduction into the Diet of the draft Law on Temporary Measures for the Promotion of Designated Industries. The proposal was not enacted into law, but was reintroduced, in revised form, in 1964. This bill provided that councils composed of industrial and closely related financial representatives and appropriate government officials would be formed in the designated industries for the purpose of devising standards regarding product specification, production specialization, rationalization of equipment investment, the efficiency of facilities, cooperation among enterprises, corporate mergers, conversion of enterprises, and similar measures relating to the improvement of production, management, and scale. Mergers would be greatly encouraged and special reductions in the cor-

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4 The lone exception is the seamen's union.
5 The zaibatsu combines, notably the Mitsui, Mitsubishi, Sumitomo and Yasuda firms, dominated not only the financial field, but also pyramidal industrial and commercial fields in Japan after 1920. RESTRICTIVE TRADE PRACTICES SPECIALISTS STUDY TEAM: JAPAN PRODUCTIVITY CENTER, CONTROL OF RESTRICTIVE TRADE PRACTICES IN JAPAN 2 (1958); VON MEHREN 482.
6 Chusho Kigyo Dantai no Soshiki ni Kansuru Horitsu Law No. 185, Nov. 25, 1957, art. 55.
7 Tokutei Sangyo Shinko Rinji Sochi Hoan, April 10, 1963.
8 Art. 3.
poration and registration taxes would in fact be granted. On approval of appropriate government officials, including the Fair Trade Commission, the following types of concerted action would be authorized: limitations on product types and production processes, limitations on production volume, limitations on production facilities and the disposition thereof, limitations on methods of purchasing components and accessories, common utilization of production, storage and transportation facilities, and donations to adjustment funds for discontinued enterprises.

Space does not permit an extended discussion of the multifarious facets of this tendency to subject private business to bureaucratic supervision, and its numerous manifestations, but one should not pass over the subject without reference to what are considered very real circumstantial necessities for coordinated action. On the one hand government intervention into the private sector has been based on a clear and present need to conserve foreign exchange balances, to provide protection for developing but still weak industries, to accord with foreign demands for "voluntary" export restrictions, and to provide means for the rectification of imbalances and defects in the Japanese industrial structure. The incentives for such actions were provided largely by forces and events external to Japan and beyond her control, and the solutions adopted have, in general, reflected an approach of encouragement, sometimes compulsion, of group action under government guidance, with a considerable degree of group autonomy nevertheless reserved.

The reference to imbalances and structural defects in the Japanese economy is primarily to the phenomenon of economic dualism, which is the coexistence of a small group of large, modern, efficient industries towering above a sea of small and medium-sized, backward, low-wage enterprises. It is characteristic of labor-intensive, low-wage enterprises, in which the economies of scale are negligible, that established firms have no real cost advantage over potential entrants and product differentiations are slight. The result is a situation in which prices and profits fall below what might be considered a reasonable level, with the inevitable regressive effects on wages and working conditions. Thus, in these conditions, the protection and the encouragement of the medium and small industries relates, to a large extent, to preventing excessive competition among them.

These factors, taken together, present a rather strong case for government encroachment into the sphere of private business activity, particularly when viewed in the context of increasing exposure of Japanese business to the vagaries of international competition.

The second major issue, the reemergence of the zaibatsu, is related to the above through the disposition of the Japanese government to ignore, perhaps encourage, intercorporate shareholding, mergers, and joint venturing among

