

BOOK REVIEWS

REVUE DES LIVRES

The Impact of American Constitutionalism Abroad. By CARL J. FRIEDRICH. Boston: Boston University Press. 1967. Pp. vii, 112. (\$4.75 U.S.)

For the purposes of this study, Professor Friedrich has divided the broad area of American constitutionalism into three general parts: presidentialism, federalism and judicialism. Each of these parts forms the subject matter of a chapter in which it is attempted to demonstrate the influence or impact of the unique American manifestations of these ideas about government upon the rest of the world since the eighteenth century. The result is not entirely satisfactory. A number of generalized pronouncements are scattered through the book in which assertions that are at best, questionable, are stated without qualification or explanation, as simple truths:

Since the Bolshevik Revolution in Russia, European thought has been increasingly shaped by the hostile view of the United States prevalent among intellectuals who, if not necessarily communists, inclined to sympathize with the Soviet Union.¹

In a variety of fields, notably the liberation of colonial peoples through trusteeship, the League [of Nations] was a projection of the American concept.²

These are punctuated with occasional instances of what can only be termed portentous obscurity. For example, in the chapter on "Judicial Power and Human Rights", there is a passing reference, for no compelling reason, to the polarization of the regional Sicilian constitutional court.³ This sort of writing is indeed an impressive display of erudition, but many an annoyed reader will ask himself if it is anything more than precisely that.

The meaning ascribed by this book to the operative word in the title, "impact", is so broad as to render it almost devoid of all significance. No effort is made to confine it to some limits such as "functional impact", and no real distinction is made between major adaptations from the American model and occasional references to the American experience during constitutional conventions around the world. Absent the use of some qualitative

¹ P. 6.

² P. 64.

³ P. 90.

test to distinguish between American constitutional concepts and insights that shaped political destinies outside of the United States, and those that were merely mooted or discussed and discarded, then, for whatever it is worth, every similarity to American constitutionalism, as well as every antithesis, can be said to be an example of an "impact". And in fact, this is the manner in which the American influence is shown. In addition, "American constitutionalism" in this book means at one point or another, the structure of government established in Philadelphia at the founding of the republic, the system as it has evolved since that time, and all of the idealism, both as practised and as professed, that is found in the American view of the way in which a people should govern itself. This almost exhausts the entire store of political wisdom in Western civilization. When the implications of these sweeping premises are applied to a sometimes distorted view of other nations (*vide* the treatment of Canada, discussed below), the reader is given the impression that, somehow, all roads lead to Washington.

It cannot be said that the book suffers from any excess of dispassionate or objective observation. At times one finds instead an exposition of particular views that are currently fashionable in the United States. General De Gaulle provides a favourite target. His widening of the powers of the president is referred to as a "perversion" on two occasions.⁴ The only other man to whom this harsh epithet is applied is Adolph Hitler—and then only once.⁵ Professor Friedrich goes on, with apparent inconsistency, to advocate the adoption of a "properly modified presidential system" for the developing countries, so that their governments may take "vigorous and if necessary decisive action, unhampered by the need to consider parliamentary majorities . . .".⁶ Given the dreary succession of French governments up until the time of De Gaulle's presidency and the grave threat posed to Europe and the world by the possibility of a collapse or military takeover in an unstable France, it is difficult to reconcile Professor Friedrich's characterization of De Gaulle's vigorous and decisive presidential actions as a "perversion" with his view that a similar regime would be a positive virtue in most of the rest of the world. In contrast to this, the shifts in power in the United States are subjected to no such stern view. The quasi-legislative activities undertaken by the Supreme Court of the United States during the past two decades are not viewed as a distortion of fundamental democratic principles or of the separation of powers doctrine—rather, they make the court "the pathfinder of progress . . .".⁷

On the opening page of the book, it is observed that "since the days of the founders, Americans have been protesting against

⁴ Pp. 20, 24.

⁵ P. 84.

⁶ P. 39.

⁷ P. 92.

what they believed to be highly misleading notions about their country and its institutions".⁸ With respect, the same protest should be registered by Canadians in relation to Professor Friedrich's view of this country and its institutions. The Canadian reader experiences his first twinge of apprehension when Professor Friedrich elects to "cast a brief glance at the British Colonies", and discovers the first impact of American constitutionalism evidenced by "Lord Durham's famous Report of 1868".⁹ Apprehension turns to dismay when one reads: "With the [American] Civil War just ended . . . it is remarkable how deeply influenced by American experience the great English statesman's conception really was."¹⁰ "Remarkable" is really too mild a term for this situation, but here, for a change, Professor Friedrich understates the American influence. The reviewer would suggest a word such as "extraordinary", or even "astounding", in view of the fact that Lord Durham had been dead for almost thirty years.¹¹

The brief glance at the colonies goes on to say about Confederation that: "The basic problem which had to be faced was, of course, whether federalism could be combined with a system of cabinet government responsible to parliament, or whether it required a stable chief executive such as the American president. . . ."¹² Despite the "of course" in this sentence, this basic problem was not nearly as apparent to the Canadian framers as it is to Professor Friedrich. It is simply not correct to state that they saw this as a basic choice which had to be made prior to Confederation; the notion of abandoning the Monarchy for republicanism was unacceptable to an overwhelming majority of the men who put together Canada's constitutional structure.¹³

The remainder of the section on Canada shows a comparable amount of fidelity to actuality. The division of legislative powers is stated as being that the national government has the residual powers while those of the provinces are explicitly defined. This would be accurate enough were the reader informed, in some general terms, that the Parliament of Canada also has a considerable list of explicit enumerated heads of legislative power. But no mention is made of these—instead it is said that in times of peace, the Dominion government has no significant power under the residuary clause, thus giving the impression that the

⁸ P. 3.

