

BOOK REVIEW

Guenther Doeker-Mach and Klaus A. Ziegert (eds.), *Law, Legal Culture and Politics in the Twenty First Century. Essays in Honour of Alice Erh-Soon Tay*. Stuttgart: Franz Steiner Verlag. 2004. 527 pp.

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This *Festschrift* is a collection of essays on comparative private and comparative public law, written in honour of the work of Alice Erh-Soon Tay upon the occasion of her retirement from the Sydney Law School, University of Sydney. A special focus is on the comparative law of human rights and comparative constitutional analysis. The book also contains cross-cultural contributions to comparative private law and constitutional law in the form of in-depth studies of legal cultures.

Murray Gleeson, Chief Justice of the High Court of Australia, writes a tribute to Professor Erh-Soon Tay in which he emphasizes her theoretical and practical interest in human rights, for which her appointment as President of the Human Rights and Equal Opportunity Commission of Australia is testimony (489 et seq.). Kim Santow, Chancellor of the University of Sydney and Judge of the Court of Appeal, Supreme Court of New South Wales, relates in a Preface that Alice Tay as a young girl under the Japanese occupation of Singapore experienced what suppression and disempowerment meant. A longer biographical sketch follows later in the book, written by Dr. Julia Horne of the School of Philosophical and Historical Inquiry of the University of Sydney (491–508). The reports on Alice Tay's legal studies as an exchange scholar in the Soviet Union of 1965-66 and – being fluent in Russian and Chinese – her work on Chinese law and legal culture make fascinating reading. Having published on Chinese legal systems previously, and in 1981 visiting Maoist China as someone who was no-one's research assistant but her own, she later said that “they had never had anybody like me before” (498).

Part I concentrates on common law themes. Saul Fridman, Senior Lecturer at the Sydney Law School, contributes an article on comparative insolvency administration pointing, among other topics, to the interesting issue of abuse of voluntary insolvency administration and the judicial control thereof (17–42: 34 et

seq.). The broader aspects of the conflict between expediency and legal security and control are not difficult to be ascertained. W.M.C Gummow, Justice of the High Court of Australia, compares the activities and jurisprudential tendencies of the High Court of Australia and the House of Lords during the entire century 1903-2003. J.A. Jolowicz, Professor Emeritus at the University of Cambridge, discusses similarities and differences between civil procedure systems in the Common and Civil (primarily French) law. He states that there have been slow approaches from both sides to fact finding in 'adversary' common law and 'inquisitorial' civil law systems (55-78: 77 et seq.). Hiroshi Matsuo, of Keio University School of Law, Tokyo, deals with the receptions that led to present Japanese law (79-88). Ivan Shearer, Professor of International Law at Sydney Law School, takes up the important and in many countries controversial issue of how human rights can be safeguarded in an age of terrorism. The author's treatment of the subject is comparative (89-105). Years ago Joseph W. Bishop of Yale Law School engaged in similar studies with regard to terrorist attacks in Northern Ireland, of the Palestine Liberation Organisation, and in connection with Basque claims of independence,.

Part II has as headline and common denominator Philosophy of Law and Social Philosophy. Christopher Birch, a barrister in Sydney, discusses a conflict between the demand for justice to be done for torts on the one hand, and time-related limits on the identification of damaged persons on the other. Wrongful life is one example; a claim for indemnification raised by African Americans for the wrongs inflicted upon their enslaved ancestors is another. Restitution demanded by descendants of persons displaced or expelled in a war is a presently much debated problem. The author gives cautious advice: there are serious obstacles to showing sufferings because of such wrongs (109-126). The subject borders on two much discussed subjects of legal anthropology, the 'national trauma issue' and the anthropology of political apologies.

Tom Campbell, of Charles Sturt University, Canberra, contributes a study of collective rights and individual interests (127-147). The article is written at a rather conceptual level. More examples would strengthen the author's argumentation. Participation in a culture, clean air, having 'roots' in history, *Heimatrecht*, traditional knowledge, genetic resources – the world is full of what may be collective rights. Roland Drago, Secrétaire de l'Académie internationale de droit comparé, Membre de l'Institut de France, raises the subject, increasingly relevant for modern tort laws, of 'Le principe de précaution' (148-152). Thomas M.J. Möllers has recently worked on this. Would the duty of the victim to keep the damage as low as feasible count as a precautionary measure? Jennifer Hill,

