



January 1978

Book Review

Recommended Citation

Book Review, 32 Sw L.J. 707 (1978)

<https://scholar.smu.edu/smulr/vol32/iss2/7>

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BOOK REVIEW

LAW AND DEVELOPMENT IN LATIN AMERICA: A CASEBOOK. BY KENNETH L. KARST AND KEITH S. ROSENN. Berkeley: University of California Press. 1975. Pp. 738. Index. \$32.50.

The typical process for turning out a book review goes something like this—the reviewer reads, or skims, the book once; then, in a couple of hours he dashes off an opinion on a work which may have taken years to write. Although this procedure may be acceptable for some kinds of literature, I question its suitability where a casebook or a legal treatise is concerned. Such a book needs to be lived with, worked with, and digested over a period of time. Once its pages have become slightly dog-eared, previously unseen facets may be revealed; then one can discuss it realistically.

For two years I have used *Law and Development in Latin America* as a research and teaching tool for my course, International Economic Development Law. During this time, I have also discovered the utility of portions of the book for scholars of contracts, torts, and tax.

The authors have taken an unorthodox approach to the law in this work. First, they have compiled a veritable gold mine of Latin American judicial decisions. The case method of teaching legal concepts is almost unheard of in Latin America. Rather, an exposition by a Latin American scholar on a particular legal question would most likely consist of a quotation from the relevant section of the civil code followed by the writer's philosophical ideas about how the section should be interpreted. Should a case be mentioned at all, it is likely that only its holding would be given. The Latin American jurist will justify this methodology by explaining that his civil law system is derived from Roman law, that the doctrine of *stare decisis* is usually not followed in the civil law, and that judicial opinions are of little importance as a source of law in that system. In addition, the indexing of cases is so inadequate that it is exceedingly difficult to locate relevant decisions.

Professors Karst and Rosenn are fully aware of the Latin American attitude toward case law, yet they have opted to set forth the full texts of a multitude of cases. One may speculate that these scholars, as products of the American system of legal education, cannot be satisfied with merely knowing what the general rule of law is—they want to see how it works in practice. By utilizing the case method, even for these civil law countries, the authors have brought the reader out of the realm of theoretical abstraction to the concrete reality of individual litigation. Procedural remedies, such as "amparo" and "writs of security," become meaningful to the United States reader as they are illustrated in the factual contexts of the cases included. The concern for practical experience is one of the virtues of the American legal mentality. These writers have demonstrated in this book that such pragmatic orientation can be helpful in analyzing legal systems in different cultures.

Also unorthodox is the interweaving of legal norms and economic policy in this work. Traditionally, lawyers in less developed countries have not played a particularly significant role in the structuring of laws to promote economic growth or distributive justice. With their education heavily stressing private law and private rights, the legal fraternity tends to concern itself with ensuring that changes in existing legal structures do not unduly infringe upon the rights of their private clients.

Consequently, many recent legislative innovations in Latin America have come from economists, military officers, or technicians, such as engineers or agronomists. One might ask, has the lawyer become so engrossed in looking backwards at what courts, legislatures, and administrators have done that he is unable to participate creatively in the structuring of new laws to foster development or promote fairness? Has his education been too narrow to permit him to see the big picture? Is the lawyer merely a scribe who converts into written form the decisions previously made by the politicians and the bureaucrats? Is law itself simply a passive instrument intended to articulate the wishes of the rulers? Or do lawyers and the law have some active role to play in the development process?

This writer believes the answer to the last question is clearly, "yes." Lawyers in the developing nations need to perceive themselves as social engineers, involved in the generation of capital, the allocation of resources, and the distribution of wealth, as well as other human values. But lawyers cannot properly perform these tasks unless they comprehend the basic economic, commercial, and sociological facts underlying the laws. Most graduates of law schools in Latin America do not have a workable knowledge of their own tax structure; few lawyers have been exposed to basic accounting principles. Even Brazil, which has been very innovative in tax, corporate, and securities legislation, continues to graduate attorneys with little or no knowledge in these fields. If a government attorney does not comprehend the cost of authorizing a multinational corporation to take accelerated depreciation, that country may subsequently believe itself exploited by the foreign company, when, in fact, the nation's problem stemmed from the failure of its lawyer to grasp the financial consequences of the legal norm applied.

In the Karst-Rosenn book explorations of legal issues are preceded by an economic analysis. The effective integration of law and economics makes this work invaluable to any lawyer in a developing country who wishes to discover precisely how he may contribute to the modernization of his own nation.