⁹ P. 60. This, and all other dates pertaining to Canada cited in this review are as reported by Professor Friedrich. The Durham Report was presented to Parliament on February 11th, 1839: Bourinot, *A Manual of the Constitutional History of Canada* (1901), p. 24, n. 6.

¹⁰ P. 60.

¹¹ Lord Durham died in 1840. The American Civil War ended in 1865.

¹² P. 60.

¹³ See, *e.g.* Dawson, *The Government of Canada* (1949), p. 48.

national government is currently devoid of all meaningful authority.¹⁴

To conclude the Canadian section, Professor Friedrich, citing himself as the primary source in a treatise entitled *Status of Puerto Rico*,¹⁵ tells the reader that the system of government in Canada, established by the British North America Act of 1868,¹⁶ "is now gravely imperiled".¹⁷ Most Canadians will probably bear up rather well under this gloomy prediction, inasmuch as there is very little resemblance between the unstable, ineffectual national political organization described by Professor Friedrich and that which exists in the apparently unknown country which they inhabit at the top of the Western Hemisphere.

The danger in such a glib and glossy dismissal of Canada's past and future is that persons holding positions of influence or authority in other countries are liable to take Professor Friedrich's views seriously. One would hope and expect that foreign decision makers who articulate policies that affect Canada would act on the basis of accurate information. Not much is provided in this book. Perhaps someone should set the record straight by publishing a treatise on the impact of Canadian constitutionalism abroad. If Professor Friedrich's views are representative, a simple leaflet should be sufficient.

It may not be fair to assume that the constitutional situations in some of the other countries in which Professor Friedrich discerns an American impact are as inaccurately reported as Canada's—but the feeling is difficult to eradicate. The influence of American ideas cannot be properly shown unless the national structures of the influenced countries are accurately known. The message of *The Impact of American Constitutionalism Abroad* will be lost on Canadians when they see their country thus portrayed through the fog of misinformed punditry. Professor Friedrich has produced works of outstanding scholarship, but this book is not one of them. Perhaps it may be that the impact of American constitutionalism on the rest of the world is simply too soaring an idea for one man to successfully capture in print. This book is perhaps the best evidence of the soundness of such a thesis that could be found.

EDWARD F. RYAN.*

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¹⁴ P. 60.

¹⁵ (1966).

¹⁶ 1867, 30-31 Vict., c. 3. 1868 is the date given by Professor Friedrich.

¹⁷ P. 61.

*Edward F. Ryan, of the Faculty of Law, University of Western Ontario, London, Ontario.

Pakistan. The Development of its Laws and Constitution. Second Edition. By ALAN GLEDHILL. London: Stevens & Sons. 1967. Pp. xi, 393. (£4, 17s. 6d.)

This is the second edition of Professor Gledhill's book on the *Republic of Pakistan*. It forms Volume 8 of the British Commonwealth series published under the general editorship of George W. Keeton. The first edition of this book with its emphasis on federal government, was published a little more than a year¹ before the abrogation of the Constitution of 1956. Since then Pakistan has been obliged to find solutions for a variety of constitutional and administrative problems. There has also been a spate of legislation, mainly by ordinance, chiefly directed towards the establishment of the welfare state. Professor Gledhill remarks: "If compression and omission created difficulties in writing the first edition, they were trifling compared with those met in confining the present edition within the allotted space."²

The method employed by the author is similar to that he used in *The Republic of India*. The book is divided into two parts. In the first part, Professor Gledhill gives an account of the development of Islamic notions of the state. He explains how the United Kingdom government built up a system, preserving much of what the Mughals had previously established and also explains the creation of Pakistan under the Indian Independence Act, 1947.³ He points out that whereas in India, the Government of India Act, 1935,⁴ proved a satisfactory starting point for the evolution of the new constitution, Pakistan had to think afresh. Having discussed the first Constitutional Assembly, its dismissal, and the constitutional problems arising therefrom, he sets out the main features of the Constitution of 1956. In the interval between the dismissal of the first and the summoning of the second Assembly, official statements spoke of a "controlled democracy". Under the guidance of Sir Ivor Jennings, an abortive attempt was made to draft a constitution grafting an executive elected for a fixed period based on the British system of responsible government. The greater part of the Constitution of 1956 consists of provisions similar to those in the Government of India Act, 1935, although there are significant differences between the two documents. The Constitution of 1956, which called for a democratic state based on Islamic principles of social justice, set up a Westminster type of government both at the centre and in the provinces. This constitution which emerged nine years after independence and was the product of so much turmoil and strife had a very short life.

¹ 1957.

² P. v.

³ 10 & 11 Geo. 6, c. 30.

⁴ 26 Geo. 5, c. 2.

The breakdown of this constitution is examined and the resulting constitutional problems are discussed.

Professor Gledhill rightly remarks:⁵

Though it may be contended that no other course could have saved Pakistan from disaster and that no law deserves enforcement when the reasons for its enactment have ceased to operate, the action of the President in proclaiming martial law on October 7, 1958, was taken in circumstances which cannot be regarded as justifying it according to the principles accepted elsewhere in the Commonwealth. After disturbances in Canada in 1838 the Law Officers of the Crown gave their opinion that martial law "can only be tolerated because, by reason of open rebellion, the enforcing of any other law has become impossible".⁶ . . . The recitals in the proclamation of October 7, 1958, did not allege that war was raging or there was armed rebellion. Pakistan was tranquil, the courts and public offices were functioning normally. What the proclamation said was that the politicians holding office were corrupt, incompetent and malignant: those facts were not previously regarded in the Commonwealth as justifying a proclamation of martial law.