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9 Art. 8.
10 Art. 9.
11 In 1960, enterprises of from four to twenty-nine employees constituted almost forty per cent of total establishments and accounted for twenty per cent of all employment, whereas enterprises employing three hundred or more persons comprised only about one-half of one per cent of the total establishments but accounted for thirty per cent of the national employment and fifty per cent of the total deliveries of products and goods, Economic Planning Agency, Economic Survey of Japan 337 (table II-1) (1961-62).
former zaibatsu enterprises. Starting in 1958, the trend toward corporate merger accelerated rapidly. The vast majority of mergers has been among the smaller companies, under the aegis of one or more of the larger ones, but the cases of amalgamation of the large companies, while far fewer in number, are vastly more significant as an indicator of a possible return to oligopoly conditions. Several of these have attracted the attention of the Fair Trade Commission, either because of the size of the merged company or its resultant market strength, but all have been allowed to stand. As a matter of fact, since the 1949 amendments to the Anti-Monopoly Law, there has not been one case in which the Fair Trade Commission has prevented a proposed merger. The questions that cannot be answered now are whether the accelerated trend toward cohesion is merely the natural result of a keenly felt competitive weakness and lack of size in Japanese industry, fanned by the opening of the domestic market to foreign competition, or whether it is the beginning of the reconstitution of the giant groupings of former times.

Following an excellent essay by Professor Michida on selected aspects of Japanese commercial law and Professor Yazawa's penetrating analysis of shareholder-management relations under Japanese law, the volume concludes with Mr. Uematsu's treatment of Japanese income taxation. After referring briefly to pre-war practices, there is presented an extensive discussion of present theory and practice, and the major problems in the taxation of individual and corporate income, is presented. Reference is always to the Shoup Mission recommendations and the reasons for their continuance or abolition. Certainly Japan has offered one of the most interesting testing grounds for tax experimentation. In the complete chaos of taxation and public finance which prevailed after World War II, the Shoup Mission saw a unique opportunity for constructing a whole, complete system—the ideal system. The Shoup Report itself is a timeless statement of taxation theory. Yet, while most of it was temporarily enacted into law, it was later despoiled—as perhaps it should have been—by the inexorable realities of economic forces and political expedients. Mr. Uematsu's essay is thus a singular contribution to our understanding not only of the Japanese tax system, but of the adjustment of taxation theory to reality as well.

In an introduction to the volume, Professor David Cavers, who was the life force of the program, describes the planning and the objectives of the Japanese-American Program for Cooperation in Legal Studies. Surely, by any standards, it has been a success, of which Law in Japan as a book is the most tangible, but not the only manifestation, and more than can be expressed is owed to this man's vision and selfless application. But, this much having been accomplished, the question is how to continue similar programs so that this magnificent volume is not the end but the beginning of the Japanese-American dialogue in legal studies.


13 Shoup Mission to the Supreme Commander for the Allied Powers. The Shoup Mission, a body of distinguished American tax scholars, visited Japan in 1949 and 1950 at the invitation of the Supreme Commander for the Allied Powers and prepared two reports regarding reconstruction of the Japanese tax system.

14 *SHOUP MISSION TO THE SUPREME COMMANDER FOR THE ALLIED POWERS, REPORT ON JAPANESE TAXATION* (1949) and *REPORT ON JAPANESE TAXATION* (1950).
It was with great pleasure that I recently received an announcement of the proposed organization of the Japanese-American Society for Legal Studies, which is being formed for the purpose of carrying forward the work thus begun. Its nucleus is composed of the Japanese participants in the Japanese-American Program for Cooperation in Legal Studies, many of whom appear as authors in the instant volume. The plan, as I understand it, is to continue the exchange of scholars and the liaison among them, and to institute the publication of a semi-annual Japanese language periodical on American law and an annual issue in English on Japanese legal developments. Surely this is the next logical step.

It is heartening to know that this excellent work will be continued.

*Carl J. Bradshaw*

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In a rapidly changing society, constitutional powers alloted to government must be allowed a considerable capacity for growth and adaptation in order to meet new problems and to adjust to the many new forms in which perennial problems may present themselves. Few who have given the question serious attention would now question this. There is no such wide recognition, however, that constitutional limitations, no less than constitutional powers, need the capacity to grow and adapt in order to maintain their adequacy and effectiveness as conditions change—a recognition that should accompany awareness that the dangers feared when these constitutional limitations were drafted may also expand to unforeseen dimensions or present themselves in totally unforeseen forms.

To say this is to say that civil liberties must be capable of growth and of adaptive transformation, since a civil liberty is merely a constitutional limitation seen in reverse—viewed from the standpoint of the person who invokes it for his own protection. Just as a right is, in general, a limitation on the freedom of others which society will in some way seek to enforce, so a civil liberty is a limitation on the freedom of government which a court will enforce.

