Book Reviews

Ombudsman for American Government? Edité par Stanley V. Anderson. Englewood Cliffs, New Jersey: Prentice-Hall, Inc. 1968. Pp. vii, 181. ($4.95, Paper $1.95).

Ce livre, édité par Stanley V. Anderson,[1] est composé de cinq essais destinés à servir de documents préparatoires à la 32ème session de «the American Assembly»[2] (New York, octobre 1967).

L'origine et les progrès de la notion de «ombudsman» sont passés en revue par le professeur Donald C. Rowat[3] et l'énumération des pays, provinces et même organisations internationales qui ont atteint l'un des stades allant de la suggestion à l'établissement de la fonction d'«ombudsman» est un témoignage éloquent du succès actuel de l'idée.[4]

Le professeur William B. Gwyn[5] met ensuite en lumière les problèmes de l'adaptation de l'institution au milieu américain qui présente une population considérablement plus nombreuse et moins homogène que les quatres pays scandinaves et la Nouvelle-Zélande où des ombudsmen fonctionnent depuis un temps suffisamment long pour apprécier les résultats de leur office.

La création éventuelle de la fonction au niveau des états et au niveau local est examinée respectivement par les professeurs John E. Moore,[6] d'une part, et William E. Angus et Milton Kaplan,[7] d'autre part.

Enfin, les suggestions et politiques à suivre sont formulées par le professeur Anderson et le livre est complété par un modèle de

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[1] Professeur associé de sciences politiques à l'Université de Californie, Santa Barbara; Auteur de *Canadian Ombudsman Proposals,* (Berkeley, 1966).

[2] Institution affiliée à l'Université de Columbia, organise des réunions non politiques et publie des études concernant des problèmes vitaux de la vie politique des Etats-Unis.

[3] Professeur de sciences politiques à l'Université Carleton, Ottawa; auteur de *The Ombudsman: Citizen's Defender,* (London, 1965).

[4] Depuis la parution du livre, le projet de Loi du Protecteur du Citoyen a été déposé devant les chambres législatives du Québec (Bill 13, troisième sess., 28e Législature).

[5] Professeur associé de sciences politiques à l'Université de Tulane.

[6] Professeur assistant de sciences politiques à l'Université de Californie, Santa Barbara.

[7] Professeurs de droit à l'Université de l'Etat de New York, Buffalo.

loi établissant l'office d'«ombudsman» rédigé et commenté par le professeur Walter Gellhorn.[8]

La réponse à la question posée par le titre du livre, telle qu'elle se dégage des différents essais et des conclusions, est affirmative. Les auteurs, comme d'ailleurs «the American Assembly»,[9] se déclarent favorables à l'établissement d'ombudsmen au niveau des états et au niveau local. L'opportunité d'instaurer un tel service à l'échelon fédéral semble plus douteuse.

Cette conclusion est fondée sur des arguments dont les quelques points faibles sont signalés avec la plus grande objectivité.

Les expériences des divers services des administrations gouvernementales chargés des relations avec le public et des quelques organismes existants, basés sur le principe de l'«ombudsman», tels que le «Public Protector» du comté de Nassau et le projet pilote de l'université de Buffalo, ont montré, à l'évidence, le besoin qu'éprouve le public de se plaindre des insuffisances de l'administration.

Il n'est pas absolument certain, par contre, que l'«ombudsman» offre le meilleur remède à ce besoin car très peu de recherches ont été effectuées dans le domaine des procédures de plaintes et réclamations contre l'administration gouvernementale existant aux Etats-Unis et ailleurs.

L'étude méthodique des services mis sur pied par les administrations elles-mêmes, certains journaux ou encore le «case work» des membres des assemblées législatives mobiliserait une armée de chercheurs.

Aussi les auteurs se demandent-ils, au vu des résultats atteints par les «ombudsmen» étrangers, si les meilleures recherches ne consisteraient pas à faire l'essai de l'institution.

Une telle conclusion n'est pas sans susciter un premier sentiment de frustration chez le lecteur habitué à voir se succéder les arguments en faveur ou à l'encontre d'une réforme sociale avec une conviction qui ne laisse aucune place à l'incertitude.

