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### LAFRANCE, Guy, éd., *Éthique et droits fondamentaux - Ethics and Basic Rights*

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## recensions

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**Éthique et droits fondamentaux — Ethics and Basic Rights**, edited by Guy Lafrance. Ottawa, Les Presses de l'Université d'Ottawa, 1989. 322 pages (15 × 22.5 cm).

This volume consists of papers read at the "International Conference on the Philosophy of Law" held in Ottawa in October 1987. The proposed focus of the conference was "Do fundamental rights require the articulation of a new ethical foundation?", but the articles in this collection deal with a much wider variety of issues that involve in some way what the organizers call "basic rights".

The bilingual and multi-traditional character of this book is, for North American readers especially, one of its principal assets. The contributions are evenly distributed between English (16) and French (17) and, of the articles from the Continent, virtually all are by leading figures in rights theory. Luc Ferry and Michel Villey, in particular, provide the reader with insightful comments on the relations between different theories of rights, and their work serves as an excellent indication of the nature and quality of the research currently being done in Europe.

The papers in this volume, as in the conference, are organized according to six general themes — although some of the articles seem clearly misplaced. Given the number of contributions and the necessary brevity of this review, it would be impossible to discuss them all, but one can provide a short statement of the topics examined.

### I

In Part I, "The Epistemology of Basic Rights", studies by Maurice Cranston and Jan Narveson attempt to clarify and define some of the basic concepts in rights theory. William Conklin considers problems in the nature of constitutional texts which must be resolved if one, he says, is to "address the gap between the theory and practice of constitutional rights" (p. 43). René Sève raises the question of the fundamental character of human rights, an issue that R.G. Frey also deals with in Part IV. Under this rubric we might also add Michel Villey's entertaining analysis of the notion of "basic right" in Part II. The section concludes with Guy Haarscher's argument that nothing can stop the instability of instrumental reason from affecting even the rule of law and rights in the state, and that one must take refuge in a kind of morality which is, ultimately, "rationally unfounded" (p. 49).

Part II, on "History and Theories of Basic Rights", includes articles by Simone Goyard-Fabre on the development of rights since the French declaration of 1789 and by André Robinet on "natural right" in Leibniz. On the same theme one may add two papers from Part III and one from Part IV: Wendy Donner's examination of Gray's account of Mill's right to liberty; David Crossley's discussion of the role of moral language in Bradley's justification of the rights of the State over the individual; and Jim MacAdam's attempt to "work out" H.A. Prichard's view of rights and their consequences in light of Prichard's moral intuitionism.

The issue of "Justice, Equality and Basic Rights" is considered in Part III. Louise Marci-Lacoste provides an analysis of the concept of equality, and Kai Nielsen focuses on the compatibility of equality and self-ownership. Leslie Mulholland turns to Rawls and Kant for insight into the view that every human being has an "innate right" to be a person. More "applied" work on this issue can be found in K. Wendling's Rawlsian contractarian approach to why children and the mentally handicapped should be treated on a par with other human beings.

The papers in Part IV, "Ethical Theories and Basic Rights", come closest to dealing with the proposed theme of the book. Jean-Louis Baudouin asks why bio-ethics so often calls upon the model of basic rights, and suggests that such a move is not necessarily legitimate or even fruitful. Edith Deleury argues in favour of limits on biotechnology, based on the value of the person and on the concept of the law as protector of human dignity. Joseph Pestieau broadly sketches the role of "right" in terms of its function in ethics and economics, and draws a contrast between its role in the West and in China. Roger Lambert appeals to a broad sense of "positive right" (similar to that of idealist political thought) as a right recognized by, and also based on, social behaviour. Such recognition involves moral knowledge and this, he insists, must acquire a more important role than social behaviour for rights to be an adequate expression of the just (p. 206).

André Mineau maintains that fundamental rights at the basis of legal constitutional norms have a two-fold origin — ethical and political — and discusses the implications of such a view. To conclude this section, R.G. Frey argues that if rights are based on agreed principles, they are unnecessary, and if they are not, then appealing to the language of rights will get one no further.