It is interesting to note that the so called martial law régime that lasted for less than four years resembled the government of British India by the East India Company in the nineteenth century more than the military régimes which were set up in other countries that have attained independence in the past twenty years. When President Ayub Khan assumed power in 1958, he made a pledge to restore a type of democracy that people in Pakistan would understand. As the first step towards restoring democracy he introduced in 1959 a scheme of local self-government, popularly known in Pakistan as Basic Democracies. The Basic Democracies Order of 1959 which constitutes an important constitutional document is briefly discussed in this book. Under this Order, the people elect the man they know to the local councils which consist of five tiers.⁷ Health, agricultural development and social welfare are some of the spheres entrusted to these councils. It is hard to agree with Professor Gledhill when he says:⁸

There is much to be said for the view that local government boards provide the best training ground for national politicians and, while one could not expect it to be heard with patience in the Indo-Pakistan sub-continent today, it could be argued that constitutional progress in the sub-continent has introduced democratic government at the higher levels

⁵ Pp. 108-109.

⁶ Keir and Lawson, *Cases in Constitutional Law* (1954), pp. 445-446.

⁷ Namely: (i) union councils covering a group of villages with a total population of ten thousand to fifteen thousand people; (ii) *tahsil* council for West Pakistan and *thana* council for East Pakistan; (iii) district council; (iv) divisional council and (v) provincial development advisory council. The inauguration of the constitution of 1962 brought into existence the provincial Assembly; the provincial advisory councils were, however, abolished.

⁸ P. 116.

too fast to avoid the strains resulting from the slower progress at lower levels; democracy at provincial headquarters fits ill with autocracy in the villages. But it seems probable that considerations of this kind were current when the President made the Basic Democracies Order on October 27, 1959.

The search for a new permanent instrument of government as the next step in the restoration of democracy, is outlined by the author and the centralized constitution of 1962 which became Pakistan's instrument of government discussed. The outstanding features of the Constitution of 1962 are well set out. A remarkable feature is that it provides for presidential, not parliamentary, government and the President enjoys powers not accorded to the President of the United States of America. Elections to the office of President, National Assembly and to the provincial Assembly are indirect, being performed by the Electoral College, the members of which are elected by adult suffrage. The President similarly refers to the Electoral College any conflict between himself and the National Assembly. The provincial governors are appointed by the President and they are bound to obey directions from the President. The Pakistan constitution also deals with political parties though all the relevant articles would not be regarded by everyone as an important contribution to the problem of pressure groups, lobbies and trade unions.

Whereas under the Constitution of 1956, the Supreme Court has discretion to refuse to determine a question of law which the President might have referred to it, under the new Constitution of 1962, the Supreme Court must consider it and give its opinion. Professor Gledhill has rightly pointed out that both in India and Pakistan, the advisory jurisdiction has proved to be very useful and has set the ship of state on a safe course. American and English jurists, however, have made critical observations on the advisory jurisdiction of the court. The late Mr. Justice Frankfurter, a judge of the Supreme Court of the United States of America, points out that advisory opinions of the courts move in an "unreal atmosphere" and are rendered upon "sterilized and mutilated issues".⁹ Lord Merrivale has said that it is not the business of the judiciary to advise the executive; the natural result is to compel the judiciary to share responsibility for the acts of the executive and so weaken its own authority.¹⁰

Special emphasis is given to the protection of fundamental rights. Large areas of the Pakistan statute law, namely, criminal law, criminal procedure, civil procedure, law of evidence, arbitration, laws relating to property, contract, industry, communications and professions are clearly digested and set out in the second part

⁹A Note on Advisory Opinions (1926), 37 Harv. L. Rev. 1002.

¹⁰1928 Parliamentary Debates, 5th Ser., H. of L., 763.

of the book. There is also a separate chapter devoted to the personal laws of Hindus and Muslims including the statutory innovations that have been made in this field.

Professor Gledhill's discussion is short but on the whole, very well done. It is doubtless a product of the highest order of competence and any comparative law student who seeks an introduction to the laws in Pakistan will find this book extremely useful. It can, further, be of great value and a good guide to the developing countries which have found the Westminster type of government unsuitable.

S. KHETARPAL*

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Law and the Common Man. By C. H. ROLPH. Springfield, Illinois: Charles C. Thomas. 1968. Pp. xiii, 282. (\$11.75)

"This book tries to show how the law has to reflect life",¹ and with that in mind the author proceeds to poke, prod, cajole and generally use any literary means at his disposal to direct the law and its institutions onto the right course. Mr. Rolph is a legal correspondent of *The New Statesman* and this book is a collection of his articles and essays written between 1946 and 1966. All the pieces are short (there are seventy-two of them), written in the refreshing, irreverent style of a concerned journalist with his tongue in his cheek. The author casts the book as one "for that growing body of citizens who are taking an interest in the law as a reflection of current social history".² Perhaps. I see it rather as a book for the legal profession. Law operates in society not in a vacuum and we need to be reminded of that fact. Mr. Rolph takes some of our most cherished institutions off the shelf and, sweeping off the dust of tradition and precedent, shows them as much-less-than-perfect artifacts.

I think verdicts are more often right than wrong. But having a propensity to distrust all secrecy in the temples of justice, I have sometimes wondered whether verdicts might not be right still more often if every obstinate, biased, stupid, or sleepy juror was aware that his performance might be exposed to public criticism. The thought might at least keep him awake.³

So he wrote in January 1954, never having served on a jury. The opportunity fell his way only a few months later, after which he wrote, in July 1954,

I was once a warm supporter of trial by jury, defending it, often, against the attacks of better-informed men. Today I have a still linger-

*S. Khetarpal, of Gray's Inn, Barrister-at-Law, of the Faculty of Law, University of Alberta, Edmonton, Alberta.

