

## Comptes rendus — Book Reviews

Robert Badinter, ed. — *Une autre justice, 1789-1799. Contributions à l'histoire de la justice sous la Révolution française*. Paris: Fayard, 1989. Pp. 406.

At a moment when revisionist historiography has come perilously close to reducing the history of the French Revolution to a narrow teleological problem of the Terror, this collection of nineteen essays by eminent historians and practitioners of the law, edited and eloquently introduced by Robert Badinter, comes as a welcome dyspeptic. *Une autre justice* brings together new research by legal specialists to offer a broader scholarly public a provocative reassessment of the contribution of the French Revolution of 1789-1799 to modern French legal theory and practice.

Standard legal histories depict the revolutionary period as an “intermediary period” or “parenthesis” between the collapse of the legal system of the Old Regime in 1789 and the promulgation of the *Civil Code* in 1804. Moreover, what little attention has been devoted to the legal history of the Revolution has focused almost exclusively upon the political aspects of the law, and particularly the Revolutionary Tribunals of the Terror. The essays presented in this volume go a good distance towards redressing this situation. They share two common objectives: 1) to reveal the theoretical and institutional creativity of the decade 1789-1799 in shaping all aspects of modern French legal theory and practice, from the civil to the administrative; 2) and as Henri Dontenville writes, to reconstruct

la justice au quotidien... trop souvent entrevue, et de façon fâcheusement réductrice, à travers le prisme d'une justice déformée : le tribunal révolutionnaire (347).

The first part of this book examines the intellectual and theoretical turbulence of the legal world in the closing decades of the Old Regime. Nicole Castan explores the evolution of eighteenth-century theories of criminal procedure while Arlette LeBigre assesses the near universal demands for legal reforms such as the suppression of the seigniorial courts, corporal punishment, and the *lettres de cachet* expressed in the *cahiers de doléances*. Jean-Pierre Royer reconstructs the Constituent Assembly's suspicion of judicial authority and utopian pursuit of laws so ideally formulated as to require no special interpreters.

Part two focuses on criminal justice in a series of exceptionally fascinating essays which together form the best section of the book. Here, we learn from Lascoumes and Poncelet that the first comprehensive modern French law code was not the *Civil Code* of 1804, but rather the *Penal Code* of 1791. Further, following Foucault, they advance the provocative thesis that the main preoccupation of the *Penal Code* was not prevention of violence against persons or property, but rather the prevention of political crimes against the state. The penitentiary system, however imperfectly realized, was the single most important innovation of the revolutionary penal system. Following the *Declaration of the Rights of Man*, the deprivation of liberty, rather than bodily pain, became the dominant form of punishment. Further, as

René Martinage shows, the purpose of punishment also shifted during the revolutionary period from retaliation to reform. Bernard Schnapper offers a reassessment of the criminal jury system. Arguing that the jury system has received unduly harsh press as a consequence of its corruption during the Terror, Schnapper shows how the new juries created in 1791 were designed to embody the principle of the "sovereignty of the nation" and, in reality, actually did democratize the exercise of justice. A fascinating contribution by Martineau on the uses and abuses of the new criminal and revolutionary tribunals to prosecute accused grain hoarders during the Terror offers perhaps the most vivid reconstruction to date of how the legal system actually functioned during the Terror, for whom, and towards what ends. It is a *tour de force*.

Civil and administrative law also underwent radical changes. While the revolutionary government has recently been depicted as having conducted an unmitigated assault upon private life, Commaille's work on the family courts suggests that a more complex view of revolutionary reordering of the relationship between public authority and private life may be in order. The creation of the family courts, Commaille argues, must be interpreted in the context of destruction of the patriarchal tyranny of the *lettre de cachet*. Far from representing a further intrusion of the State into private life, the family tribunals are better understood as an effort to resocialize and democratize family law, encouraging mediation and conciliation between family members rather than imposition of paternal will. Indeed, the theme of conciliation runs throughout these studies of revolutionary civil law. The French Justices of the Peace, as Léonnet shows, were required to hold a *bureau de conciliation* in order to attempt arbitrated resolutions to all civil cases before allowing them to go into litigation. Further, despite the relentless parliamentary denunciations of particularism, some of the more effective special courts of the Old Regime, for example, the tribunals of commerce (formerly the *consulaires*), were, in fact, retained by the revolutionary legislators. And Halperin's essay on the *Tribunal de Cassation* (the Court of Appeals) shows that despite the desire to limit judicial discretionary powers, the legislature still recognized the need for a special body to "faire parler la loi", and how easily the official mandate to "apply the law" became, in reality, an opportunity to interpret it. The result, Halperin demonstrates, was that despite the utopian claims that the meaning of the law was transparently self-evident, the revolutionary period, in fact, witnessed the emergence of a significant new body of jurisprudence.

