

BOOK REVIEWS  
REVUE DES LIVRES

*Statutory Interpretation.* By RUPERT CROSS. London: Butterworth & Co. (Publishers) Ltd. 1976. Pp. xv, 180. (\$17.50)

In this book Professor Cross, having already written leading works in evidence and criminal law, directs his prodigious talent at the vexing question of statutory interpretation. The result is a volume that more than justifies his unduly modest hope that it will "constitute spare time reading for any practitioner who likes to devote part of his spare time to the contemplation of the law".<sup>1</sup>

The author intended this book for law students.<sup>2</sup> On reading the book it becomes apparent that the appropriate audience is students of law of all ages and experience. The treatment of the subject matter is academically stimulating and the volume constitutes an informative, practical guide to this difficult area.

Chapter I (Historical) provides a brief review of largely pre-twentieth century decisions on statutory interpretation and a description of the genesis of some of its present-day rules and principles.<sup>3</sup> Chapter II (Jurisprudential) deals, again briefly, with the views on statutory interpretation of Blackstone, Bentham, Austin and Gray and a critical analysis of these views taken together, as well as a consideration of the thorny questions of what is meant by the "intention of Parliament" and "interpretation". I hasten to add that though the discussion is brief it is not insubstantial and each area is subjected to the learned author's critical purview and analysis. This is illustrated by the following passage dealing with Austin's arguments concerning extensive interpretation *ex ratione legis* (a description of the process whereby a judge extends the law to cover a case omitted from the law "because the omitted case falls within the general design, although it is not embraced by the actual unequivocal provision" of the law<sup>4</sup>) and restrictive interpretation *ex ratione legis*:<sup>5</sup>

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<sup>1</sup> P. vi.

<sup>2</sup> *Ibid.*

<sup>3</sup> The author adopts Dworkin's (Odger's Construction of Deeds and Statutes (5th ed., 1967)), description of the difference between them and applies the distinction in his analysis: pp. 27-29.

<sup>4</sup> P. 23.

<sup>5</sup> P. 24.

The idea underlying extensive interpretation *ex ratione legis* is uniformity, the exclusion of the *casus omissus* would be unjust. The idea underlying restrictive interpretation *ex ratione legis* is consistency, failure to exclude the case that is in fact within the broad words of the statute would lead to an inconsistency with the decisions required by the narrower object of the statute. Austin seems to have been suspicious of restrictive interpretation *ex ratione legis*, but the principle of justice that unlike cases should be treated differently is in no way inferior to the principle of justice that like cases should be treated alike. We shall see that on the rare occasions when the modern English judges interpret a statute *ex ratione legis* in the Austinian sense they appear to be more at their ease when doing so restrictively than when their interpretation is extensive. To ignore statutory words looks less like legislating than to add to them.

The body of the work involves a statement of the basic rules (Chapter III), an illustration of these rules (Chapter IV), and discussions of internal aids to construction (Chapter V), external aids to construction (Chapter VI) and presumptions (Chapter VII). The work concludes, in the finest tradition, with a chapter on legislative proposals and concluding questions (Chapter VIII).

Professor Cross identifies four rules of statutory interpretation. In stating the rules he indicates that the "statement is made with all the diffidence, hesitancy and reservation the subject demands".<sup>6</sup> With that reservation out of the way he sets out the four rules as follows:<sup>7</sup>

1. The judge must give effect to the ordinary or, where appropriate, the technical meaning of words in the general context of the statute; he must also determine the extent of general words with reference to that context.
2. If the judge considers that the application of the words in their ordinary sense would produce an absurd result which cannot reasonably be supposed to have been the intention of the legislature, he may apply them in any secondary meaning which they are capable of bearing.
3. The judge may read in words which he considers to be necessarily implied by words which are already in the statute and he has a limited power to add to, alter or ignore statutory words in order to prevent a provision from being unintelligible or absurd or totally unreasonable, unworkable or totally irreconcilable with the rest of the statute.
4. In applying the above rules the judge may resort to the aids to construction and presumptions mentioned in Chapters V-VII of this book.

Professor Cross' rules involve a fusion of the three rules (literal, golden and mischief) advanced by Professor Willis in his article "*Statutory Interpretation In A Nutshell*", published in this *Review* in 1938,<sup>8</sup> a point that Professor Cross makes.<sup>9</sup> While admitting the danger of any dogmatic assertion in the area, as pointed out

<sup>6</sup> P. 42.      <sup>7</sup> P. 43.

<sup>8</sup> (1938), 16 Can. Bar Rev. 1.

<sup>9</sup> P. 169. The author credits Driedger, *The Construction of Statutes* (1974), for the original observation.

previously, Professor Cross perceives a more rule regulated system than that envisioned by Professor Willis when he asserted that a court invokes "whichever of the rules produces a result which satisfies its sense of justice in the case before it".<sup>10</sup>

There is an ample Table of Cases (over 250 entries) and a reasonably thorough index. The proofreading is excellent. One small criticism could be made of the system of footnoting. The footnotes are numbered from one to twenty, and then the numbering system returns to one again within the same chapter. Whatever the reason for this method, and frankly the reason eludes this reader, any advantage is surely offset by the risk of erroneous reference, and by the unduly complicated method of reference that is necessitated if one wishes to refer to a footnote which is in the second series of footnotes within a chapter.

For all students of the law this is an extremely useful book. The Canadian reader will find Professor Cross' references to Driedger's *The Construction of Statutes*<sup>11</sup> and his analysis of the Willis article particularly interesting. All will benefit from the learned author's attempt to analyse the many conflicting decisions and dicta in this field and to provide the reader an overview of the subject unlike, as the author respectfully notes, Maxwell's *On the Interpretation of Statutes*<sup>12</sup> which, in the author's opinion, is "useless for anyone hoping for a general review of the subject which has the remotest claim to coherence".<sup>13</sup> This is not a criticism that could be credibly made of this excellent addition to legal scholarship.

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*Compensation and Rehabilitation: a Survey of the Report of the National Committee of Inquiry into Compensation and Rehabilitation in Australia and the National Compensation Bill 1974.* By HAROLD LUNTZ. Melbourne, Australia: Butterworths. 1975. Pp. xv, 157. (No Price Given)

In 1972 New Zealand replaced much of its tort law with a statutory compensation scheme,<sup>1</sup> which would appear to be working reason-

<sup>10</sup> *Op. cit.*, footnote 8, at p. 16. Quoted by Cross, p. 169.

<sup>11</sup> *Op. cit.*, footnote 9. <sup>12</sup> (12th ed., 1969).

<sup>13</sup> P. 42. A criticism equally applicable to the early Canadian work, Beal's *Cardinal Rules of Legal Interpretation*, ed., by A. E. Randall (3rd ed., 1924).