The first third of the book is devoted to a historical analysis of Latin American legal institutions and the role of the courts. The development of the law is traced from its Roman origins through the Portuguese and Spanish heritage to the present day structures. Sensitive to the close link between law and culture, the authors have included an excellent discussion of certain key elements: idealism, paternalism, legalism, formalism, and corruption. One cannot observe the Latin American legal scene without being impressed by the vast distance between the formal prescriptions (codes, legislation,

court decisions) and the effective authority which governs the masses. Karst and Rosenn refer to this phenomenon as the "lack of penetration" of the formal legal system and go on to describe the informal normative structures which actually control the slum dwellers in cities such as Caracas.

A major portion of this background material concentrates on constitutional law. The American reader will be introduced to a number of concepts which may be new to him: the "popular action"; the "state of seige"; "amparo"; and "habeas corpus" as applied in a non-common-law nation. As one ponders these cases, disturbing questions arise about the efficacy of a written constitution in protecting basic human liberties.

Turning more specifically to developmental aspects of the law, the authors have intentionally excluded those subjects which tend to stress economic growth, such as investment incentives, international trade, and economic integration. Rather, they have elected to focus on three questions of distributive justice: agrarian reform, urban squatters, and inflation.

The almost 200-page chapter on agrarian reform is a detailed exploration of the legal and economic problems, ranging from what type of lands should be taken, through how much compensation should be paid, to how redistributed lands should be supervised. The absence of easy answers becomes obvious. If landowners are paid the full value of their property, the government treasury will not have sufficient funds to carry out any meaningful agrarian reform. If the property is simply confiscated, then persons with capital will be reluctant to make any new investments in the economy.

The contrast between the American and Latin American approach to private property rights is apparent. The United States Constitution has been strictly construed to protect the rights of the private property holder. In contrast, under many Latin American constitutions the rights of private owners may be subordinated to the needs of society. This difference in values explains why Latin American nations have justified payments for expropriated property in amounts less than the current fair market value. Examples include payments in long term bonds insufficiently indexed to compensate for inflation; payments based on the tax assessed value of property; or payments made in currency which has substantially depreciated since the date of the expropriation decree. Such expropriations may occur whenever a Latin American government needs to obtain large tracts of land to build infrastructure projects, such as dams and roads, to achieve agrarian reform, or to manage urban development.

With our present problem of inflation, Americans would do well to read the chapter on inflation and ponder the Brazilian solution of "monetary correction." With increasing frequency, tax professors are complaining about the distorting effects of inflation on the American tax structure. They might profit from the study of the impact of a far worse inflation on the Brazilian tax system and the legal machinery that nation has devised to cope with this problem.

Contract professors, in thinking about the doctrine of impossibility, could note the Brazilian courts' uses of the doctrine of "imprevisión," or unforeseeability, to adjust the price in construction contracts. If United States

inflation were to become sufficiently severe, would our courts ever invoke the doctrine of impossibility to effect a similar result?

In explaining consideration, it would be instructive to mention the Chilean approach to the idea of a bargained-for exchange. American law requires consideration or a substitute therefor, but generally will not inquire into its adequacy. In contrast, no consideration is necessary in Chile or other civil law countries. Yet, in Chile a contract may be avoided on the ground of "lesion enorme" by the purchaser if the property is worth less than one half of the purchase price. Alternatively, the contract may be canceled by the seller if the property is worth more than twice the contract price. Hence, although consideration is not required, Chilean law may void a contract if what is exchanged is of inadequate value.

Scholars of torts and compensation systems will find the material on tort recoveries and the "adaptable debt" theory a source for stimulating questions. Would the Chilean system of pensions or the Brazilian system of annuities be preferable to our lump sum recoveries? Should the defendant be allowed to reduce or terminate his payments if the plaintiff recuperates? Is our lump sum system unduly speculative when it tries to compute losses of future earnings? How should a pension or an annuity system of damages deal with the problem of inflation?

As should now be apparent, this is a book which can be used and enjoyed by a wide variety of lawyers and scholars. Certainly, anyone interested in Latin American history, politics, or law should read it. Likewise, the volume contains sufficient basic materials on Latin American civil law to be used as a basic text in a comparative law course. Finally, the book is essential for those concerned with economic development and distributive justice in the third world.

*Beverly May Carl**

* B.S.L., J.D., University of Southern California; LL.M., Yale University. Professor of Law, Southern Methodist University.