The Revolution, however, was a disaster for administrative law, as the contributions by Monnier and Thuillier detail. Here, suspicion of judicial independence and the decentralization of the functions of the former royal Council of State led to a collapse of judicial oversight of the national administrations, with devastating effects for State finances in particular. Corruption and arbitrary authority ran rampant. It would take the Napoleonic recentralization of the administration to restore order to this area of the law.

Finally, the suppression of the *parlements* and the reorganization of the court system precipitated nothing less than a social revolution within the legal world. Rather than remake their careers within the new court system, the venal magistrates of the Old Regime withdrew from their duties. As contributions by Dontenwille and Gazzangia show, the judges of the new tribunals were drawn from the former underclass of the legal world, the *avocats*. The revolution within the judicial system was indeed a "revolution of lawyers". Boedel's essay on judicial costumes shows how the judicial profession recast itself in the new egalitarian mold, adopting the somber black uniform of the deputies of the third estate, albeit with the addition of a plume.

A collection of essays as diverse and complex as these would have benefited from a conclusion. Nonetheless, taken as a whole, they make resoundingly clear that the positive contributions of the revolutionary decade 1789-1799 to the development of modern French legal theory and practice have been greatly underestimated and underexplored. Having rescued revolutionary legal history from the narrow lens of the Terror and restored to it much of its complexity and richness, a key interpretive problem remains: how can the legal Terror be reintegrated into this new, more positive assessment of revolutionary law? Interesting directions for such a project are suggested by Nicole Castan's study of criminal procedure along with Schnapper's work on the jury system, Martineau's work on the Terror, and Halperin's essay on appellate law and jurisprudence. Though far from conclusive, this collection is a major achievement and a welcome provocation to further research.

Carla Hesse

*University of California, Berkeley*

\*\*\*

Adam Bunnell — *Before Infallibility: Liberal Catholicism in Biedermeier Vienna*. Rutherford, Madison and Teaneck: Fairleigh Dickinson University Press; London and Toronto: Associated University Presses, 1989. Pp. 239.

The title of this study does not do full justice to the coverage that it provides of the ideas and aims of the Viennese Liberal Catholics in the early and mid-nineteenth century. The Biedermeier era extended from about 1820 to the Vienna revolution of March 1848, but the author also treats the Liberal Catholics' activities during the abortive constitutional experiment which followed it. He then summarizes the later careers of their leading personalities after the monarchy reconquered Vienna in October of the revolutionary year.

Still, one can understand why Bunnell chose his title. The Liberal Catholics had come to maturity in the Biedermeier period. This was a time of ultra-conservative government, bureaucratic regimentation and police snooping. The monarchy insisted on retaining most of the controls that Emperor Joseph II (1780-1790) had imposed on the Catholic church: they included the right to select the bishops, to regulate their relations with Rome, to close religious houses and to dictate the clergy's livery, inclusive of their footwear. The lower clergy, especially those of its members affected by the post-1815 Catholic revival in Vienna, were often offended and frustrated by the Josephist state-church system, feelings which the popes and Roman Curia shared with them. But the bishops, governmental appointees yet apparently men of correct lives, appeared to believe that the advantages which accrued to the church from the existing arrangements outweighed the disadvantages to it. Consequently, some activist priests were eager, in the spring and summer of 1848, to bring about liberal reforms in the church itself as well as its liberation from the bureaucratic monarchical state.

For the most part, the author focuses his attention on two close friends, Anton Gunther (1783-1863) and Johann Emmanuel Veith (1787-1876). Gunther was undoubtedly the most gifted theologian and Veith the most impressive preacher in the Austrian Catholic church of the nineteenth century. Each was a disciple of Clement Hofbauer (1751-1820), the noted Redemptorist homilist, who had done much to