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<sup>1</sup> Accident Compensation Act 1972, as amended in 1973 (twice), 1974 and 1975.

ably well.<sup>2</sup> England, France, Ireland, Israel and Sweden are considering that experience. The Americans have a multiplicity of no-fault schemes<sup>3</sup> while we in Canada enjoy peaceful co-existence.<sup>4</sup> The Australian Labour government of Mr. Whitlam established an inquiry into compensation and rehabilitation in 1973. The resulting *Report*<sup>5</sup> gave birth to the National Compensation Bill of 1974 which was one of several lost in the prorogation of the Federal Parliament in November 1975 and which has yet to be resuscitated by Mr. Fraser's Liberal-Country Party. It is that shelved Bill which is the subject of Professor Luntz's monograph, written as a contribution to the proper understanding of the proposed scheme.<sup>6</sup>

The initial chapter tells the story of the Bill's origins and subsequent development and restates the now familiar arguments for comprehensive entitlement of the injured, equality of real compensation, administrative efficiency<sup>7</sup> and genuine rehabilitation of the accident victim.

The present law is appropriately castigated in chapter two and the detailed provisions of the Bill are scrutinized in the succeeding chapter. It is explained that the Bill seeks to provide benefits for incapacity or death as a result of personal injury or sickness to the exclusion of legal damages. But, as is pointed out, the common law action of an injured child survives as benefits are not payable to a person until he attains the age of eighteen or is employed full time.<sup>8</sup> The consequent injustices are clearly presented by the writer.<sup>9</sup> While the Bill aims to meet the needs of all Australians howsoever incapacitated nevertheless the committee and the government agreed upon a staggered implementation so that its overall costs could be monitored. This was to be achieved by drawing a distinction between injury and sickness to be operative only in the early life of the Act. On full implementation, that is when the community as a whole had decided it could afford the scheme, then the distinction would become redundant. Professor Luntz describes the phasing operation thus:<sup>10</sup>

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<sup>2</sup> Palmer, *Accident Compensation in New Zealand: The First Two Years* (1977), 25 Am. J. Comp. L. 1.

<sup>3</sup> O'Connell, *Operation of No-fault Auto Laws: A Survey of the Surveys* (1977), 56 Neb. L. Rev. 23.

<sup>4</sup> Linden, *Peaceful Co-existence and Automobile Accident Compensation* (1966), 9 Can. Bar. J. 5.

<sup>5</sup> Report of the National Committee of Inquiry into Compensation and Rehabilitation in Australia 1974 ('The Woodhouse Report').

<sup>6</sup> The possible abortion of the Bill was foreseen by the author, p. ix.

<sup>7</sup> We are informed that the draftsmen of the Report were impressed by the cost efficiency of the Ontario workers' compensation scheme.

<sup>8</sup> S. 18(1).      <sup>9</sup> Pp. 46-47.      <sup>10</sup> P. 51.

*Schematic Representation.* The introduction of the scheme may be represented as follows:

Time \_\_\_\_\_

A	B	C	D
A is 1st July 1976, from which date people injured or born congenitally disabled thereafter will be covered.			
B is the date from which people injured or born congenitally disabled before A and still incapacitated will receive benefits.			
C is the date, not earlier than 1st July 1979, from which people, incapacitated by sickness occurring thereafter will be covered.			
D is the date from which people who fell sick before C and who are still incapacitated will receive benefits.			

The persons covered by the Bill include residents, Australians injured overseas (if occurring within one year after departure), visitors (for injury only), self-injurers but excludes persons injured in the commission of serious crimes.<sup>11</sup>

The benefits under the Bill are payable weekly although there is provision for lump sum payments for disfigurement, medical expenses and payments to surviving spouses. The general tenor of the Bill is one of opposition both to the commutation of future periodical payments<sup>12</sup> and to their assignment.<sup>13</sup> The competing aims of speedy payment and deterrence of nuisance claims are coped with by the placing of the cost of the first week's incapacity entirely on the injured or his employer.<sup>14</sup> The payments are fixed at eighty-five per cent of the average earnings of the person concerned with tolerances built in for inflation.<sup>15</sup> Conversely there is fixed a maximum of \$10,000.00 as a lump sum payment for disfigurement with no provision for erosion of the value of the dollar.

One of the more arresting features, with regard to the benefits payable on death, lies in the classification of female survivors as either class A or class B widows, or as *de facto* wives. Class A widows are lawful wives subject to disabilities in that they are either pregnant, or custodians of children under twenty or aged or infirm relations, or unemployable or over fifty-five.

Class B widows are lawful wives not so disadvantaged. On the other hand, *de facto* wives, who may be either class A or B

<sup>11</sup> The list comprises: murder, intentionally causing grievous bodily harm, piracy, an act done with the intention of endangering a person on board a vehicle, vessel or aircraft, revolt against the authority of the captain of a ship or aircraft, and attempts at these crimes.

<sup>12</sup> S. 54.

<sup>13</sup> S. 113.

<sup>14</sup> S. 41(1)(a).

<sup>15</sup> S. 94.

widows, are women who lived with the deceased for at least three years "on a permanent and *bona fide* domestic basis immediately before his death".<sup>16</sup> The class A widow receives a pension until she reaches sixty-five whereas the class B widows' payments cease after one year. The justification of the differential treatment is the expected one: the disadvantaged needs the assistance whereas the sturdy independent must be encouraged to re-enter the productive community as soon as possible.<sup>17</sup>

The penultimate chapter outlines the claims procedures and their assessments. This emphasizes the speed and flexibility of the operation of the scheme. In the last portion Professor Luntz offers us some thoughts on the constitutional problems facing a national scheme in a federal jurisdiction, the overall savings to Australians of the scheme over the existing common law service along with the alternatives open to the deprived trial Bar.<sup>18</sup> It is here that the author explains the rejection by the committee of Calabresi's theory of general deterrence<sup>19</sup> and the decision to fund the operation out of general taxation. Rehabilitation and safety are covered in the closing pages.

Professor Luntz has written a readable and informative description of the individual Australian proposal<sup>20</sup> and so has performed a valuable service not only to interested Australians but also to comparativists elsewhere.

For us in Canada it is necessary to supplement *Luntz* with some additional reading. Fortunately we have Professor Palmer's report on the working of the New Zealand scheme,<sup>21</sup> wherein he informs us of the most awkward problems faced by that legislation:

In conversation with Commissioners and staff the following issues appear to constitute the main problem areas, at least in the minds of those who administer the scheme: 1) Assessing earnings-related compensation for periods of incapacity suffered by the self-employed. Most agree that this has been the most important problem and the one least capable of easy solution; 2) Pain and suffering compensation, §120; 3) §114, Permanent partial, incapacity; 4) The need to obtain authoritative medical assessments, especially for cases of permanent incapacity; 5) The proper limits of compensation available under §121 which allows payment for "actual and reasonable expenses and proved losses necessarily and directly resulting from the injury or death

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<sup>16</sup> *Cf.*, s. 13(b)(i) The Family Law Reform Act 1977, and s. 58(b) Succession Law Reform Act 1977.

<sup>17</sup> P. 99.

<sup>18</sup> These are: labor law, human rights and civil liberties, consumer affairs and environmental protection. P. 134.

<sup>19</sup> Calabresi, *The Cost of Accidents* (1970).