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Professor of Corporate Law at Sydney Law School, asks why the privatization of Russian corporate business failed, so that it is hard to count modern Russia among the nations that care about good corporate governance. Her answer is that the Russian infrastructure had not been sufficiently strengthened before full privatization of her assets was attempted (153–164). Part of this lack of an infrastructure may be attributable to antitrust measures. ‘Antitrust à la Russe’ consists in banishment to Siberia of those convicted of anti-competition activities and the neglect of health care of prisoners with ensuing hunger strikes. To be blamed are the shock therapists of 1990. Whether the international antitrust system will help remains to be seen. Michael Kirby, Justice of the High Court of Australia, dresses his title in a question: “The Future of Human Rights – Does It Have One?”. He answers in the affirmative, pointing to the UN and to personalities like Alice Erh-Soon Tay (165–175). Karin Lemerrier of Sydney Law School presents an in-depth investigation of the allegedly self-referential and paradoxical nature of legal systems (176–196). Historically, Lemerrier works with the research results of van Caeneghem, and philosophically with Luhmann’s studies in synchrony and diachrony (in F. de Saussure’s terminology). The slippery slope is Luhmann’s neglected distinction between closed and open systems (Canaris 1969). Aleksander Peczenik, Professor of Law and Philosophy at Lund University, offers a challenging defence of coherence, as anti-complex, and of legitimacy of juristic theory based on political legitimacy (197–211). Peczenik also criticizes Habermas’ procedural justice as lacking substantive principles. This argument is an interesting combination of epistemological substantivity and a political realism that draws its strength from democratic politics. Robert S. Summers, Professor of Law at Cornell University, proposes a straightforward methodological theory on the form and content of a precedent, leaving aside dozens of older texts and theories, and partly inventing a new, see-it-fresh vocabulary. Attempts such as this are in demand and may become influential for the jurisprudence of the courts of the European Union where the common law tradition, and civil code rule interpretation and application meet (212–224).

Part III is devoted to legal culture and the law. Albert H. Y. Chen, Professor of Law at the University of Hong Kong, gives an account of socio-legal thought and legal modernization in contemporary China, by taking the work of a single scholar, Professor Zhu Suli, currently Dean of the School of Law at Peking University, as an example *pars pro toto* (227–249). The author introduces Dean Zhu’s general orientation to jurisprudence, his thought on law and China’s modernization, in particular his scholarship on the judicial system, and the relationship between formal and informal law in China, and provides an overall evaluation of Zhu’s work including both its contribution and its limitations. Zhu is

described as a committed member of the Chinese Communist Party and an adherent to historical materialism on the one hand, and a believer in the market and Hayek's 'spontaneous order', in Foucault's understanding of power/knowledge, and in Posner's pragmatic and economic approach to jurisprudence on the other. Albert H. Y. Chen has some reservations concerning the workability of this eclectic mix of conservatism, pragmatism, economic analysis of law, postmodernism, nationalism, anti-'Western ethnocentrism', and Marxist materialism. This instructive and revealing chapter stimulates thinking about whether Dean Zhu's 'mix' is not a mix but the combination and mutual reinforcement of various strands of one and the same mind-set: value-freedom from, instead of value-directed freedom to. Jianfu Chen, Professor of Law at La Trobe University, Melbourne, expresses similarly sceptical ideas under the speaking title: "To Have the Cake and Eat it, Too: China and the Rule of Law" (250–272). Edward McWhinney, who among many positions is a former president of the Institut de Droit International, reports on pending issues and the present state of the "Sysiphean Labours of the International Law Commission" (the subtitle of his contribution) in codifying international law in an era of clashing civilizations and legal cultures (273–295). The article makes an ideal introduction to the difficulties of international law, but also to those which the study of legal cultures has presently to cope with. J. Eric Smithburn, Professor of Law at the University of Notre Dame Indiana, takes up a special topic in Hague Conventions law, the fugitive disentitlement doctrine, as an exercise of appellate court authority which can be used to dismiss the appeal of a convicted criminal defendant who became a fugitive while the appeal was pending (296–323). The conclusion is that courts should recognize that in the application of the fugitive disentitlement doctrine, cases brought under the Hague Convention/ICARA are to be analyzed differently to account for the due process interests at stake. Klaus A. Ziegert, Professor of Jurisprudence at the Sydney Law School, discusses the ideas of the rule of law in view of changing norms in the work of the Centre of Asian and Pacific Law in the University of Sydney. He thinks, for example, that it is only a matter of time before an international legal communication structure will be too strong to be denied its operative centre, that is, independent courts applying a democratic constitution and global law, in Vietnam (324–354: 353). Charles de Gaulle once said (probably with a view to Germany, but expressed as a general statement), that a culture will never change its mode of thought. Reading Albert H. Y. Chen's and Klaus A. Ziegert's predictions for Eastern cultures, one may well ask what is stronger: lapse of time or cultural mind-set?