¹ From the Preface, p. vii. ² P. vii. ³ P. 61.

ing faith in it as a tribunal for simple, disputed cases of larceny and assault, a diminished faith in respect of any case involving figures, sexual morality, or culpable drunkenness, and none at all in respect of any case lasting more than two days.⁴

At times one has difficulty following the author's logic or theme through an article, and much of the comment is directed at English legislative provisions which have no counterpart on this side of the Atlantic, but no matter, when he is good, he is delightful. In particular there are "Fiat Justitia"⁵ on crime and psychology, "By the Nine Gods"⁶ on oaths, "Traverse Jury"⁷ on his experience as a juror, and "Cradle to University"⁸ on the legal ages of emancipation and culpability.

"Standing on the sidewalk among the facts of daily life, it touches its forelock as the Law goes by."⁹ Oh yes! It also twits the law and ventures some advice on its direction.

J. W. SAMUELS*

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Existentialism and Legal Science. By DR. GEORG COHN. Translated by George H. Kendal. Dobbs Ferry, New York: Oceana Publications. 1967. Pp. 148. (\$6.00 U.S.)

Every legal theory is the result of the specific application of the basic postulates of a more general philosophical school to the law. Catholic natural law is derived from the postulates of the philosophy of Saint Thomas Aquinas. Traditional English legal positivism was created by Bentham and Austin from the empiricism of Hobbes, Locke, and Hume. Kelsen's pure theory of law is a direct outcome of Neo-Kantian continental thought. American Legal Realism is an outgrowth of American Pragmatism, while Scandinavian Legal Realism incorporates the postulates of non-cognitive ethical theory. Contemporary legal positivism, as represented by Professor H. L. A. Hart, reflects the philosophy of Ludwig Wittgenstein and the linguistic analysis or ordinary language school, just as communist legal theory mirrors the philosophy of Hegel, Marx and Lenin.

Existentialism, one of the more important contemporary philosophies, has as yet, however, had almost no effect on Anglo-American jurisprudence. Although this philosophy is of Continental origin, it is fast picking up adherents in North America, particularly among the younger generation. Any book, therefore,

⁴ P. 65. ⁵ Pp. 42-46. ⁶ Pp. 50-54. ⁷ Pp. 61-65.

⁸ Pp. 153-158. ⁹ P. vii.

*J. W. Samuels, of the Faculty of Law, University of Alberta, Edmonton.

which deals with the application of its basic premises to the field of law, ought to be of interest to any member of the legal profession who thinks seriously about the nature of law.

The Canadian lawyer, George H. Kendal, is to be congratulated therefore for translating into the English language, *Existentialism and Legal Science* by the late Danish international lawyer and scholar, Georg Cohn, and thus making available the first, and as yet, only book in English on the implications of existential philosophy for law.

As is the case with the names of most philosophical schools, the term existentialism covers a broad spectrum of divergent views. The central core which most have in common, however, is the emphasis on existence. The traditional philosopher approaches his study of man and nature through preconceived categories and concepts in terms of which he seeks to organize the raw data of the world of fact. The existentialist rejects all such forms and abstractions and attempts to come directly to grips with reality. According to the existentialist, reality cannot exist apart from the experiencing individual person for whom the universe dies when he ceases to exist. Existence, therefore, is the source of reality. Any concept will, by its very different nature, distort the real world of experience in reflecting it.

There can be no valid norms for the existentialist. It is up to each person to shape his own life. Although each individual has the responsibility of choosing what he will be and how he will act and react, the choice is an agonizing one which must be made on the basis of the unique facts of each situation, without the benefit of principle, authority, or guide.

Existentialism is thus a revolt against conceptualism in any and every form. Since few people deal with concepts more than the lawyer, existentialism and the law make strange bedfellows. It is therefore not surprising that the express aim of Cohn's book is, "the abolition of conceptual jurisprudence".¹

The first part of the book is devoted to establishing that "reality cannot be perceived by means of concepts".² Cohn defines reality as the intersection in time and space of the individual experiencing person with the organic processes of the unknowable external world, thus locating it in the ever-changing, ever-perishing sequence of sights, sounds, smells, and feelings of sensed experience.³ If one accepts this definition Cohn is correct in saying that reality can be known only directly and not in terms of concepts. Applying the adjective "real" to the transitory experiences of the senses which are different for each individual is at best however, a questionable use of the term, and is certainly not in accordance with the whole approach of twentieth century physics

¹ P. vii.

² P. 12.

³ P. 11.

which explains reality in terms of speculatively conceived mathematical constructs.⁴

The central part of the book consists of an attack on jurisprudential systems which conceive of law as a logical system of legal norms or rules derived from the concept of sovereignty, which when correctly applied to a given fact situation will give the correct legal solution to the dispute. His attack, however, adds little to those made by his common law anti-conceptualist counterparts, the American Legal Realists. The interesting aspects of Cohn's book are to be found in his suggested alternatives.

The main theme of Cohn's book is that, by attempting to solve a legal dispute by use of a norm or rule, the unique aspect of each case is lost. "Each situation", according to Cohn, "is concrete, unique, unpredictable, 'free' and incalculable"⁵ therefore, "The law in a concrete situation is neither foreseeable nor definable in general terms nor subsumable under definite concepts",⁶ but must be drawn from its own particular set of facts. Upon the basis of these premises Cohn goes on to recommend a system of courts made up of people having a broad background of "general practical experience in the various fields of social and human endeavours" rather than legal technicians trained in the "theoretical acuity and subtlety" of the law.⁷

One cannot help but sense a certain amount of inconsistency in Cohn's position in that he uses normative words such as "real law", "the right solution" and "the just decision" when on the basis of his existential philosophy he is not entitled to do so. He even goes so far as to make room for a limited role for precedent and statutes in his legal theory, which leads this reader to the suspicion that Cohn has not successfully reconciled his legal training and existential philosophical commitment as, "the consistent existentialist . . . admits no norm".⁸

The problem directly raised by this book is an important and a valid one. That is, "How can any dispute be meaningfully settled by use of a norm when the facts of each case are not only unique in regard to every other case, but are also subjective and unique for each of the litigants?" Nearly every case appears to raise a problem of conflict between two kinds of justice. The first is justice in the sense of uniformity or certainty of the law. A minimum degree of stability of expectations as to what is or is

⁴ According to Einstein: "The belief in an external world independent of the perceiving subject is the basis of all natural science. Since, however, sense perception only gives information of the external world or of 'physical reality' indirectly, we can only grasp the latter by speculative means." See *The World as I See It* (1934), p. 60.