Part V, "Individual Rights and Collective Rights", considers both legal and theoretical approaches to the issue. Gérald-A. Beaudoin and, to a greater degree, Michael Hartney, examine the juridical concept of collective rights. Here one might also include Brian Slattery's discussion (in Part VI) of two possible models of the Canadian Charter of Rights and Freedoms (1982), although Slattery is concerned more about the nature of the Charter than that of human rights.

A philosophical exploration into the nature and origin of collective rights is pursued in the remaining papers of this section. Michael McDonald argues in favour of the existence and value of collective rights as fundamental and irreducible to individual rights. Denise Réaume attempts to make sense of collective rights by reference to "participatory goods", and she refers to the example of language rights in the Canadian Constitution. Wesley Cragg examines the hostility in liberal theory toward collective rights, arguing that there is room in it for recognizing such rights.

The last theme treated in this volume is that of "Culture and Basic Rights". Apart from the presentation by Ernest Caparros of the contribution made by Christianity to fundamental rights, there seems to be no clear focus to this section. Luc Ferry denies the alleged gap or contradiction between negative rights ("droits-libertés") and social rights, and argues that an emphasis on the former would count against the universal character of human rights. Richard Gervais suggests that the widespread interest in natural rights is a result of "a renewed and general awareness of the phenomenon of totalitarianism" (p. 308). Jean Roy favours the modern liberal tendency that asserts the priority of rights over the communitarian view of the priority of the common good, but argues that this need not lead to an incessant proliferation of individual rights nor to a severing of the connection between the good and the right. This section — and the book — concludes with Patrick Fitzgerald's wide-ranging survey of contemporary discussions of rights, focussing in particular on whether there are any human, non-legal rights.

## II

This volume is clearly of use to anyone wishing to have some sense of the breadth of the issues involved in current research on the nature of rights. It also provides readers with an opportunity to see examples of the interesting work being done in Canada — especially on the notion of “collective rights”. Finally, given that the subject matter of this collection touches on both the theoretical and the practical, the reader will be pleased to see that there are a significant number of articles from lawyers.

Despite these features and despite the obvious quality of many of the essays, there are certain limitations to this volume.

The term “basic right” was apparently used by the organizers of the conference and of this collection to indicate a “more appropriate and more supple” notion than that of “human” or “natural rights”. Nonetheless, there is no consistent use of the term in this volume and, in the majority of the papers, the authors employ the more commonly used terms.

One of the selling points of the book would seem, moreover, to be its “international” character. Unfortunately, only nine of the 33 papers come from outside Canada: four from France, two from Belgium, two from the United States and one from Britain. This fault cannot be passed over lightly. Nor are the English-language articles especially representative of what is being done in the English speaking world. One is surprised at the absence of participation from Australia, and the dearth of contributions from the United States and Britain where a good deal of the major work and much of the debate on rights is now taking place. Even if some of this discussion is beginning to sound a bit too familiar, it is unfortunate that figures like Rawls, Nozick, Dworkin, Melden, Finnis, Gewirth, Wasserstrom, McCloskey or Lyons do not find a place among the contributors.

Moreover, while the “European side” of the volume is clearly of interest to North American readers, it is at best representative only of the work being done in France and Belgium. It is also regrettable that there is no mention of the on-going research on rights and law in other European countries — for example, in Switzerland (by Otfried Hoffe), Spain (by Javier Hervada) and Italy (by Norberto Bobbio).

Added to this is the virtual lack of attention accorded to several major traditions of human rights theory. Idealism is mentioned only in historical treatments; Thomist natural law theory (and its modern counterparts in Jacques Maritain or Germain Grisez) is alluded to only twice, and utilitarianism is represented as a live option — and then, indirectly — by only two authors. These lacunae are especially unfortunate as they prevent this volume from serving as a survey of contemporary rights theories.

Finally, the volume would have been much better had the process of selection been somewhat more ruthless. (While the volume claims to be a “selection” of the “best texts” presented at the conference, it contains 33 of 34 papers on the programme.) Some of the papers are clearly tied to what were then current events and will not stand the test of time. Others add little, if anything, new to the discussion of human rights or present, at best, mere accounts rather than defenses of particular positions. In fact, one of the two U.S. contributions — P. Westen’s article on “Consent and the Criminal Law” — is clearly out of place. A short critical introduction would also have been particularly useful, since it would have served to introduce the reader to the problematic and to bring the issues into sharper focus or even into confrontation.