Mais les auteurs soulignent, à plusieurs reprises, qu'il ne s'agit justement pas d'une réforme sociale, d'une panacée qui résoudra les grands problèmes de la société américaine, la discrimination, la pauvreté, etc... Le rôle de l'«ombudsman» se limite à essayer de redresser les erreurs et injustices administratives, à éclaircir les

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[8] Professeur de droit à l'Université de Columbia; auteur de deux livres sur le sujet: *When Americans Complain,* (Cambridge, Mass., 1966) et *Ombudsmen and Others,* (Cambridge, Mass., 1967).

[9] *Final Report of the Thirty-Second American Assembly,* October 26-29, 1967, (New York, 1967), pp. 6 et 7.

malentendus dont l'effet est, sans doute, vital pour l'individu intéressé mais dont la portée générale est, le plus souvent, assez faible.

Enfin, les auteurs ont insisté sur les conditions du succès de l'entreprise. Il n'est guère surprenant qu'elles soient sensiblement analogues à celles qui ont permis la création et le bon fonctionnement des quelques instances internationales qui reçoivent les pétitions individuelles, tels que, par exemple, la Commission Européenne des Droits de l'Homme : *consensus* plus ou moins général lors de l'établissement de l'organe, modes de nomination, de rémunération et de contrôle assurant l'indépendance de la personne nommée, haute compétence de cette dernière et, enfin, l'écoulement d'un laps de temps suffisant pour permettre à l'institution de faire ses preuves.

Sans entrer dans les détails des pouvoirs et fonctions de l'«ombudsman», il paraît utile de mentionner une très intéressante disposition du projet de loi relatif à l'établissement d'un «ombudsman» dans l'Etat de Massachussetts : la mise à jour d'une nomenclature de toutes les commissions d'appel et agences similaires destinée à être mise à la disposition des personnes intéressées sur leur requête.

Il s'agirait là, ainsi que le signale le professeur Anderson, d'un genre de service d'assistance légale dans le domaine administratif.[10] Il est dommage qu'une mesure aussi utile ne soit pas prévue dans le projet québecois.

Pour conclure, il est réconfortant de noter qu'un sujet aussi complexe, envisagé sous des angles différents par des auteurs différents ait été traité avec une économie de mots et une unité d'ensemble également remarquables.

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[10] p. 157.

Der Weltraum in der Raumordnung des Völkerrechts. By Peter-Michael Sontag. Cologne, Berlin, Bonn and Munich: Carl Heymanns Verlag. 1966. Pp. 372. ($7.50).

Raumfahrt und Völkerrcht. By Peter Creola. Zürich: Polygraphischer Verlag. 1967. Pp. 129. ($4.50).

These two books on space law — both written as doctoral theses — have recently been published in German-speaking countries. Both authors have put the legal problems of space exploration into the framework of existing public international law. This is in the reviewer's opinion the only scholarly method which helps to distinguish between *lex lata* and *lex ferenda.* Since most of the existing publications on space law fall short of this important distinction, the two new studies represent a valuable contribution to and analysis of the fast growing law of outer space.

Sontag presents a thorough study of all legal problems with regard to outer space. His book constitutes the first comprehensive juridical analysis of this kind which has been written in the German language. The only relevant book written in German which had been available prior to Sontag's publication was a book written by Fasan. Fasan's book, however, had been written from a popular educational point of view rather than in an academic manner.

In Part I Sontag analyses the principle of state sovereignty in air space, the principle of freedom in outer space, the meaning and extension of this freedom, and the problem in drawing a border line between air space and outer space. According to Sontag, the legal régime of outer space has a tendency to become really supranational ("zu einer echten supranotionalen Rechtsmaterie werden").[1] This statement appears to be a little too optimistic. The upmost we can hope for is an international organization for outer space with some regulatory competences comparable with those of the specialized agencies of the United Nations. Such an international agency would — in any case — be an international organization without any supranational attributes. One may add that there are some voices inside and outside the United Nations favouring the creation of a specialized agency for oceanography and outer space. This is due to the fact

[1] At p. 185.

that many of the problems involving the exploration of both media are quite similar in their technical and legal aspects.