⁵ P. 23. ⁶ P. 115. ⁷ P. 121.

⁸ Paul Foulquie (K. Raine trans.), *Existentialism* (1948), p. 55.

not permissible is essential for the smooth functioning of any legal system. There is as well, however, a question of justice in the sense of the "right", "just", or "fair" solution in regard to the particular unique set of facts before the court. That the just solution in the former sense can be in conflict with the just solution in the latter sense of the word is evident from such maxims as, "hard cases make bad law". Cohn attempts to solve the problem by declaring that the former, justice in the legal sense, is meaningless and illusory. The only legal philosopher in the common law world to directly come to grips with this problem is Professor F. S. C. Northrop.⁹

Even though it is generally accepted that judges must not decide cases arbitrarily but must justify their decisions in terms of sound reasons, much of that reasoning is circular.¹⁰ Most anti-conceptualists go on to draw the conclusion that since the illusion of certainty is created through the use and manipulation of legal concepts, all such concepts must be either reduced to terms of sensed experience or abolished. But such writers, base their concept of law on only the litigation process. Cohn makes the same mistake, drawing most of his examples from criminal law and torts. Professor S. H. Lawson has pointed out, on the other hand, that the activities of a lawyer can be divided into two broad branches, legal drafting and legal pathology.¹¹ The drafting function consists of using constructs such as the corporation, contracts, and other property concepts to engineer and plan human behaviour, while the pathological function is concerned with the correcting of wrongs and the settling of disputes. Most anti-conceptualists, including Cohn, base their concept of law only on the latter function. In so restricting themselves their view of law is as distorted as is that of the traditional conceptualist. What is needed is a new analytical jurisprudence which will take fully into account both aspects of law, reconciling the role of concepts in each.¹² Such a jurisprudence cannot come out of existentialism.

This does not mean, however, that existentialism has nothing relevant to say to the legal profession. Even given that analytical jurisprudence, concepts, principles and norms have a legitimate and important function in the judicial process, in the final analysis it is still individual human beings who must pay the damages or

⁹ F. S. C. Northrop, *The Epistemology of Legal Judgments* (1964), 58 N.W.U.L. Rev. 732; *The Comparative Philosophy of Comparative Law* (1960), 45 Cornell L.Q. 617; *The Mediatonal Approval Theory of Law in American Legal Realism* (1958), 44 Va L. Rev. 347.

¹⁰ Julius Stone, *Legal System and Lawyers' Reasonings* (1964), pp. 241-280.

¹¹ F. H. Lawson, *The Creative Use of Legal Concepts* (1957), 32 N.Y.U.L. Rev. 909.

¹² J.C. Smith, *Law, Language, and Philosophy* (1968), 3 U.B.C.L. Rev. 59, at pp. 99-116.

finer, be imprisoned, remain married or be divorced, be given or denied custody, be deported or allowed to remain in the country. By stressing the unique nature of each situation, by forcing our attention on the human being caught in the web of the law, and by revealing the irrational, dark side of man's nature, existentialism presents a valid and vital message.¹³ *Existentialism and Legal Science*, therefore, is to be welcomed as a thought provoking book which in non-technical language introduces us to some of the implications on the law of this important stream of Continental philosophical thought.

J. C. SMITH*

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Annual Survey of Commonwealth Law 1966. Edited by H. W. R. WADE. London: Butterworths. 1967. Pp. lxxxvii, 873. (\$29.50)

This is the second volume of a series designed to set out the annual development of the law in Commonwealth countries. It is an ambitious work of twenty chapters, each dealing with one area of the law and written by a leading scholar in the field. It would be presumptuous of a reviewer to deal with errors and omissions in the text. In the first place, no reviewer is competent to discuss all the areas covered in the *Survey*; and, secondly, small mistakes in any chapter are irrelevant in a discussion of the book as a whole.

One small criticism may be made. Some of the new developments are only hinted at and this is often disconcerting. We want to know, not only that a change has taken place, but also what the change is. For instance, we are told that "The Cemeteries Act 1965 of Saskatchewan is a major piece of legislation of seventy-two sections".¹ If it is so important, why not at least a line or two on what is contained in these sections?

The text is well augmented by a Table of Statutes, a Table of Cases, a very commendable Subject Index and a Territorial Index.

We need more works on comparative law. In an age of world concern for law reform, we need to see what is being done in jurisdictions other than our own. The general cross-fertilization of ideas can do nothing but good. Commonwealth countries,

¹³ J. Batt, *Notes From the Penal Colony: A Jurisprudence Beyond Good and Evil* (1965), 50 Iowa L. Rev. 999. This article is the only other work in the English language of which I am aware that deals directly with the implications of existentialism for law.

*J. C. Smith, of the Faculty of Law, University of British Columbia, Vancouver.

¹ P. 848.

nursed on the common law and rooted in the British tradition, have gone their separate ways and have shown a wonderful diversity of development of this common foundation. The size of this volume attests to the pace of change.

J. W. SAMUELS*

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The Assassination of D'Arcy McGee. By T. P. SLATTERY. Toronto: Doubleday Canada Ltd. 1968. Pp. xviii, 527. (\$7.50)

Thomas D'Arcy McGee was, in turn, a "Young Ireland" patriot and rebel on whose head in due course a price was put, a journalist and pamphleteer, an editor and publisher of newspapers, a poet and historian, and finally, a politician and statesman with an extraordinary talent for public speaking; it was D'Arcy McGee, the politician and statesman, the earliest and most ardent advocate of Confederation for the colonies comprising British North America,¹ who became so widely known to Canadians as one of the fathers of Confederation. In addition, McGee was trained as a lawyer; this interlude in his varied and turbulent career probably accounts for the inclusion in this journal of a review of this biography by T. P. Slattery, who incidentally is himself a practising lawyer.

