the Tokyo Tribunal at page 38 ought to be compared with what the Nuremberg Tribunal said when it condemned Germany's invasion of Norway as not being justifiable on the grounds of self-defence.[2] Both decisions took place before the Charter entered into force and regardless of the conflict between them the question of self defence is now governed by the Charter and particularly Article 51. The words of Article 51 are quite clear and make provision for a right of self defence if and only 'if an armed attack occurs'. There is no right of anticipatory self defence and the Soviet action in Czechoslovakia last August, to which he refers, only shows that to allow such a right would involve a return to the wilderness of neo-barbarism. The community interest of Mankind requires that the law of the Charter should prevail.

GERARD BRENNAN*

The History of English Law Before the time of Edward I, by SIR FREDERICK POLLOCK and FREDERICK WILLIAM MAITLAND, 2nd Ed., reissued with a new introduction and select bibliography by S. F. C. MILSOM. (Cambridge University Press, Cambridge, 1968), 2 volumes, pp. 1-688, 1-674. Australian Price: $4.70 per volume.

Pollock and Maitland, now seventy years of age, has been given a new and deserved lease of life by this reprinting. This classic history of the early English law as seen in the documents then available might have been in danger of becoming itself simply another historical document. It might have been viewed as merely a late nineteenth century picture of the ancient common law, merely another portrait in the series of pictures drawn by Bracton, Coke, Hale and Blackstone in their own times. It is that, but it is also more than that.

The publishers have wisely not attempted any rewriting of the original text. Equally wisely, they invited Professor Milsom to compile an Introduction, not to bring that text up to date in detail—but to assess in general terms the veracity of the vision seen by the authors in 1895—above all, that of Maitland (who is generally regarded as the senior partner in the enterprise). A vast work of scholarly discovery has been done since then. Professor Milsom himself has supplied in this new issue an impressive list of recent texts, books and learned articles. He rightly laments that great masses of other records have not yet been seriously examined. Thus, in very many details of *rules* Maitland has been corrected and replaced; though what he said about *institutions* 'has indeed worn well' (xxiv). His vision is still relevant, important, perceptive. An Australian lawyer, whose institutions and rules are now receding rapidly from what went on in the reign of Henry II, will still be grateful for Maitland's permanent contribution and agree that he can still derive benefit from the fact that 'Maitland wrote not about rules and technicalities but about people and ideas, about an achievement. This is what makes his picture vivid and his book great. It has become the foundation of all that we know about the history of the common law . . .' (lxxi).

It is true that the more pertinent problems for our law students today are of another kind. An American Scholar, Barbara J. Shapiro, has complained recently, with some justice, that:

> Legal history is a rather peculiar field. It is dominated by the great nineteenth and early twentieth century school of historical jurists. These men were lawyers, essentially concerned with contributing to an autonomous discipline of the law by the use of historical methods. In spite of their frequent general disclaimers and their very real interest in the historical interrelations of law and society the impact of their work has been to create a legal history ghetto. Particularly in the abbreviated way in which legal history reaches the law student, it is likely to take the form of tracing the evolution of the writs or explaining the difference between common law and equity.[1]

She goes on to describe the impression left on the student that, by some internal dynamism of their own, legal doctrines grew and changed with little reference to

2 *Proceedings of the trial of Major War Criminals before the International Tribunal at Neuremberg* xxii, 448-450.

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1 Shapiro, 'Law and Science in Seventeenth Century England' (1968) 21 *Stanford Law Review* 727, 728.

social realities. (Some excellent attempts have been made recently to link legal history and general history, notably that of Harding, *Social History of English Law* (1968)).

Too little work has been done on these latter centuries, as compared with the middle ages, to make it easy to discern the social and legal operations in the period after 1750, which is now what really matters for the modern lawyer. (The new Melbourne University course in Advanced Legal History, which tackles these more contemporary areas, represents a real attempt to describe relationships between social and legal developments, and similar courses in English and American universities promise well for the future).

Nevertheless, we can all enjoy and profit from this brilliant yet restrained appraisal by Professor Milsom of the value to legal historians of Maitland's assessments. He does show that the documents on which Maitland had to rely are not sufficient guides today. As the Justices of the Royal Courts took over more and more matters previously dealt with by the local or special courts, they were working with concepts, classifications and customs which were perfectly familiar to all those then concerned—but whose meaning to us is often either doubtful or downright confusing. Nor do we know enough about the social background of the economic forces that produced the rules and techniques as they were needed. Professor Milsom has to confess that:

> the assize of novel disseisin is the greatest enigma in the history of the common law (xxxviii) . . . For all that has been done, seisin is still the mystery of which Maitland wrote (xlix) . . . Words like covenant and trespass meant different things after the reign of Edward I than before. The insistence on the seal in covenant may have been due to social factors about which we are still in the dark (li).

Even less is known, of course, about the bulk of private litigation fought out on the 'personal actions' then in the county courts; for hardly any records have survived (lxiii). The judges in the Royal Courts had to reshape customs, devise new categories and formulate principles which would give system to the growing set of decisions on particular facts; even so, the lines early drawn over between contract and tort were not those that were acceptable to their successors (lxiii).

Professor Milsom has other fascinating things to say about the work of the court clerks, whose success in systematizing writs and actions made workable the centralization of English Justice; though later the same writ system led to decay and odd fictions and to an exaggerated formalism. He rightly draws attention to those inspired guesses of Maitland's genius that have not proved successful—but that is the fate of every creative historian. His conclusion is balanced and judicious: that the shortcomings in details do not spoil the truth of what Maitland saw. 'Maitland himself would probably wish his work to be superseded. There is little sign that this will happen soon. When it does, the subject will still be his' (lxxiii).

It is good that *Pollock and Maitland* is again readily available for all students. The non-expert is doubly grateful for the rich scholarship and lucidity of Professor Milsom's appreciation of the situation as the professional legal historians see it today. (And he will be further pleased that these two volumes are available at such a reasonable price).

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Modern Federalism, by GEOFFREY SAWER. (The New Thinkers' Library, C. A. Watts & Co. Ltd, London, 1969), pp. i-vii, 1-204. United Kingdom Price: 15s sterling.

In his dustjacket note the General Editor of the series, Raymond Williams, remarks that The New Thinkers' Library attempts to bring 'seriousness' and 'general availability to the thinking and problems of a new generatian'. On both scores Professor Sawer's discussion of federations and federal concepts is a welcome addition to the series.

There is no attempt to construct a quintessential definition of federalism. Rather, Professor Sawer has examined a variety of solutions to the problem of allocating power between a central government and regional governments and the places occupied by these solutions in a 'federal spectrum'. The discussion is essentially compara-

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