If a constitutional limitation is defined by, and confined to, the applications which were expected at the time of its enactment, it may well degenerate into a mere historical curiosity, a comment on an aspect of the problem which no longer occurs, or at least is no longer of central importance—though the problem itself may be more pressing than ever.

Furthermore, if powers expand, as they must, while limitations remain static, the net result is a continuous change in the constitutional balance of power originally struck between representative government and the people represented. That change is all in one direction and it is cumulative. If allowed to continue

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unchecked indefinitely, it must ultimately lead to what amounts to a change in the form of government, a change which has not been discussed or voted on and which few, if any, consciously intended. When civil liberties (i.e., limitations) are viewed according to the balancing of interests doctrine, the trend is even more rapid. The very same pressures which justify an expansion of powers are automatically viewed as justifying also a simultaneous contraction of liberties (i.e., a relaxation of limitations). The candle is burned at both ends. Indeed, if the balancing doctrine is embraced consistently, it ceases to be regarded as even theoretically desirable that a civil liberty should be capable of withstanding any substantial social pressure for its curtailment.

In certain areas, the Supreme Court has been vigorously—and, in my view, commendably—engaged in the expansion and adaptation of traditional limitations upon government. Criminal procedure and the protection of criminal suspects against police overreaching is one such area. The right of counsel may once have meant no more than the right of one who could afford to hire a lawyer to do so and to insist that he be permitted to participate in the court proceedings. If so, the original right was scarcely more than an acorn to the oak which has grown in its place. Yet this is not generally regarded as judicial usurpation and the result has received widespread approval. On the other hand, it certainly cannot be said that the Court has always approached other constitutional limitations in the same spirit. The view that civil liberties must be capable of growth and adaptation has neither been overtly expressed by the Court, nor won general acceptance among the public.

The two books under review point up a problem which has rapidly outgrown our legal and constitutional tools for dealing with it.

Mr. Brenton, an ex-private detective and insurance investigator, has written an exposé of the private investigation industry. His thesis is that the “intimate details of our lives are being secretly bought, sold, manipulated and exploited by an ever-growing army of private inquirers.” He deals with such matters as credit investigations; methods used to coerce payment from defaulting debtors; investigations of insurance applicants and insurance claimants; the probing of private job applicants by means of psychological tests and interviews, neighborhood checks, and loyalty-security checks; private blacklisting; the “full-man” reports, assembled by private detectives as a means of evaluating prospective executives, which include intimate details of social and family life; the use of the polygraph, alias “lie detector,” for routine pre-employment screening and periodic testing of all employees; the methods by which business firms spy on their employees and on each other; the application of sleuthing methods in market research (e.g., concealed cameras and microphones in the supermarket or department store to observe customer reaction to displays);


3 In Gideon v. Wainwright, 372 U.S. 335 (1963), the state governments of 22 states joined in urging the Court to impose stricter right to counsel standards on them by overruling Betts v. Brady, 316 U.S. 455 (1942). Only one state joined Florida in urging retention of the looser standard.
invasions of privacy by the press; the selling of names for sucker lists; and the intrusive techniques sometimes used in highly organized fund-raising.