Although McGee's eventual connexion with law was not to be all that close, he exhibited a continuing desire during his youth "to study the law of the land". On two occasions he had to forego his plans in this regard.² However, in 1858, a year after McGee had come from the United States to settle in Canada, "he registered at McGill University as a student in the Faculty of Law. It was then located in a building at the northeast corner of Dorchester and Union streets, with John C. Abbott as its Dean. . . . McGee was fulfilling a dream long deferred. . . . He was selected to give the valedictory address for the graduating class. But on that brilliant morning in May of 1861, as the students and their friends gathered under the elms of McGill, it had to be announced:

'Parliamentary duties at Québec City require Thomas D'Arcy McGee to receive his degree in absentia.'³

*J. W. Samuels, of the Faculty of Law, University of Alberta, Edmonton.

¹ Ironically, due to the political situation in 1867, McGee was not able to be accommodated in the first government of the Dominion of Canada after playing such a material role in the events leading up to the achievement of Confederation.

² See pp. 8-10. ³ See pp. 124-5.

The announcement was particularly indicative, for apparently McGee's political duties never permitted him to engage in active practice.⁴

The title of the book, *The Assassination of D'Arcy McGee*, is somewhat misleading in that Mr. Slattery deals with McGee's whole life, with the emphasis on the eleven years which McGee spent in Canada. No large amount of knowledge concerning the Canadian political scene of the 1850's and 1860's is needed as Mr. Slattery supplies the reader with sufficient background detail. The actual assassination, about which little is known, and the events surrounding it are recorded in the final thirty-six pages of the book. In these times when the sickening and frustrating presence of the assassin has become almost all too familiar, Mr. Slattery nonetheless manages to move the reader by his treatment of McGee's final parting from his family, his last hours in Parliament, his clandestine murder, his eulogies, and his funeral.⁵

This biography of McGee is one of the new wave of Canadian political biographies.⁶ Those familiar with the biography of McGee by Isabel Skelton,⁷ and with some of the other lesser works on McGee such as those by Taylor, Brady and Phelan,⁸ might well be prompted to question the need for Mr. Slattery's effort. I think that it would be fair to say that Mr. Slattery's biography sheds very little additional light on the subject, although he does tap some of the sources to a greater extent. Serious historians will be dismayed by Mr. Slattery's failure to use any footnotes.

⁴ Interestingly, as a trained lawyer McGee was in no way unique amongst the fathers of Confederation; no less than twenty of the other thirty-two fathers were trained lawyers, namely Sir John A. Macdonald, Sir Georges Etienne Cartier, Sir Oliver Mowat, William McDougall, Sir Alexander Campbell, Sir Hector Langevin, James Cockburn, Jonathan McCully, William Alexander Henry, Robert Barry Dickey, Adams George Archibald, Charles Fisher, Peter Mitchell, Edward Barron Chandler, John Hamilton Gray (of N.B.), John Mercer Johnson, Edward Palmer, William H. Pope, Thomas Heath Haviland and Frederick Bowker Terrington Carter.

⁵ Mr. Slattery's poignant description of the funeral train which carried McGee's body from Ottawa to Montreal is all the more haunting in its resemblance to that of Senator Robert F. Kennedy of New York who was to suffer a similar fate shortly after the publication of this book.

⁶ Which has included, *inter alia*, fresh works on other fathers of Confederation, such as Donald Creighton, John A. Macdonald (MacMillan, Toronto, 1952, 1955), J. M. S. Careless, Brown of the Globe (MacMillan, Toronto, 1959, 1963).

⁷ *The Life of Thomas D'Arcy McGee* (Garden City Press, Garden-ville, Quebec, 1925). Mrs. Skelton, incidentally, canvassed the first thirty-two years of McGee's life, that is to say up until he emigrated to Canada, much more fully than does Mr. Slattery.

⁸ Fennings Taylor, *The Hon. Thos. D'Arcy McGee, A Sketch of his Life and Death* (Lovell, Montreal, 1868); Alexander Brady, *Thomas D'Arcy McGee*, (MacMillan, Toronto, 1925); Josephine Phelan, *The Ardent Exile* (MacMillan, Toronto, 1951); see also E. R. Cameron, *The Memoirs of Ralph Vansittart* (Mussion, Toronto, 1924). Indeed, Mr. Slattery acknowledges his reliance on these previous publications: see p. 499.

From the technical point of view, Mr. Slattery has produced, without doubt, a readable and engrossing book. The illustrations which grace the book were done by the author himself and include portraits of leading political figures, scenes in connexion with the narrative, and a couple of ingenious charts concerning "men and movements affecting McGee" and "parliamentary careers [of A. A. Dorion, Sandfield Macdonald, Luther Holton, George Brown, D'Arcy McGee, Alexander Galt, John A. Macdonald, L. V. Sicotte and G. E. Cartier] and governments 1857-68". A brief resume of each chapter is set out in the Table of Contents and each chapter throughout the book is prefaced by two quotations which in most cases include one quotation of McGee and one from some other appropriate source. The book is concluded with a fairly exhaustive bibliography⁹ and a workable index.

In conclusion, the appearance of Mr. Slattery's biography of McGee throws the spotlight again on a father of Confederation who continues to be a man for our times in that he was from the outset a firm believer in Confederation and defender of the various minorities which make up the fabric of this nation. For those concerned with the future of Confederation, a reading or re-reading of McGee's writings and speeches will bring a valuable return on the investment of time required and Mr. Slattery's biography is a readily available compendium of them.