<sup>20</sup> A comparison of the New Zealand and Australian schemes reveals substantial differences. *Cf.* Palmer, *op. cit.*, footnote 2, pp. 7 and 44.

<sup>21</sup> *Op. cit.*, *ibid.*

. . ."; 6) Occupational diseases. There has been dissatisfaction from some claimants who believe the Commission has wrongly rejected claims based on the allegation that a particular disease was due to the nature of the employment; 7) The range of cover included by the words "medical, surgical, dental or first aid misadventure" in §2; 8) How to obtain adequate accident statistics; 9) Classification of risks and variable levies for employers; 10) Increases in claim rates resulting from 100% compensation for first week of incapacity where the injury arises out of and in the course of the employment; 11) "Dependency" in death cases.<sup>22</sup>

Of equal value is Professor O'Connell's survey of the present situation in the United States.<sup>23</sup> His discussion of the abuses of no-fault insurance and the blocking tactics of the Bar and insurers is instructive.

In short, as Canadian lawyers and insurers ponder Premier Levesque's no-fault proposals and the Supreme Court of Canada's decisions in *Thornton v. The Board of School Trustees of School District No. 57*,<sup>24</sup> *Andrews v. Grand & Toy Ltd*,<sup>25</sup> *Teno v. Arnold*,<sup>26</sup> and hopefully *Prather v. Hamel*,<sup>27</sup> Professor Luntz's book should add considerably to the informed quality of any ensuing discussions.

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*Constitutional Law of India*. Second Edition. 2 vols. By H. M. SEERVAI. Bombay: N. M. Tripathi Pte. Ltd 1975. Pp. 1xvi, 1580, appendices 174, index 57. (Rs 125; £13.80; \$30.00.)

In what has now become the standard commentary on the Indian constitution, the author, who for seventeen years was Advocate-General of Maharashtra, maintains in the second edition the high quality of the original work. One of the main assets, especially for the non-Indian reader, of this detailed and thoughtful book is the author's frequent comparisons of the Indian with the American, Australian and Canadian federal constitutions.

Among the matters given expanded treatment in this edition are the judicial sequels to *Golak Nath's*<sup>1</sup> case, where a reconsidera-

<sup>22</sup> *Op. cit.*, *ibid.*, pp. 4-5.

<sup>23</sup> *Op. cit.*, footnote 3.

<sup>24</sup> (1977), 73 D.L.R. (3d) 35 (B.C.C.A.), on appeal.

<sup>25</sup> [1976] 2 W.W.R. 385 (Alta C.A.), on appeal.

<sup>26</sup> (1977), 67 D.L.R. (3d) 9 (Ont. C.A.), on appeal.

<sup>27</sup> (1976), 66 D.L.R. (3d) 109 (Alta C.A.).

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<sup>1</sup> *I.C. Golak Nath v. State of Punjab*, [1967] 2 S.C.R. 762.

tion of the Supreme Court of India's interpretation of "fundamental rights" in that important decision has led to a constitutional amendment, and to the overruling of the case. Although *Golak Nath* was followed in *Gujarat v. Shantilal Mangaldas*,<sup>2</sup> when the court canvassed important issues of national policy in the *Bank Nationalization case*<sup>3</sup> and in the *Privy Purse case*<sup>4</sup> (concerning the supposed vested right of Indian maharajas to state support despite an executive decree depriving them of their "privy purses") the earlier precedent was modified. *Golak Nath*, which was sharply criticized by the author in his first edition,<sup>5</sup> appeared to flow from idealist metaphysics rather than from practical legal considerations. In the actual decision, Chief Justice Subba Rao, who firmly believed in the "transcendental character" of fundamental rights persuaded a majority of six out of eleven judges (the full court sitting on an important question) that such rights could not be abridged or taken away even by an amendment to the constitution. In so deciding the court affirmed that it was not bound by several of its own previous decisions holding the contrary, thus adopting an approach similar to that of the United States Supreme Court in constitutional adjudication. Of the former contrary decisions (involving the First, Fourth and Seventeenth Amendments (Acts) the majority held that, although erroneously decided, they had now become part of the constitution by acquiescence and must be followed. According to the doctrine of prospective overruling, however, in future the Indian Parliament would have no power to abridge by amendments any of the "fundamental rights" set out in the Indian constitution. This result, if sustained, would clearly lead to inflexibility since "fundamental rights", of which there was no clear definition, would be unamendable except possibly through the establishment of a new constituent Assembly to frame an entirely fresh constitution.

Two years after *Golak Nath* in the *Gujarat case*, a landowner challenged a "scheme" of the Bombay Town Planning authority which was applied to a plot of land owned by him, allegedly awarding him inadequate compensation, thereby violating article 31(2) of the constitution. The Supreme Court upheld what amounted to insufficient compensation, however, since to do otherwise would have nullified the Fourth Amendment, which rendered the adequacy of his award non-justiciable.

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<sup>2</sup> [1969] 3 S.C.R. 341.

<sup>3</sup> *R.C. Cooper v. Union*, [1970] 3 S.C.R. 530. This case arose when Prime Minister Indira Gandhi nationalized the assets of the fourteen largest banking companies in the country.

<sup>4</sup> *Mahdav Rao Scindia v. Union*, [1971] 3 S.C.R. 9.

<sup>5</sup> (1967), p. 1117.

In the *Bank Nationalization* case, in contrast to *Gujarat*, the Supreme Court decided that the relevant nationalizing legislation violated article 31(2) ("Right of Property"), because the money paid was less in value than the property acquired — the decision thereby nullifying the Fourth Amendment. Mr. Seervai criticizes the somewhat curious citation of Blackstone's *Commentaries* in the majority judgment,<sup>6</sup> to the effect that "full indemnification" for private property taken is an essential attribute of the rule of law, on the grounds that the historical context and emphasis of Blackstone in eighteenth-century England are not appropriate for the determination of the issue of fair compensation for the nationalization of privately-owned assets in our day:<sup>7</sup>

[T]he development of the law of England did not come to a full stop with Blackstone's *Commentaries*. The regard of the law for private property, and the disregard of the law for the public good, which Blackstone eulogised belong to an age which has passed away. A distinguished judge of our own day, Lord Justice Denning, has said that "... the extent to which judges carried rights of property seems to us today to be incredible."

He argues also that, according to article 31(2):

... the compensation is to be fixed by the legislature and not by a quasi-judicial process.<sup>8</sup>

And in the *Privy Purse* case,<sup>9</sup> the author criticizes the Supreme Court for reading a binding obligation into the bare words of article 291, charging on the Indian "Consolidated Fund" the amounts payable to former ruling princes, when by presidential decree such payments were abolished. By a practice which will be unfamiliar to Canadian lawyers, the bench interpreted article 291 by referring to a contemporaneous speech by Home Minister Vallabhbhai Patel ("The minimum which we would offer to them as *quid pro quo* for parting with their ruling powers was to guarantee to them privy purses. . . .") whereas the author considers that if extrinsic evidence were admissible, the statement made by an authoritative spokesman when the constitution was being adopted that article 291 was "non-justiciable" would be more germane to the issue.<sup>10</sup>

Faced with such judicial self-assertion, the Indian Parliament passed three countervailing constitutional amendments. The Twenty-fourth Amendment, altering article 368, sought to nullify *Golak Nath* by reasserting Parliament's power to amend "fundamental rights." And the Twenty-fifth and Twenty-sixth Amendments, respectively, nullified the *Bank Nationalization* and *Privy Purse* cases.<sup>11</sup> In *Kesavananda v. Kerala*,<sup>12</sup> heard by a bench of

<sup>6</sup> ('70) A. Sc., pp. 605-606, at p. 674 of text.

