PEACE, ORDER AND GOOD GOVERNMENT. By Peter J. T. O'Hearn, Q.C., Toronto : The MacMillan Company of Canada Limited. 1964 pp. 325. $6.50.

At this juncture of our history, when a reappraisal of the fundamental law of the land is the preoccupation of so many Canadians, Mr. O'Hearn's book is most welcome indeed. As stated in the Introduction, "the principal aim of this book is to propose a renewal, a rebirth, of the constitution of Canada . . . . " (p. 5). The author does not suggest an organization and structure radically different from what now exists since, in his opinion, "there is no need or demand for that" (p. 6). Although this statement might startle a reader who happens to be familiar with some of the views expressed in Quebec, it is good to be aware of such opinions in order to assess the situation realistically. The three main parts of the book are : (1) The Background, (2) The Proposal and (3) The Reasons.

Part I — The Background

In these twenty pages the author asks himself five basic questions : what is a constitution; what is the constitution of Canada; should Canada have a written constitution; what should the constitution contain; what shape should the constitution take. Mr. O'Hearn defines constitution as being "the supreme law of the land defining the fundamentals of government and delimiting the functions of the principal institutions" (p. 11). Canada must have a written constitution "because it is necessary that Canada be a federal state if it is to exist at all" (p. 20). One is reminded here of the purpose of a federal state, as expressed by the Australian author, D. P. O'Connell, when he states that a "Federation is a device for reconciling the separatist impulses of regional communities with the advantages of integration of small areas in a more viable economic and political whole." [1] In so far as the shape of the constitution is concerned, it is intended to be similar to that of a treaty. The name of the constitution "Articles of Confederation" is meant to indicate "that the document so named is the result of agreement, that it represents a consensus of the views of distinct entities, and that these entities, though united, are not swallowed up in the result" (p. 33).

Parts II and III — The Proposal and the Reasons

Part II is the text itself of the proposed constitution and consists of twelve articles subdivided into sections. The full text takes up fifteen pages, about half of the length of the constitution proposed by Faribault and Fowler in their book *Dix Pour Un*. Justifying his short text, the author explains that "a great deal of wordy detail has been cut out without impairing the effect of what remains" (p. 52).

Part III is the major portion of the work and covers some 230 pages.

[1] 1 O'CONNELL, INTERNATIONAL LAW 317 (1965).

It explains the proposed constitution and advances reasons for the various articles and sections. Some of the articles and reasons warrant comment.

Article 1 — Name, Form and Languages

Mr. O'Hearn defines Confederation as "a Union of the Peoples of autonomous Provinces in one Nation with a federal Government" (art. 1(2)). In his justification for the term "nation," he states that "it relates to nations only as the sources of nationality in international law, a neutral sense" (p. 66). If the author means to imply that "nation" is used in a neutral sense in international law, it is difficult to agree. The distinction between "nation" and "state" is well recognized and, I suggest, easily justified, particularly in Canada. The author seems to recognize this himself, since he goes on to say "It does not prejudge whether there is a Canadian nation composed of English-speaking and French-speaking nations...." (p. 66). On the question of official languages (art. 1(3)), French and English may be used not only in Parliament and federal courts but in the legislature and courts of any province. Whereas Faribault and Fowler would limit such right to provinces where French-Canadians constitute at least 20 per cent of the population, Mr. O'Hearn makes this right unconditional. One cannot but admire the high sense of equity and fairness prompting the granting of such right, but one can question the possibility of its practical implementation in all provinces. It is also doubtful that this would necessarily "exorcize the ghosts of separatism and secession" (p. 67).

Article 2 — Citizenship

A novel approach to citizenship is found in article 2. Under this proposal, a person born in Canada would have only a right to become a Canadian. "He would have to take some action to become a citizen...." (p. 69). This, of course, is a departure from the general, accepted rule of *"jus soli"* and could pose some problem.

Article 3 — Parliament

On the Senate, we find one section only. It is certainly an improvement over the present seventeen sections of the B.N.A. Act, in so far as simplicity is concerned. It merely provides that the Senate shall not exceed 105 members and that two-thirds are to be appointed or elected by every province in equal number from each (art. 3(2)). The balance of one-third would be appointed on the basis of various political, economic and cultural interests. The mode of appointment is not spelled out.

Parliament would consist of not less than 250 members and not more than 432 (art. 3(3)). Any larger body is rejected because it does not afford sufficient opportunity for proper deliberation. In principle, a bill would still need the concurrence of the Senate to become law but not so at the first session following a general election. "The purpose of this section is to put

into the law the convention that the Senate shall not continue to oppose a measure passed by a Commons that has survived a general election" (p. 98). This, as he points out, is the law in the United Kingdom since 1911.