CAMERON HARVEY*

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Index to Canadian Legal Periodical Literature 1963-1965 and Annual Volumes for 1966 and 1967. Edited by MARIANNE SCOTT, Law Librarian, McGill University. Montreal: Canadian Association of Law Libraries. 1967, 1968. Pp. 316, 163, 145. (No price given)

This valuable periodical index has survived the delicate incubation of such new research tools and has established itself as a carefully produced and very useful addition to the bibliography of legal literature. Although improvements can still be suggested, the *Index* is a credit to its editor, its indexer, and to the Canadian Association of Law Libraries. One hopes that the Canadian legal profession has come to appreciate its importance to legal research and will provide the support it needs to develop further.

The importance of legal periodicals has been enhanced by significant changes which have occurred in the nature of legal

⁹ However, see also the indexes to the biographies by Brady and Phelan, *ibid.*

*Cameron Harvey, of the Faculty of Law, University of Manitoba, Winnipeg.

authority in this century—changes which have blurred the traditional dichotomy between primary and secondary authority. Instead of finding authority only in appellate decisions and statutes, the new pragmatic view is that anything cited or relied upon by courts is authority. We are no longer strictly bound by the traditional notion of legal authority as a set of dependable rules which can be used to provide the one applicable principle needed to resolve a particular problem or case. We now see the concept of authority as part of a legal process in which a variety of materials can be brought to bear on a particular problem. These materials may include statutes, judicial decisions, administrative promulgations, scholarly writings or data provided by scientific investigation. The persuasiveness of authorities may be determined not only by distinctions as to their source, but by judgments of their intrinsic intellectual stature, persuasiveness and force in the light of the particular problem. With this increased flexibility, there has been a striking increase in the importance of much of what has been traditionally designated as secondary authority. Texts, monographs and periodical articles have become both quantitatively and qualitatively a far more influential part of jurisprudence both in the United States and Canada.

To be included in that corpus of potentially effective sources, legal writing must be accessible by convenient and current indexes. Until this *Index* was established, one had to depend on the coverage of Canadian periodicals in the *American Index to Legal Periodicals*. This was not, however, an adequate and reliable means of subject access to Canadian periodical literature, particularly for the Canadian bench and bar. As the number, scope and quality of the Canadian periodicals increased, the *Index to Legal Periodicals* (which now indexes about twenty of the major Canadian journals) was, for reasons of economy, contracting its own general coverage. Although issued less frequently than the *American Index*, this new tool adds coverage of a dozen other Canadian legal publications and provides indexing of legal articles appearing in some fifteen non-legal periodicals. If its frequency can be increased to at least quarterly issues, it should permit the over-burdened *Index to Legal Periodicals* to shift its attention to other areas. The Canadian *Index* can then develop its potential as a truly comprehensive and current index to all of Canada's legal texts, periodicals and monographs.

The basic publication of the *Index* so far is a one volume cumulation covering the three years 1963-1965, which offers access to the contents of approximately forty-nine Canadian legal and non-legal periodicals in French and English and a few volumes of *festschriften*. It includes separate indexes to articles by subject and author, with subdivision by country in the subject

index. The subject headings are based on those used by the *Index to Legal Periodicals*, augmented by well-chosen topics of local interest and French cross-references. There is an additional index for book reviews and one for case notes and comments, the latter being arranged alphabetically by the name of the case under discussion.

What are the other strengths and weaknesses of this *Index*? It has been sensibly planned and well conceived to meet a real need. Qualitatively, its indexing appears to be competently and carefully done. Entries seem to be made with a freer hand than in the *Index to Legal Periodicals* and, where appropriate, articles are usually listed under several different topics. An article on "Speeding as Negligence", for example, appears under *Negligence*, *Torts* and *Traffic Laws and Regulations*. Occasionally one feels, however, that even more intensive indexing and more frequent use of multiple entries would be desirable. An article in the *Canadian Tax Journal* entitled "Taxation and Business Trusts" is correctly listed under *Trusts and Trustees*, but not under *Taxation*. Other examples of under-indexing could be cited, but in all fairness it should be noted that the general standard is at least as high, and frequently higher, than that of other comparable indexes. More frequent use of multiple listings would obviously enhance the usefulness of the *Index*, but would also increase its costs.

Annual supplementation, as now provided, is not adequate for a periodical literature which includes many quarterly, bi-monthly and monthly journals. As noted above, the *Index* should be put on a quarterly basis. Annual and triennial cumulations should, of course, be continued.

Another simpler improvement would be to give the inclusive pagination of all indexed material, instead of just indicating the beginning page. Readers could then note at a glance the length of the piece being indexed and thereby get additional assistance in deciding whether it was worth their attention. That omission is the only significant instance I could find of deviation from the American Standards Association approved standards on indexing.

The format is clear and well laid out and the entries are easy to locate and legible, although rather small. One may prefer larger and more attractive type in such reference books, but the economics of the venture undoubtedly requires production by the photo-reproduction of typed copy in some form. For such an undertaking, the physical product is quite satisfactory. The price is well within the reach of every law library and law office and but a fraction of the cost of the *Index to Legal Periodicals*.

The compilers of the *Index* should be credited for their sensible inclusion of articles in non-legal journals, an additional service which makes the *Index* even more valuable to users. The

fuller development of the *Index* offers many other possibilities which will, however, require financing beyond the bare survival level at which it presently seems to be operating. Were it not now for the help provided by the Canadian Council, McGill University Law Faculty and Commerce Clearing House, Inc., the *Index* probably could not be published. In view of the still quite manageable size of periodical and monographic legal publishing in Canada, it would seem most desirable that the *Index* be expanded to cover not only periodical literature and a few collections of essays, but *all* of the published Canadian secondary legal sources. It would not require very much additional support for this index to be a pioneer in providing subject access to texts, treatises, monographs and all collected essays, as well as periodicals. There is no logical reason why an index should be limited only to the periodicals. In a country sorely needing such an information service, the expansion of this *Index* would create a research tool which could be a standard of excellence throughout the legal world. Such an effort will require, however, more interest and commitment than the Canadian legal profession now provides.