<sup>7</sup> P. 674; italics in original.

<sup>8</sup> *Ibid.*, p. 700.

<sup>9</sup> See *supra*, footnote 4.

<sup>10</sup> Pp. 23-24.

<sup>11</sup> P. vii.

<sup>12</sup> ('73) A. Sc. 1461.

thirteen judges, since the full court's decision in *Golak Nath* was an issue, the latter decision was explicitly overruled by a majority of nine to four, it being held that "law" did not include a constitutional amendment, and that the latter could therefore override "fundamental rights" in the Indian constitution.<sup>13</sup>

The author's discussion of the "right to Freedom" in Chapter XI is especially interesting in the light of the recent turbulence accompanying ex-Prime Minister Indira Gandhi's proclamation of emergency powers. Article 19(1)(a) which provides "that all the citizens shall have the right to freedom of speech and expression", was powerfully influenced by the First Amendment of the United States constitution. The Indian provision has been held to embrace freedom of the press, but unlike its American counterpart it also embraces preventive detention, which has no parallel in the American constitution.<sup>14</sup> In one context the author uses language curiously reminiscent of the *Alberta Press Bill* case:<sup>15</sup>

The freedom of thought and expression, and the freedom of the press, are not only valuable freedoms in themselves, but are basic to a democratic form of Government which proceeds on the theory that problems of Government can be solved by the free exchange of thought and by public discussion.<sup>16</sup>

It was under article 352(1) that Prime Minister Gandhi had declared a state of emergency on June 26th, 1975,<sup>17</sup> a condition that prevailed until her defeat by Morarji Desai's coalition forces early

<sup>13</sup> The contrary position, which was upheld in *Golak Nath*, should be briefly mentioned. S. 13(3)(a) of the constitution of India provides that no "law" shall be made abridging "fundamental rights", with the term "law" including, e.g., ordinance, order, by-law, rule, regulation, and so forth. If "law" within the meaning of s. 13(3)(a) included a constitutional amendment made pursuant to s. 368 (which contains the amending power) the result would be that no "amendment" could abridge "fundamental rights." It was so held in *Golak Nath*. In *Kesavananda v. Kerala*, however, an earlier view was reaffirmed which distinguished between "law" made by ordinary legislative processes, which could never override "fundamental rights", and "law" by way of amendment made in the exercise of constituent power, which could do so. The result of this reconsideration of ss 13(3)(a) and 368, of course, was to confirm that "amendments" made pursuant to the latter section, but not ordinary statutes, could alter or abridge "fundamental rights," see Seervai, *op. cit.*, p. 168.

<sup>14</sup> Seervai, *op. cit.*, p. 347.

<sup>15</sup> [1938] S.C.R. 100.

<sup>16</sup> *Ibid.*, at p. 348; it should be mentioned, however, that preventive detention was used frequently by the British before independence was gained in August, 1947, *New York Times*, June 27th, 1975, p. 12.

<sup>17</sup> See, e.g., *The Times* (London), June 27th, 1975, p. 1. The President of India activated the state of emergency by the following proclamation: "In exercise of the powers conferred by clause (1) of Article 352 of the Constitution, I, Fakhruddin Ali Ahmed, President of India, by this proclamation declare that a state of emergency exists whereby the security of India is threatened by internal disturbances."

in 1977. Charging that a "subversive conspiracy" against the government was imperilling the state, after a lower court had found her guilty of irregularities in her 1971 election campaign, she banned opposition parties, jailed opponents, censored the press, suspended civil liberties and, in effect, equated her own survival with the welfare of her country. Unfortunately, the proclamation was issued almost contemporaneously with the publication of Mr. Seervai's book, and he was, accordingly, unable to provide us with his usual lucid commentary on the development of the law in this area.

He mentions, however, that if the President is satisfied that a grave emergency exists, with state security being threatened by "war, external aggression or internal disorder", he may issue a proclamation to that effect. Such a proclamation ceases to have any effect unless it is approved within two months by a resolution of both Houses of Parliament. The effect of the proclamation is that during its operation Parliament can make laws on matters ordinarily under state jurisdiction. The central executive can also direct the state governments concerning how local executive powers are to be exercised.<sup>18</sup> As in Canada after the proclamation of the War Measures Act, the executive decree centralizes both legislative and executive powers, virtually suspending the doctrine of *ultra vires* as it affects the central power.

There are other interesting comparisons with the Canadian constitution. India, apparently, profited from Canada's example when article 253 was enacted, conferring treaty-implementing jurisdiction on Parliament even over subject-matters falling exclusively under state jurisdiction.<sup>19</sup> Seervai refers to Lord Atkin's 1937 decision<sup>20</sup> which severed the Canadian treaty-implementing from the treaty-making power, requiring the Dominion to enlist the legislative co-operation of the provinces when a treaty (for instance, The Columbia River Treaty) was entered into on matters falling under provincial powers. The resultant divided treaty power could prove a diplomatic embarrassment to the central power, and recent judicial dicta by Chief Justice Laskin indicates that the matter is being reconsidered.<sup>21</sup> "It may be mentioned here", says

<sup>18</sup> Seervai, *op. cit.*, p. 92.

<sup>19</sup> *Ibid.*, p. 117.

<sup>20</sup> *A.G. Can. v. A.G. Ont.*, [1937] A.C. 326.

<sup>21</sup> *Cf.* the following words by Laskin, C.J. in *MacDonald v. Vapour Canada Ltd* (1976), 66 D.L.R. (3d) 1, at p. 30: "In my opinion, assuming Parliament has power to pass legislation implementing a treaty or convention in relation to matters covered by the treaty or convention which would otherwise be for provincial legislation alone, the exercise of that power must be manifested in the implementing legislation and not left to inference. . . ."