One should not, however, ignore the virtues of this volume, noted earlier, and it should be added that the level of articles is not so technical as to be beyond the reach of senior

undergraduates. Moreover, one can conclude from this collection that the discussion of the nature and origin of rights shows little sign of relenting and many of these papers indicate, perhaps surprisingly, that more attention is being given to the importance, if not the centrality, of collective rights. These considerations, then, warrant its qualified recommendation as an interesting and provocative — though somewhat incomplete — reference book.

William SWEET,  
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Rolf RENDTORFF, **Introduction à l'Ancien Testament**. Traduit de l'allemand par Françoise Smith et Heinz Winkler. Paris, Les Éditions du Cerf, 1989, 526 pages (13,5 × 21 cm).

Ce livre est la traduction d'un original allemand paru en 1983. Une édition anglaise est également parue en 1985. Cette traduction française était donc vivement attendue.

Cette introduction à l'Ancien Testament comprend trois parties: 1- l'histoire d'Israël (pp. 13-131); 2- l'histoire des formes (pp. 133-219); 3- la présentation des livres de l'Ancien Testament (pp. 221-484).

La première partie est remarquablement développée, car l'A. croit que l'intelligence de la Bible suppose nécessairement un minimum de familiarité avec le contexte historique et l'évolution de la société israélite. Par ailleurs, c'est l'Ancien Testament lui-même qui est la principale source de cette histoire d'Israël. Ainsi, l'originalité de cette présentation est dans cette relation de réciprocité qui constitue même, pour R. Rendtorff, le problème fondamental de l'exégèse vétérotestamentaire. Toutefois, cette première partie a ses limites, puisque l'A. ne fait pas véritablement appel aux sources extra-israélites et aux découvertes archéologiques. Dans son étude d'Israël avant la monarchie, il fait maintes fois l'aveu que sa reconstitution historique des faits n'est qu'hypothétique. Mais il en va autrement des débuts de la royauté jusqu'à l'époque de Néhémie, où l'A. nous donne des informations plus sûres. Bien qu'il réserve près de trente pages à la période postexilique, il est dommage qu'il n'en consacre que deux à la période hellénistique. En effet, pour Rendtorff, c'est avec Néhémie que s'achève le récit de l'histoire d'Israël. Ceci donne à réfléchir, écrit-il à la p. 126, sur le sens de l'histoire d'Israël dans les siècles suivants. J'affirmerais plutôt que ceci donne à penser sur la différence du canon fixé par les réformateurs protestants du 16<sup>e</sup> siècle, qui n'inclut pas, entre autres, les livres des Maccabées, le livre du Siracide (voir particulièrement Sir 44-50) et le livre de la Sagesse (voir surtout Sg 10-19).

La deuxième partie nous présente les textes de l'Ancien Testament comme manifestations des divers domaines de la vie israélite. L'attention est principalement portée à l'histoire d'Israël et ses institutions sociales et religieuses. Ainsi, une fois de plus et longtemps après H. Gunkel, le lecteur est entraîné à parcourir différents lieux de vie: la vie familiale, clanique, tribale et communautaire, la vie juridique, le culte, les institutions politiques, la royauté et le prophétisme. Cette deuxième partie se termine par une réflexion sur la «nouvelle assise dans la vie» (*Sitz im Leben*) de cette abondante littérature que forme l'Ancien Testament: la communauté religieuse juive se forgeant un canon d'écrits religieux normatifs. C'est ici que R. Rendtorff se distingue le plus de H. Gunkel, puisqu'il ne se limite plus à l'étude des formes originelles, mais s'intéresse également à la forme achevée des livres bibliques.

Bien sûr, la troisième partie du livre traite davantage de cette question. En effet, celle-ci est influencée par l'approche canonique de B.S. Childs, *An introduction to the Old Testament*