That this *Index* now attracts and merits critical scrutiny without the condescension usually afforded to such fledglings is a credit to those who have created and sustained it. The Canadian Association of Law Libraries has performed a remarkable service. Whether it can continue to develop as it should and perhaps become a comprehensive index to all of Canada's secondary legal literature, will depend upon the support it receives. Hopefully, the quality of the *Index* and the increasing importance of periodical literature in Canadian jurisprudence will accelerate the bar's awareness of its value. If not, it will be a tragic and costly loss both for Canada and for legal research generally.

MORRIS L. COHEN*

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Periodicals in Canadian Law Libraries, A Union List. Published at York University Law Library for the Canadian Association of Law Libraries. Downsview, Ontario: Mrs. Lydia Messier, York University Law Library, 4700 Keele Street. 1968. Pp. iii, 64. (\$2.00)

Manual for Canadian Law Libraries. By SHIH-SHENG HU, B.A., B.L.S., LL.M., Law Librarian, University of Saskatchewan, Saskatoon. Downsview, Ontario: Mrs. Lydia Messier, York University Law Library, 4700 Keele Street. 1966. Pp. ii, 203. (\$10.50)

*Morris L. Cohen, Biddle Law Librarian and Professor of Law, University of Pennsylvania.

Periodicals in Canadian Law Libraries, A Union List, by specifying the location of these publications, supplements *Index to Canadian Legal Periodical Literature*, *Index of Articles from Legal Periodicals* (Canadian Abridgment) and *Index to Legal Periodicals* (H. W. Wilson & Co.), thus greatly facilitating the use of interlibrary loan. The holdings in fifteen libraries are listed and comprise over eight hundred titles which include not only Canadian, (both English and French) American, and the Commonwealth, but a large group of foreign publications.

When one considers the value of this list to both librarian and lawyer, it is regrettable that the holdings of the law libraries of the Universities of Montreal, Sherbrooke, Windsor and York are not represented. Happily, however, the Committee states in the foreword that it is their expectation that these holdings will appear in the next edition. One sincerely hopes, that despite the great care and labour required for revision, it will be possible for this edition to appear sooner than the "next few years" mentioned.

Mr. Hu is to be commended for an extremely detailed and lucid description of organization and procedures as outlined in his *Manual for Canadian Law Libraries*, a manual sponsored by The Canadian Association of Law Libraries.

In twelve chapters, the scope of his subjects ranges from acquisition, cataloguing, classification, circulation and reference, to search tools, interlibrary loan, binding and rebinding. Very comprehensive bibliographies follow each chapter; there is a listing of library suppliers, law publishers and dealers, and a very good index as well as a table of contents. The binding is loose-leaf with hard covers, which makes it convenient for the insertion of revised pages or pages of one's own notes.

It is a book, as Mr. Hu states, for medium and small libraries and especially for those which do not have professional staff. For the private law office library, undoubtedly, many of the methods appear too detailed for that library's requisites. Nevertheless, it would be wise to consider certain aspects of a small library's set-up in relation to the function of this manual. Uncomplicated procedures are often necessary for the quickest solution to one's immediate needs, yet knowledge of proper procedural methods and their utilization even in a simplified form can save much future confusion and labour, when, with the growth of the library, the need for recognized organizational methods must be faced.

Mr. Hu, aware of that oft-repeated statement "cataloguers are born, not made", does much to clarify the intricacies of cataloguing. Numerous examples and illustrations of cards, entries, and so on, complement very good directions for a properly functioning catalogue. The chapter on search tools contains essential information and the section dealing with Canadian statute law, and

in particular, provincial regulations is extremely useful.

An important asset of the book is that one can refer to one volume for varied information rather than having to consult several individual sources.

A great deal of work has gone into the preparation of this manual and despite the fact that the application of all its methods may not apply to all libraries, one cannot help but feel that it has considerable value for most law libraries. Understandably, it has little significance for large well-established ones, yet how informative a manual it is for the neophyte librarians and assistants to peruse and study in order to have an understanding of the overall functioning of the library and to provide them with a feeling of additional confidence upon the occasion of their first confrontation with the law!

HELEN MCSWEENY*

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A Bibliography of Canadian Law. By REYNALD BOULT. Montreal: Wilson and Lafleur, Limited. 1966. Pp. 393. (No price given)

It seems that all too few legal readers have become acquainted with this very useful compilation although it has been available for over two years.

Mr. Boulton has brought together a total of 5,954 significant published materials dealing with Canadian law and has assembled his references in a convenient order for the benefit of all those interested either in complete research or in finding an isolated citation or supporting theory.

All who have made extensive use of this work acclaim its comprehensive coverage and skillful arrangement in the listing of legal writings in the texts, treatises and periodicals covered.

There is both an alphabetical index of authors and a table of contents, which is organized under carefully selected subject matter headings.

After grouping and listing reference works including other bibliographies, statutes, law reports, legal dictionaries and periodicals, there are headings relating to Canadian law in general and its history. These are followed by well-organized subject matter classifications such as constitutional law, administrative law, taxation, criminal law, conflicts of laws and procedure and evidence.

There are also classifications of special interest such as legal education, military law, organization of the courts, uniformity and comparative law.

*Helen McSweeney, Law Librarian, Messrs. Fasken & Calvin, Barristers and Solicitors. Toronto.

It is hoped that the author will be encouraged to perpetuate this excellent work by way of periodic supplements or new editions.

K. E. EATON*

*K. E. Eaton, of the Ontario Bar, Ottawa.