Seervai, "that article 253 of our Constitution appears to have been enacted in order to avoid the difficulties such as were experienced by Canada in implementing international agreements or conventions".<sup>22</sup>

Another contrasting feature is the much longer list of concurrent powers in the Indian constitution. There are some ninety-seven items on the Union list enumerating central powers, sixty-six on the state list, and forty-seven concurrent powers (including, for instance, criminal law and procedure; marriage and divorce; contracts; actionable wrongs; bankruptcy and insolvency; trust and trustees; evidence; prevention of cruelty to animals; lunacy; adulteration of foodstuffs; labour law; vocational education and the professions).<sup>23</sup> Referring specifically to the Indian example, the Special Joint Committee on the Constitution recommended in 1972 that Canada adopt a wider list of concurrent powers in any new constitution.<sup>24</sup>

In discussing the cultural and educational rights of Indian minorities the author learnedly refutes the misapplication of two early Manitoba cases, cited by way of analogy by Venkatarama J. in his dissent in *In re Kerala Education Bill, 1957*,<sup>25</sup> correctly explaining the tangled background of the 1890's litigation. The author finds the Canadian defence power, vested exclusively in Parliament, to be closer to the Indian power, originating in articles 245 and 246, than to the Australian and American parallels, which remain distributed. Perhaps in this connection he might have mentioned the great influence of the "peace, order and good government" clause in the preamble to section 91, along with section 91(7) which he does mention ("Militia, Military and Naval Services and Defence"),<sup>26</sup> the latter having played a relatively lesser role in supporting Canadian legislation for war purposes.

Mr. Seervai's work is learned, polished and thorough. At a time when many Canadian scholars are reconsidering the terms of the British North America Act<sup>27</sup> with a view to possible changes, there is much to be learned from his balanced, judicious and exhaustive scrutiny of a federal model diverging widely from our own.

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<sup>22</sup> P. 117, and see p. 1301.

<sup>23</sup> Pp. A-149 - A-151.

<sup>24</sup> Final Report, Ottawa (1972), pp. 43-45.

<sup>25</sup> [1959] S.C.R. 995.

<sup>26</sup> Seervai, *op. cit.*, p. 93.

<sup>27</sup> (1867), 30 & 31 Vict., c. 3 (U.K.).

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*The Role of the Supreme Court in American Government.* By ARCHIBALD COX. Oxford: Clarendon Press. 1976. Pp. 118. (£2.75 net)

This magnificent little book is a documented and slightly revised version of a series of lectures delivered by Professor Cox at Oxford University in 1975 shortly after he had been fired by President Nixon from his job as Special Prosecutor in the notorious "Saturday Night Massacre". Professor Cox sets himself two goals: first, to discuss in broad terms the kinds of questions which the United States Supreme Court attempts to handle; secondly, "to face the currently pressing question, how far can and should the federal judiciary resolve by constitutional interpretation questions of public policy which are also fit for resolution through the political process?"<sup>1</sup> Although Professor Cox achieves both goals, it is his discussion of the second, more jurisprudential, question that is of particular value.

Professor Cox begins by discussing the pervasive role of the Supreme Court in the resolution of important issues of public policy in the United States. This phenomenon was recognized as early as 150 years ago by de Tocqueville who observed, "Scarcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question".<sup>2</sup> The fact that the Supreme Court in recent years has been faced with the school desegregation, reapportionment, abortion and Watergate issues (to name but a few) is compelling testimony to the continuing validity of de Tocqueville's observation.

Of course, the magnitude of the judicial role in the United States is unique. No other western democracy has permitted the courts to exercise such broad powers in the establishment of national policy. Cox himself cites the example of the Scandinavian legal scholar who informed him that it was unthinkable that the courts of any country should issue an order to its Chief of State.<sup>3</sup> As well, the recent decision of the House of Lords in *Attorney-General v. Gouriet*<sup>4</sup> illustrates the continuing reluctance of the English courts to interfere with executive decisions.

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<sup>1</sup> P.v.

<sup>2</sup> P.1.

<sup>3</sup> P.4.

<sup>4</sup> The Times, July 26th, 1977, p. 12. In this case the House of Lords held unanimously that where the Attorney General has refused his consent to relator proceedings in the civil courts, a private citizen who asserts the public interest is involved by threat of a breach of the criminal law has no right to go to the civil courts for a remedy. Lord Wilberforce said: "That it is the exclusive right of the Attorney General to represent the public interest . . . is not technical, nor procedural, nor fictional. It is constitutional. It is also wise."

Although other political systems deny their courts a role similar to that played by the American Supreme Court, Cox's historical analysis of the development of the court's constitutional role is useful—particularly for Canadian readers. Historically, the Supreme Court of Canada has not been a central institution in the development of public policy. The fact that some observers would characterize the recent *Anti-Inflation Act Reference*<sup>5</sup> as the most important Canadian constitutional case in the last fifty years<sup>6</sup> is as much a commentary on the insignificance of constitutional litigation generally in Canada as it is a statement concerning the significance of the *Anti-Inflation Act* case itself. However, there are signs that this is changing. For example, although the Canadian Bill of Rights has not yet been a significant source of litigation it is likely that, as the courts become more familiar with it, the case law in this area will expand and develop. In this context, two centuries of American jurisprudence relating to their Bill of Rights may assist the Canadian Supreme Court in avoiding confusion<sup>7</sup> and the formulation of bad law.<sup>8</sup>

More importantly, it is likely that the Canadian Supreme Court's traditional role as umpire of the federal system will become increasingly prominent in the next few years. As the provinces gain in strength and in confidence and as they attempt to expand the perimeters of their constitutional jurisdiction (something Ottawa has done for decades) the co-operative federalism of the Pearson years, the events of which were played out in the political arena, may dissolve into a more classical, and legalistic, brand of co-ordinate federalism with substantially increased judicial involvement. In any case, even if the governments continue to agree on some measures, private litigants will sometimes be able to upset this political agreement by raising the issue in a judicial proceeding.<sup>9</sup>

For these reasons, the Canadian Supreme Court will probably play an increasingly active role in both facets (government versus

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<sup>5</sup> (1976), 68 D.L.R. (3d) 452 (S.C.C.).

<sup>6</sup> See the *Financial Post*, Aug. 14th, 1976, p. 7.

<sup>7</sup> Such as that caused by the conflicting decisions in *Regina v. Drybones*, [1970] S.C.R. 282 and *Attorney-General of Canada v. Lavell*, [1974] S.C.R. 1349.

<sup>8</sup> Such as that formulated in *Hogan v. The Queen* (1975), 48 D.L.R. (3d) 427 (S.C.C.), in which the majority placed a higher value on the admission of relevant evidence in a criminal proceeding than on protection of the rights enumerated in the Canadian Bill of Rights.

<sup>9</sup> For example, the ability of the Renfrew Schoolteachers Association to short-circuit an important intergovernmental agreement was the main impetus for the *Anti-Inflation Act Reference*.

government; government versus citizen) of constitutional law. Consequently, Professor Cox's lucid description of the historical development of the powerful role of the American Supreme Court is both interesting and valuable.