Mr. Packard, who has an uncommon flair for converting unattractive and alarming aspects of modern life into non-fiction best sellers, covers substantially all of this and a great deal more besides. Since he deals with governmental, as well as non-governmental intrusions on privacy, he also takes up the political screening of public employees; the demand for this type of investigation made upon the academic community through the requirements of defense contracts; the questioning of faculty members about the opinions and attitudes of students and former students; the subjection of public school students to personality tests and family-background inventories without parental consent; opinion policing by legislative committees; mail covers; welfare raids; and bureaucratic harassment through unreasonable forms and questionnaires and the power to withhold licenses and permits. Indeed, Mr. Packard is all over the lot and manages also to get into such matters as the harassment of teachers by self-appointed censors; laws against contraceptives; the impropriety of treating homosexuality as a police problem; the omnipresence of noise; governmental interference with the right to travel; pressure on screen actresses to work in the nude; and the possibility of directly controlling people's feelings and attitudes by means of drugs or of electrodes planted in the brain. His presentation seems to me rambling and disorganized, but at least it has an index, as Mr. Brenton's does not. Both books are journalistic treatments, designed primarily to arouse our alarm with a parade of horrible examples of what is happening. Both score most heavily when they describe the terrifying new technology of surveillance: the mirrors behind which an observer can watch at close range, but unobserved; the cleverly-hidden cameras and closed-circuit TV cameras which can operate behind a screen and can cover, by means of mirrors, an area apparently safe from observation; the microphones and transmitters which can be concealed on the person or disguised as anything from a cigaret package to a sugar lump (Mr. Packard tells of one transmitter which was concealed inside the olive in a martini and used the "toothpick" as its antenna); the microphone which uses wires so thin they can be varnished into the wall, or can use an invisible line of conducting paint instead of a wire; the sound-focusing devices which can eavesdrop on a whispered conversation from a considerable distance or from a nearby building. The world in which no one can be certain he is not under observation is no longer a dream of 1984. It is here now, so far as its technology is concerned.4

One important question raised by these facts is what it does to the human personality to have to live, as Brenton puts it, in a "goldfish bowl." (Packard's title forcefully makes the same point.) Another is the moral problem implicit in treating people as things which can be endlessly observed, tested, and

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4 Justice Brandeis foresaw developments along these lines, and others which may yet come, a third of a century ago: "The progress of science in furnishing the government with means of espionage is not likely to stop with wiretapping. Ways may some day be developed by which the government, without removing papers from secret drawers, can reproduce them in court, and by which it will be enabled to expose to a jury the most intimate occurrences of the home. Advances in the psychic and related sciences may bring means of exploring unexpressed beliefs, thoughts and emotions." Olmstead v. United States, 277 U.S. 438, 474 (1928) (dissenting opinion).
reported upon for the sake of their more effective manipulation. I will pass over these, however, since I do not know what to say about them, and mention only the fact that surveillance seems to be inseparable from some measure of control.

Of course, this principle has its positive aspects. The members of a crime syndicate, without a doubt, commit fewer and less successful crimes if the police keep an eye on them. Efforts to frustrate the federal Constitution and laws in Mississippi may be somewhat mitigated when the state is dragged into the national spotlight. Government officials will be more mindful of their responsibilities and the limitations of their authority when the press is free to uncover and disclose their official actions, especially when an opposition party is standing by, eager to exploit any shortcomings which may come to light. But these are situations where surveillance is healthy because the measure of control which results is needed and proper.

The complementary principle is that, where control should be eliminated, privacy must be protected. Probably the secret ballot is the point at which this principle has received its clearest realization. It would be easy to parody recent rationalizations by saying that the voter ought not to be ashamed of his choice. He should be proud to stand publicly and be counted. Surely, therefore, he would have no just cause for complaint if his ballot were signed and filed for public record. But, regardless of what would or would not be unjust or oppressive to the individual voter, society, when it seriously wants his free choice, shuts him up in a booth and draws the curtains—and makes sure that his ballot bears no marks by which it could later be identified. Similarly, when we want to know what twelve jurors really think, we lock them in a room by themselves and permit no one else to be present at or overhear their deliberations.

Some new recognition of the coercive force of public scrutiny is already creeping into our constitutional law. Thus, the Supreme Court has already reinforced freedom of speech and press with a right to anonymous publication.\textsuperscript{5} And the right freely to associate for the promotion of causes now includes, at least in some instances, a right to be protected against compulsory disclosure of such association.\textsuperscript{6} Unfortunately, where the coercive force of public scrutiny has been deliberately harnessed to enforce standards of conformity which have not been enacted into law, and probably could not constitutionally be enacted, the Court has professed inability to look behind the pretext and has invoked the theory of the unlimited collapsibility of rights. A striking example is the Court’s finding proper legislative purpose behind the investigations of the House Un-American Activities Committee into alleged Communist infiltration of education in the face of the Committee’s declared purpose of exposing supposed Communists to “pitiless publicity.”\textsuperscript{7}