Part IV presents studies on Asian Pacific Legal Cultures with a special focus on comparative constitutionalism. Margaret Allars, Professor of Public Law at the

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Sydney Law writes on the borrowing from foreign legal systems, for example of the European notion of proportionality, advanced in Peter Lerche's idea which has had worldwide influence (359–385, referring to Lerche 1961). I remember well that Peter Lerche, when in the process of writing his habilitation paper on *Übermaß and Verfassungsrecht* in Munich, complained that we civil lawyers had our established system of law dating back to the Roman Republic, but that he was bound to look around for big stones to pick up and throw into the morass in the hope of obtaining footholds to step on for getting ahead in public law. Han Depei, Dean Emeritus of Wuhan University Law School, addresses the problem of regional conflict of laws within China and proposes a set of nationally unified rules for the purpose (386–388). Guenther Doeker-Mach, Professor Emeritus of Law and Politics at the Free University of Berlin, reflects on the past and the future of comparative constitutional law which he deems to be a neglected field (389–407). As regards Germany, Doeker-Mach finds one part reason among others for this retarded development in the lasting influence of professorial Nazi ideology in post-WWII Germany, e.g., as represented by Carl Schmitt and his students (who are now professors). This point can indeed be made. However, there are influential 'returnees' (such as Doeker-Mach himself), and there is a new generation of teachers and researchers of comparative constitutional law and political theory who are certainly free from nationalist and national socialist traditions: Erich Kaufmann, Erich Cordt, H. J. Wolff, F.W. Scharpf, J.A. Frowein, H. Ehmke, G. Dürig, O. Bachof, Hermann Mosler, J. Haverkate, and O. Lepsius, to name just a few, represent that type of comparative constitutional teacher and researcher with a broad international view and political-theoretical background which the author favours.

Hoang Van Hao, Distinguished University Professor, Ho Chi Minh Academy of Politics, Hanoi, unfolds the role of the issue of human rights and rights of citizens in the constitution of Vietnam (408–413). Tommy Koh, Professor of Law at the National University of Singapore, stresses the strong bond of interdependence between Australia and East Asia (414–417). Adam Lopatka, Professor of Law at the University of Warsaw, deals with cultural diversity and cultural human rights in a pronouncedly positive way: he argues that cultural identity and the peculiarity of every culture should be guaranteed (418–423). Gabriel A. Moens, Professor of Law at the University of Notre Dame Australia, discusses the subsidiarity principle in European Union law and the Irish abortion issue, warning against an emasculation of the European subsidiarity principle by a disregard of the EU Member States' pursuit of their own vision of moral excellence (424–438). Cao Duc Thai, Chairperson of the Scientific Counsel of Ho Chi Minh Academy of Politics, Hanoi, traces Vietnam's own issues concerning human rights. "Like all

other countries, Vietnam is also facing its own challenges on human rights” (439–452: 449). Correct as this is, the specificity of each national situation should not conceal the frequently global nature of human rights.

Wang Gungwu, Professor, East Asian Institute, National University of Singapore, describes “China’s Long Road to Sovereignty” (453–464). It is of great interest that China is founding its claim to rule over Hong Kong, Macao, (not mentioned: Tibet) and Taiwan and to subject these countries to the Chinese rule of the mainland on the concept of sovereignty. However, for the inventors of the concept of sovereignty, William of Orange, Jean Bodin, and, for international use, Hugo Grotius, sovereignty meant something quite different. It was not a title to possession of something, e.g., a country, but independence from a larger imperial structure such as the Roman-German Empire or the Catholic Church, and, particularly with Grotius, the right and duty of cooperation in peace, harmony and good faith (*fides*) between independent governments. Would China heed what sovereignty historically was conceived for, she would have to entertain peaceful, cooperative, and good faith relations on equal terms between herself, and Hong Kong, Macao, Tibet, and Taiwan R.o.C. The difference between the European meaning of sovereignty and its near-opposite meaning in China is not easy to explain, and here it must remain a conjecture that it is the Chinese self-understanding of being the country of the middle that turns the concept of sovereignty into a title for extension. Finally, Peter Wesley-Smith, Professor of Law, University of Hong Kong, comments on judges and judicial power under the Hong Kong Basic Law (465–486).

The *Festschrift* for Alice Erh-Soon Tay offers a wealth of historical and up-to-date insights into law, legal culture, comparison of laws, legal philosophy, and politics, with special regard to Asian and Pacific legal systems.

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