Having discussed the main features of the judicial role in the United States, Professor Cox then turns to a consideration of the most striking and most significant concept buttressing that role—judicial supremacy. The Watergate tapes decision<sup>10</sup> is only the most recent in a long line of cases declaring that it is for the courts, and ultimately the courts alone, to declare what the constitution means. But how has such a view come to be accepted as a fundamental principle of political life in America? As Cox points out, "It is hardly self-evident that only judges can interpret the laws".<sup>11</sup> Indeed, it can be argued that judicial supremacy cannot be justified historically, logically or even on the merits. Historically, there is nothing in the American constitution which supports the principle. Logically, since the cornerstone of American political philosophy and government structure is the principle of separation of powers it should follow that a true separation of powers would be realized only if the jurisdiction of each of the three branches of government was not subject to the scrutiny and dictates of the other levels. This was Jefferson's view—that each level of government could declare for itself the limits of its constitutional jurisdiction. Finally, even if one puts aside history and logic, it can be contended that judicial supremacy is not desirable because the courts are unsuited to decide important issues of public policy. As Cox states, "... the proper application of the Constitution in a given situation calls sometimes for the construction of the text, but usually for appraisal of disputed facts (including social and economic conditions), and for weighing the relative importance of opposing interests rather than construing words".<sup>12</sup> Are not politicians likely to be better suited to perform this task than judges?

So what explains the continuing attachment of the American people (as vividly illustrated by public reaction to the Watergate decision) to their judicial Platonic guardians? Cox finds the answer in two sources: first, "the necessity for an umpire to resolve the conflicts engendered by an extraordinarily complex system of government";<sup>13</sup> secondly, "a deep and continuing American belief in natural law".<sup>14</sup> Because of these two facts, and in spite of occasional attempts to overcome judicial supremacy (President Nixon was not unique in attempting to ignore or challenge the role of the Supreme Court—Presidents Jefferson, Lincoln and Franklin

<sup>10</sup> *U.S. v. Nixon* (1974), 418 U.S. 683.

<sup>11</sup> P. 12.

<sup>12</sup> P. 14.

<sup>13</sup> P. 16.

<sup>14</sup> *Ibid.*

Roosevelt made the same attempt) judicial supremacy, as first expounded, eloquently and unflinchingly, by Chief Justice Marshall in *Marbury v. Madison*,<sup>15</sup> is still one of the foundations of the American system of government.

Having discussed the central role of the Supreme Court and having considered the philosophical and historical underpinning of the principle of judicial supremacy, Professor Cox proceeds to examine some of the consequences of Supreme Court activity in recent years. This he does with clarity and style, particularly in chapters 2 and 4.<sup>16</sup> His statement that "the constitutional litigation of an era reflects the aspirations and divisions of the contemporary society"<sup>17</sup> is borne out by a mere roll call of the areas of litigation discussed in these chapters—freedom of expression, the right to privacy, school desegregation, school financing, reapportionment and abortion, to list but a few. His discussion of all these issues is valuable to Canadians because we are facing many similar problems in these areas. For example, having discussed the case law relating to freedom of expression, Cox concludes that the law of libel in relation to statements made about public figures has been virtually wiped out by recent Supreme Court decisions. He speculates that much of the early Watergate reporting would not have been attempted under the old law and then asserts, "Similarly, a visitor to England gets the . . . impression that the danger of libel suits inhibits the British much more than the American press, and that this affects the democratic process".<sup>18</sup> The recent confrontation between Justice Minister Lang and the Saskatchewan newspapers, and the newspapers' capitulation because of their fear of the virility of Canadian libel laws, makes one wonder if the same observation might not be equally applicable in a Canadian context. Is our legal protection of free speech values so diluted that a Canadian Watergate would go undetected? If so, what can we learn from the line of American decisions discussed by Professor Cox?

In his final chapter Professor Cox returns to the jurisprudential question that has been central throughout his book, ". . . how much of the business of government shall be reserved to the people and the political process and how much should go to the judges, ultimately to the Supreme Court of the United States, under the label 'constitutional law'?"<sup>19</sup> His answer to this question shows Cox at

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<sup>15</sup> (1803), 5 U.S. (1 Cranch) 137.

<sup>16</sup> Ch. 3, in my view, is not quite as well written. The chapter is short (twenty pages) and yet Professor Cox covers a number of substantive areas of constitutional law. Consequently, on occasion, a point which probably is obvious to Professor Cox is not as obvious to the reader. For instance, it was not clear to me (until I read the case) why the truck advertising case, discussed briefly on p. 60 was "similar" to the river pilotage case discussed on the same page.

<sup>17</sup> P. 56.

<sup>18</sup> P. 40.

<sup>19</sup> P. 33.

his best—eloquent, balanced and wise. He is not an adherent of the facile judicial activism of a Black or a Douglas, an activism which takes no account of the institutional limitations inherent in the very nature of the judicial function. For, as Cox recognizes, there are dangers in full-blown judicial activism. The Supreme Court is a national institution. Hence when it steps in to overturn legislative decisions made by the states in the political arena (and this is usually what happens—very little federal legislation is struck down by the court) the result is not only the substitution of judicial judgment for political judgment. Another result is the centralization of decision-making in a national body. At a time in Canada when increased centralization is a bankrupt political concept those who support an enlarged judicial function should at least address themselves to this consequence of judicial review. Secondly, as stated so persuasively by another Harvard constitutional law scholar of another era, a too heavy reliance on the courts to resolve crucial public issues will result, in the long run, in a dwarfing of the political capacity of the people and a deadening of their sense of moral responsibility.<sup>20</sup> Throughout his book Cox attributes the legitimacy of judicial review to public acceptance. But public acceptance based on apathy would not legitimate judicial review. This is what concerned Thayer—and this is what men like Justice Douglas fail to perceive.

Equally though, Cox does not align himself with absolutist advocates of judicial restraint like Justice Frankfurter or Professor Bickel. He cites the desegregation and reapportionment cases as instances of the court leading the nation in a direction which it was prepared to go but might not have gone if the decision had been left to the political institutions. So strong judicial leadership can be immensely valuable—at the appropriate time. The last words are the key ones—ultimately, the appropriate judicial role is a matter of balance and proportion, of common sense and wisdom. Professor Cox started his book with a quotation from de Tocqueville. Having read the book and become aware of his philosophy of the judicial function, one is left with the impression that he could just as appropriately have ended with another de Tocqueville statement, “Judges must know how to understand the spirit of the age, to confront those obstacles that can be overcome, and to steer out of the current when the tide threatens to carry them away.”<sup>21</sup>

Professor Cox's book is well worth reading. It firmly establishes him in the long line of Harvard constitutional law scholars—Holmes, Thayer, Frankfurter, Powell—who coupled a profound understanding of the public issues of their day with a

<sup>20</sup> James Bradley Thayer, *John Marshall* (1920), pp. 106-107.

<sup>21</sup> Alexis de Tocqueville, *Democracy in America* (1966), p. 137.

willingness to look at those issues from an institutional and philosophical perspective as well as on the merits.