Article 5 — Judiciary

The Supreme Court of Canada would consist of nine justices and would be an appellate tribunal as well as a constitutional court. Indeed, the author states that "the chief jurisdiction of the Supreme Court must be to guard, interpret, and put into effect the constitution" (p. 117). The composition, however, would not necessarily include judges from Quebec, although the author agrees that "the present number is necessary so that a reasonable number of Quebec judges may sit in civil cases appealed from that province" (p. 116). His reasons for not specifically providing for the inclusion of judges from Quebec are essentially twofold : first, the possibility of an eventual fusion of the principles of the two legal systems in Canada, and second, the likelihood of Quebec withdrawing its appeals to the Supreme Court in civil cases. Any province could so withdraw its appeals, under the proposal, since it would be up to each province to decide whether or not to give to its own courts the final determination of cases governed by provincial law. The second reason has probably more validity than the first. However, having regard to the important constitutional role of the Court, it is still difficult to explain the absence of a specific provision for judges from Quebec. Personally, I think that the idea of having a constitutional court, as well as a Supreme Court, as suggested by Faribault and Fowler in articles 50 to 56 of their proposed constitution, is a more acceptable solution.

Articles 6 and 7 — Provincial Governments and Legislative Powers

The existing distribution of powers is generally adhered to, but the idea of exclusive jurisdiction is eliminated and replaced by the principle of paramountcy. Indeed, this is stated to be "one of the chief objects of this book — to excise the idea of exclusive legislative jurisdiction from the federal structure" (p. 131). The reason for the elimination of this idea is that "it imposes a very restrictive and nonsensical rule of interpretation on the constitution" (p. 133). Under the doctrine of paramountcy, the legislative powers would be divided into federal paramount powers and provincial paramount powers. Federal paramountcy means that "every law of a Province that conflicts with a Law of the Parliament of Canada made in relation to any Matter coming within the following Classes of Subjects (twenty-four of them are spelled out) shall be inoperative to the Extent of the Conflict" (art. 7(1)). Provincial paramountcy is, of course, the converse. Twelve powers are specifically given to the provinces (art. 7(2)). The present principle of exclusiveness of legislative powers has caused so much difficulty over the last hundred years that any reasonable substitute is bound to be looked upon with favour. Furthermore, the principle of paramountcy should facilitate cooperation

between the provincial and the central authorities. At least, it would be impossible to invoke the principle as prohibiting cooperation. It would permit legislative cooperation even in the sensitive field of education and, in Mr. O'Hearn's opinion, "the principle of paramountcy is enough to deprive the subordinate legislature of the field completely if the paramount legislature wishes to do so" (p. 166). In other words, the field could be so fully covered by provincial legislation that no federal law on education could be compatible with it. Applying this possibility to other fields of legislative jurisdiction, it could result in a somewhat complex system of legislation across the country. However, the advantages would appear to outweigh the disadvantages, and it certainly deserves serious consideration.

Article 11 — The Limits of Government

This is really an article of fundamental rights and it is not only normal but essential to include these rights in the fundamental law of the land. It covers substantially the rights covered by the United Nations Declaration on Human Rights and Fundamental Freedoms. In the matter of education, it gives the right to at least twelve years of education at public expense in public or private schools (art. 11(22)). "The limitation in the section to twelve years means that the universities would be outside of the plan and fiscal aid to them would be arranged under the ordinary law" (p. 263). The same article also incorporates the guarantee for denominational schools now contained in section 93 of the B.N.A. Act. There is no provision, however, for the establishment of French schools. The absence of such a provision is difficult to understand if one has a minimum awareness of the difficulties that this omission has caused and is still causing for the French-speaking minorities across Canada.

Article 12 — Amendments

Amendments to the constitution would be made by the Parliament and would take effect after ratification by two-thirds of the legislatures representing three-fourths of the population of Canada, except for amendments to articles I (Languages) and II (Fundamental Rights). This is essentially, as he states himself, the formula suggested by Paul Gérin-Lajoie in his book *Constitutional Amendment in Canada* in 1950 and it resembles very closely also the formula proposed by Faribault and Fowler.

As a final comment of a general nature, it must be said that Mr. O'Hearn is to be highly commended for being so interested in this question as to produce a 300-page book. After all, this is not quite the daily work of a busy crown prosecutor and lecturer in criminal law. Nevertheless, he has made a valuable contribution to the legal writing on the subject.

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