This conformity-inducing effect is not limited to situations in which surveillance is actually taking place. If people think there is a distinct possibility that they may be watched and overheard, they are likely to behave and talk as though they were being watched and overheard. And patterns so established can quickly harden into habitual self-censorship. A society in which the possibility of surveillance is everpresent is one in which the freedom to be different,

\textsuperscript{5} Talley v. California, 362 U.S. 60 (1960).
\textsuperscript{6} E.g. N.A.A.C.P. v. Alabama, 357 U.S. 449 (1958).
\textsuperscript{7} Barenblatt v. United States, 360 U.S. 109 (1959).
to be oneself, and to express views at odds with received opinion is already under some unfavorable pressure and in need of shoring up. This is the case even if it be assumed that the new surveillance technology will never be put to improper uses. What could happen if it were is frightening to contemplate.

Furthermore, the very structure and mode of operation of contemporary society is such as to intensify these pressures. For one thing, the coercive force of non-criminal sanctions is greatly increased. As society’s work is more and more done by organizations, rather than individuals, the possibly unfavorable impressions of employers and potential employers become more important. The ill will of public officials was probably a matter of small concern to a frontiersman. It is a different matter in a society in which an increasing number of things cannot be done without some kind of license or permit. As records are more and more duplicated, exchanged, and centralized, the effect of one unfavorable report is broadened. As records become more permanent, the effect of one unfavorable report is extended in time. A few generations ago, a person who had been in fairly serious trouble could go west and start a new life. Today the student who gets into one scrape with school authorities because he is rebelling against authority, the man fired from one job because he could not get along with his immediate superior, the man who fails to pay one bill because he thought it was not justly owing, the man arrested by mistake and acquitted, or released without prosecution, may each have a record capable of dogging him for the rest of his life. When a choice must be made between two persons of apparently equal qualifications, the fact that one has some unfavorable or question-raising mark on his record may be trivial, but it can still make the difference if the other has none. Packard projects these trends to their logical conclusion and suggests the possibility of a giant memory machine into which all the data gathered about people from all sources might be fed and which could produce a total dossier on any individual at the push of a button.

There are two preliminary questions with which Packard and Brenton do not deal. One is how much privacy is really possible in a high-population, highly organized, highly interdependent society; not as much, certainly, as in a low-population, individualistic, loosely structured one. The other is whether the new society may be gradually molding a new kind of human being, one who, ultimately, may cease to desire or value privacy. It is discouraging to note how quickly people become inured and indifferent to practices, such as “loyalty” oaths and “security” checks, which they, or other persons like themselves, vigorously resented when originally introduced.8 The fact that these two books have been produced almost simultaneously and that one of them, Packard’s, has become a best-seller, seems indicative of some current concern, however.

Assuming that something substantial can be saved, and that we wish to save as much as we can, it is obvious that we are confronted with a computer-

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8 Brenton takes specific note of this increasing callousness and illustrates it with an almost incredible story, for which, unfortunately, he gives no source other than an unnamed “New York sociologist.” Behavioral scientists are said to have secreted tiny microphone transmitters in the bedrooms of married couples in a college housing project to learn “just how similar people are in their lovemaking.” When advised of what had been done and promised anonymity, the couples made no protest and unanimously gave their permission for researchers’ use of the tapes. BRENTON, THE PRIVACY INVADERS 227 (1964).
age problem and that the legal tools and concepts we have available for dealing with it are more contemporary with the horse and buggy. When the Bill of Rights was adopted, the fourth amendment provision that “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable search and seizure, shall not be violated . . .,” together with the fifth amendment provision against being compelled to be a witness against oneself, probably gave rather adequate protection against the governmental invasions of privacy which could then be foreseen. If these were viewed as setting up a constitutionally protected area which ought not to be open for invasion simply because new and unforeseen techniques are available with which to do so, the interpretation of these provisions could perhaps be expanded as needs change. Some of the theoretical groundwork for such a development has indeed been laid. Unfortunately the electronic age of constitutional law was sent off to a bad start when, to uphold wiretapping, the Court gave a narrow, literal and historically fixed meaning to the word “search.” And later when it expanded the word to include electronic eavesdropping, the Court limited this to situations in which the placing of the listening device involved some technical trespass—a limitation which technological advances are rapidly outrunning and which seems, in any case, somewhat irrelevant to the problem at hand. Signs of the birth of a more flexible and imaginative approach are appearing, however, in other courts and in minority opinions. It should be noted that most of the practices which Packard writes about are not used primarily, if at all, for the purpose of obtaining evidence to be produced in court. Accordingly, if the fourth amendment is to give effective protection against them, sanctions other than the exclusionary rule will have to be found. Significantly, the ninth circuit has recently held that invasions of privacy by state officers acting under color of their authority may be actionable under the federal civil rights statutes.