JAMES C. MACPHERSON\*

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*Introduction to the Law and Institutions of the European Communities*. Second Edition. By D. LASOK and J. W. BRIDGE. London: Butterworths. 1976. Pp. xxv, 370. (£8.50)

*Encyclopedia of European Community Law*. Vols A, B and C. Edited by K.R. SIMMONDS. London: Sweet and Maxwell and W. Green and Son. 1973. Pp. loose leaf. (\$399.75)

The genesis of the idea of a European Community was primarily due to economic and political necessity. It had as its basis a factual solidarity which sought to reconstruct the battered economy and political structure of post war Europe by means of international economic co-operation. The realization was that interdependence and not independence among the states of Europe was needed.<sup>1</sup> The goal sought was a situation where the states concerned could be integrated in such a way that group interests would prevail over individual state interests. Historically, the establishment of the International Monetary Fund and the World Bank, GATT, the OEEC and the Marshall Plan, were the steps which led towards this end as they constituted a movement of solidarity in international affairs. The setting up of the Council of Europe and NATO, and lastly the Benelux experiment which began as an idea of union after the end of the second world war posed the question whether such experiments could be repeated on a larger scale in the economic field.

The aim of European Community law, in the present day context, is to substitute a common and uniform law for the many different national laws of the member states. In this way the laws of the states, at least in some fields, would be integrated into one and conflicts minimized.

The most obvious value of the book by Dr. Dominik Lasok and Dr. John Bridge, entitled *Introduction to the Law and Institutions of the European Communities*, is that it presents, as the title suggests, a comprehensive introduction to the European Community. The authors state that "the object of [their] book is to define and analyse a nascent body of law which can be described as the law of the European Community".<sup>2</sup> The uninitiated might well believe such a law to be a type of international law. However, the

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<sup>1</sup> P. 4.

<sup>2</sup> P. vii.

authors at once put the reader straight on this point: "It is neither a national nor an international system of law in the accepted sense of these terms but a *sui generis* system."<sup>3</sup>

This is an important point to note, as solidarity and integration brought about the creation within the European Community of the institutional structures. In strict legal terms, the European Community comprises three communities: the European Coal and Steel Community (E.C.S.C.), the European Atomic Energy Community (Euratom) and the European Economic Community (E.E.C.). It is the institutional structure that individualizes the Community and makes it profoundly different from any other supranational organization. Firstly, there are the independent bodies such as the Parliament and the Commission which act in the common interest. Secondly, there is the Council of Ministers which is made up of ministerial representatives of the member states. The Council as a result of this tends to have still a national rather than the ideal "supranational" flavour. Thirdly, there is the Court of Justice which acts as the watchdog of the Community "to ensure that in the interpretation and implementation of [the] Treaty the law is observed".<sup>4</sup> In this way the member states have elevated their common aims above the level of inter-governmental co-operation.

The nine states that are members of the Community, by endeavouring to use supranational organs for more effective decision making, have tried to set aside individual goals for so-called "transpersonal" ends. Thus, there must be agreement on common values in order to determine the means for achieving those goals.

The authors who teach European Community Law in the Centre of European Legal Studies at the University of Exeter, England, markedly stress the institutional aspects of the Community to the detriment of its economic law.<sup>5</sup> However, this is not a discredit to them. Rather it means that twelve out of the fourteen chapters are devoted to the nature of the Communities and the law therein,<sup>6</sup> the law of the institutions<sup>7</sup>, and the relationship between the Community law and the municipal law of the member states.<sup>8</sup>

The second edition is largely the same as the first edition. The additions that are most striking are the material on the dynamic nature of the Community legal system and the impact of three years of British membership on the law of the United Kingdom.<sup>9</sup>

<sup>3</sup> *Ibid.*

<sup>4</sup> Art. 164 of the Treaty establishing the European Economic Community (1958), 298 U.N.T.S. 14.

<sup>5</sup> P. viii.      <sup>6</sup> Chs 1, 2, 3, 4.

<sup>7</sup> Chs 5, 6, 7, 8, 9.

<sup>8</sup> Chs 10, 11, 12.

<sup>9</sup> P. v.

One of the themes complementary to all suggestions and hope for solidarity and for the broadening of common perspectives is the emphasis that has been placed on the fundamental importance of direct elections to the European Parliament. At present, the Parliament consists of 198 members nominated by their respective national parliaments. In the case of the United Kingdom for example, there are currently twenty-six representatives from the House of Commons and ten from the House of Lords.<sup>10</sup> The national parliamentary delegations are selected in proportion to the strength of the political parties in the appropriate house or chamber. However, the members do not sit in national delegations but are organized in multi-national political groups. These groups are Socialists, Christian Democrats, Liberals, European Conservatives, European Progressive Democrats, Communists and Independents.

Article 138(2) of the Treaty of Rome envisaged that the European Parliament would eventually be elected by universal suffrage in accordance with a uniform procedure in all the member states. Thus, direct elections are planned to take place in May or June 1978. These elections are considered a first priority to enable individual citizens to have a direct democratic link with the Community administration. In this way Community policy and law will not seem an abstract force but a matter of direct concern to the people of the member states.

The European Community is far from a perfect being. However, it constitutes a strong attempt to put to rest notions of national grandeur in favour of community ideals. It is in fact a bold step in the right direction, a beginning and not an end in itself.

Both authors should be congratulated for their book. It is certainly a fine and inexpensive text for those inquiring into the novel and complex system of the law and institutions of the European Community.

In the same vein of inquiry, exploration into new fields, as well as pure research material, the *Encyclopedia of European Community Law*, is invaluable. The student, teacher and practitioner can have the law of the European Community at their finger tips, and be kept up-to-date by adding the supplements to the loose leaf black binders which make up the collection.

Like any encyclopedia, the material considered is dealt with systematically. Volume A in one binder concentrates on the United Kingdom sources. It covers the European Communities Act 1972<sup>11</sup> and contains other legislation and annotations relating to England and Wales, Scotland and Northern Ireland which are essential for a

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<sup>10</sup> P. 134.

<sup>11</sup> C. 68.

clear understanding of the changes made by British entrance into the Community. For example it deals with the Referendum Act 1975<sup>12</sup> and the Employment Protection Act 1975.<sup>13</sup> All Statutory Instruments made under the European Communities Act and a record of miscellaneous documents such as, for example, parliamentary reports, are included.

Volume B, which is contained so far in three binders, covers the official English texts, in up-to-date and amended form, of all the basic Community treaties, the amending treaties, and other treaties, protocols and agreements concluded between the member states of the Community and non-member states.

Volume C, is by far the largest in size being made up of five binders. It completes a really unrivalled set of reference books. It presents annotated texts of Community secondary legislation—the instruments made under the treaties of the three Communities comprising the regulations, directives, decisions, recommendations, opinions and notices made by the Council of Ministers, the Commission and the Committee of Permanent Representatives. These instruments provide for the practical and detailed application of Community law. They are most relevant and without them a knowledge of Community law would be incomplete.

The material in this volume is arranged by subject matter under sixteen general subject headings which run in alphabetical order. A check list has been added showing various sub-divisions of the material which enables the reader to find more easily the information on a certain matter. A detailed index of all of volume C is included in binder CV in order to facilitate research. The texts set out here are the official English language texts drawn from the *Official Journal of the European Communities*.

The greatest advantage of this encyclopedia is that it is a consolidated text of an up-to-date collection of the legislation of the three communities in a well-organized, annotated and accessible form. It enables businessmen, and any persons interested in Community law, to find in an uncomplicated manner the documents they require without having to search through the numerous issues of the *Official Journal*. Although the whole encyclopedia is expensive, the volumes may be purchased individually or as a complete set. Together with the loose leaf service they are well worth the price.

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<sup>12</sup> C. 33.

<sup>13</sup> C. 71.

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*Droit international public*. Par MICHEL LEBEL, JOSE WOEHLING, FRANCIS RIGALDIES. Montréal: Les éditions Thémis. 1977. Pp. xxxv, 708. (\$13.50)

Il existe au Canada deux recueils de documents sur le droit international public en langue anglaise soit, *Canada and the Law of Nations* par Mackenzie et Laing,<sup>1</sup> et *International Law* par J.-G. Castel,<sup>2</sup> et le besoin d'un recueil semblable en langue française se faisait sentir depuis longtemps. Le recueil de notes et de documents publié par des membres de la Faculté de droit de l'Université de Montréal comble cette lacune, et il faut en féliciter les auteurs.

Le recueil est destiné principalement aux étudiants du cours général de droit international public mais il peut servir également aux étudiants en science politique, aux avocats et aux fonctionnaires en quête de renseignements sur les textes de base en la matière. Le recueil est formé de soixante-douze textes complétés par un certain nombre de notes explicatives rédigées par les auteurs. Parmi ces textes on trouve un certain nombre de traités de base tels que la Charte des Nations Unies, le Statut de la Cour internationale de justice, la Convention de Vienne sur les traités, les Conventions de Genève sur le droit de la mer, et la Déclaration de Stockholm. On trouve également un bon nombre de textes tirés des jugements de la Cour internationale de justice, des résolutions de l'Assemblée générale des Nations Unies et des propositions faites par les délégations canadiennes à la conférence sur le droit de la mer. On trouve enfin un certain nombre de lois canadiennes et des décisions des tribunaux canadiens.

A ces textes s'ajoutent des notes fort judicieuses rédigées par les auteurs et des extraits de plusieurs manuels français de droit international public tels que les manuels de Reuter,<sup>3</sup> Vellas,<sup>4</sup> et Thierry.<sup>5</sup> Ces derniers extraits, bien que fort intéressants, ne représentent pas toujours la pratique canadienne du droit international et il faut espérer que les auteurs de ce recueil seront en mesure de fournir plus de textes introductifs dans une édition ultérieure. Par exemple, les notes écrites par les auteurs sur les différends fédéraux-provinciaux concernant la conclusion des traités internationaux constituent un des éléments les plus valables du recueil. Il faut espérer également que les auteurs pourront à l'avenir ajouter de plus amples références bibliographiques pour faciliter la tâche de l'étudiant et du chercheur.

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<sup>1</sup> (1938).

<sup>2</sup> (3ème éd., 1976).

<sup>3</sup> Droit international public (1973).

<sup>4</sup> Droit international public (1970).

<sup>5</sup> Droit international public (1975).

Dans l'avertissement qui précède ce volume le directeur général des éditions Thémis nous promet la parution prochaine d'une série de *Précis Thémis*, comprenant, entre autres, un précis traitant du droit international public. Il faut féliciter le directeur et les auteurs de ce recueil de leur initiative et on attend avec intérêt la publication du précis Thémis sur le droit international public.

A. L. C. DE MESTRAL\*

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*Discrimination on Grounds of Nationality*. Par BRITA SUNDBERG-WEITMAN. Amsterdam: North-Holland Publishing Company. 1977. Pp. vii, 248. (Prix non indiqué)

Ce livre traite à la fois de façon concise et complète d'une question fort complexe: celle de la discrimination fondée sur la nationalité dans le cadre du traité de la Communauté économique européenne. La monographie se divise en quatre parties et est précédée d'une fort intéressante introduction qui situe l'interdiction de la discrimination basée sur la nationalité dans le contexte plus large des objectifs poursuivis par la Communauté économique européenne (CEE): la libre circulation des biens, des personnes, des services et du capital.

La première partie de l'ouvrage est consacrée à l'examen détaillé de l'article 7 du Traité<sup>1</sup> de la CEE, lequel interdit la discrimination fondée sur la nationalité. A l'aide de la jurisprudence et de la doctrine, l'auteur décortique cette disposition et adopte une conception plutôt large de la discrimination. Il se refuse d'en donner une définition car, comme il le souligne, plusieurs auteurs l'ont fait auparavant, mais il essaie méthodiquement de cerner les contours de cette notion. Il le fait avec succès, mais le lecteur cherchant des réponses précises sera déçu. Le concept de discrimination peut assez facilement se définir, mais il est souvent très difficile de prouver des cas de discrimination, notamment ceux fondés sur la nationalité. Comme guides pour déterminer un cas de discrimination, Brita Sundberg-Weitman mentionne d'abord la comparaison des résultats obtenus par telles mesures gouvernementales et les fins poursuivies par le Traité; le traitement particulier accordé à une personne est-il arbitraire, à savoir est-il manifestement déraisonnable ou disproportionné par rapport aux résultats recherchés par le Traité? Enfin signale l'auteur, on devra se demander si des situations comparables ont été traitées de façon différente.

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<sup>1</sup> Cmnd 5189.

Dans la deuxième partie de l'ouvrage le principe de non-discrimination vu précédemment est appliqué à la règle de la libre circulation des travailleurs.<sup>2</sup> L'auteur étudie le fondement de cette disposition, ses bénéficiaires, le droit des travailleurs à un traitement non discriminatoire et enfin l'emploi dans l'administration publique. Dans la troisième partie, il suit un plan identique à la seconde et applique le principe de non-discrimination au droit d'établissement.<sup>3</sup> Enfin dans sa dernière partie, le professeur de l'Université de Stockholm consacre deux chapitres<sup>4</sup> à des exceptions au régime de base de la non-discrimination: les règles spécifiques aux entreprises publiques<sup>5</sup> et les limites apportées à la libre circulation des personnes par des raisons d'ordre public, de sécurité publique et la santé publique.<sup>6</sup> L'auteur relate comment la Cour de Justice des Communautés européennes s'est aventurée avec grande prudence dans le maniement de ces raisons d'Etat. En effet la Cour ne semble guère désireuse d'empiéter sur ces privilèges étatiques.

L'ouvrage se termine abruptement, sans conclusion. C'est dommage, car le sujet s'y prêtait. Il est aussi vrai cependant que la Communauté européenne étant toujours en construction (lente et pénible), l'auteur a peut-être jugé qu'une conclusion était inutile ou serait assez rapidement dépassée par les événements. Cet ouvrage mérite d'être lu par tous ceux qui s'intéressent à l'avenir de l'Europe du travail et des droits de l'homme.

MICHEL LABEL\*

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<sup>2</sup> Art. 48 CEE.

<sup>3</sup> Art. 53 CEE.

<sup>4</sup> 19 et 20.

<sup>5</sup> Art. 90 CEE.

<sup>6</sup> Art. 48 CEE.

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