During the formative period of the common law there were probably few private invasions of privacy which could not be adequately treated under the law of trespass, the law of assault, or the law of defamation. Today that is

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9 “The security of one's privacy against arbitrary intrusion by the police—which is at the core of the Fourth Amendment—is basic to a free society. It is therefore implicit in 'the concept of ordered liberty' and as such enforceable against the States through the Due Process Clause.” Wolf v. Colorado, 338 U.S. 25, 27-28 (1949). “The right to privacy, no less important than any other carefully and particularly reserved to the people. . . .” Mapp v. Ohio, 367 U.S. 643, 656 (1961). The fourth and fifth amendments, “intertwined as they are and expressing as they do supplementing phases of the same constitutional purpose—to maintain inviolate large areas of personal privacy.” Feldman v. United States, 322 U.S. 487, 489-490 (1944).

10 Olmstead v. United States, 277 U.S. 438 (1928). Compare “In every day talk, as of 1789 or now, a man 'searches' when he looks or listens.” United States v. On Lee, 193 F.2d 306, 313 (2d Cir. 1951) (Frank, J., dissenting), aff'd, 343 U.S. 747 (1952).


14 York v. Story, 324 F.2d 450 (9th Cir. 1963).
very far from being the case. Over the course of several generations, and under
the stimulus of the brilliant pioneering work of Warren and Brandeis,15 our
law has managed to give birth to a "right of privacy" which gives some pro-
tection against the tendency of the press to seize upon private lives and convert
them into merchandise to be sold to seekers of vicarious thrills.16 This, however,
covers only one small corner of the problem dealt with by Packard and Brenton.
It is probably not even the most significant corner, nor the one which affects
the most people.

There have been other recent straws in the wind. One case of very extreme
surveillance has been held actionable as an intentional infliction of mental
suffering.17 The "bugging" of a hospital room to obtain evidence with which
to defend an action brought by the patient has been held actionable as an
invasion of privacy.18 In some states, some forms of surveillance may violate
"peeping tom" statutes and at least one court has held that if they do they
may become the basis for a civil suit.19 But to build a law of privacy, in the
broader sense, by means of such gradual and piecemeal accretions would be
a very long and slow process. Such a process is not well suited to a problem
which has been drastically changed by recent inventions and may be drastically
changed again tomorrow by another. The subject cries out for comprehensive
public debate and legislative treatment. So far, with the single exception of
wiretapping, it has scarcely been broached.

The trouble is that the impulse for invading privacy and especially the
technology for doing so, have been developing at a far more rapid rate than
has the law of privacy protection. Like the Red Queen, if we want to be able to
stay in the same place we shall have to run faster.

Laurent B. Frantz*

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16 However, other related, but by no means identical, torts have been developing
under the same name. Prosser, Privacy, 48 CALIF. L. REV. 383 (1960). See especially
the "intrusion" cases. Id. at 389-392.
The Georgia courts, which were first to recognize the right of privacy in Pavesich v. New
England Life Ins. Co., 122 Ga. 190, 50 S.E. 68 (1905), seem to be continuing to pioneer
the field.
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