In Sontag's analysis of the various theories for the delimination of air space [2] one misses a discussion of Professor Mateesco Matte's writings. Prof. Matte is one of the most outspoken advocates of a uniform legal régime for space vehicles in both air space and outer space.

The legal status of celestial bodies is discussed in Part II. Unfortunately, Sontag's thesis was published prior to the adoption of the «Treaty of Principles governing the activities of States in the exploration and use of outer space including the moon and other celestial bodies». For this very reason Sontag was not able to discuss the rules as laid down in this treaty. But even so, Sontag's considerations are still valuable and worth reading, especially because they relate to already existing general international law, while the new treaty constitutes mainly treaty law and not yet general international law.

In Part III Sontag presents a study of the legal status of satellites and space vehicles. The value of Sontag's most scholarly written book is enhanced by a comprehensive bibliography of 20 pages, and a subject index.

In contrast to Sontag's comprehensive study, Creola's much less voluminous book contains a discussion of certain selected legal problems of outer space.

In Part I Creola gives an introductory review of space exploration. He explains the medium «outer space», the development of space exploration, and the beginning of space law. Creola discusses the legal régime in air space and outer space and presents the various theories for the delimination of air space. The reviewer agrees with the author's conclusion that it does not seem advisable to adopt at this early stage of space exploration a convention on the delimination of air space and outer space.[3]

In Part II the author discusses the following topics : the principle of freedom of space exploration, the limitations of this freedom, and international co-operation in outer space. In connection with the bilateral international agreements,[4] Creola should also have discussed

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[2] Especially at pp. 209 *et seq.*
[3] See pp. 59 *et seq.*
[4] At p. 102.

the Soviet programmes with their Molnya telecommunication satellites in which the East European countries and — to a certain degree — even France are participating. Pages 108 to 123 are devoted to speculations on possible relations with extraterrestrial beings. Finally, in the Annex, the "Treaty of Principles" on outer space is reprinted.

It is hoped that both volumes will achieve a wide circulation and stimulate further discussion of legal problems relating to the exploration of outer space. For Sontag's excellent study, one may even hope for a translation into English.

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Studies in Canadian Company Law. Edited by Jacob Ziegel. Toronto: Butterworths. 1967. Pp. xlii, 717. ($22.50).

Under the editorship of Professor Ziegel of the McGill Law Faculty, twenty-one distinguished members of the legal profession in Canada have contributed to this collection of essays destined, I should imagine, to become a standard reference work both for the student and for the practising lawyer. Most of the contributions are in English; some are in French. The contributors include representatives of most of the Canadian provinces and their contributions cover most of the problem areas in Canadian company law. The majority of the contributors are professors at Canadian law schools but others are active practitioners and both groups appear here at their best. The professors do not bore the reader with esoteric abstractions and the practitioners do not insult him with routine trivia.

Company law in Canada is currently undergoing a series of important developments. These developments, most clearly discernible in the Province of Ontario, are concerned chiefly with the situation of the investor, actual or potential. Trading by insiders, proxy solicitations, takeover bids, financial statements, prospectuses — all these matters are increasingly subject to detailed legislation designed to protect the presumably naive against the presumably crafty. However, such legislation does not imply that the classic problems of company law, compounded in Canada by two distinct systems of incorporation and by a distribution of powers between the central authority and the provinces, have been solved, either by the legislators or by the courts. The *ultra vires* doctrine, the indoor management rule, the powers and duties of directors, the law of dividends, the rights of minority shareholders — each of these topics continues to present problems requiring the attention of every lawyer and law student. One of the merits of *Studies in Canadian Company Law* is that it focuses on these problems without neglecting the more recently fashionable areas of company law.

The *ultra vires* doctrine is dealt with at some length by E. G. Mockler of the University of New Brunswick, and Melville Neuman's essay on the differences between letters patent and certificate of incorporation companies contains several pages on the same subject. Daniel B. Prentice of the University of Western Ontario contributes a careful study of the indoor management rule, supple-

mented here again, by Mr. Neuman's essay. E. E. Palmer of the University of Western Ontario discusses the powers and duties of directors and R. M. Bryden of the University of Saskatchewan discusses the law of dividends. The position of the minority shareholder is the subject of the longest essay in the book, an analysis of *Foss* v. *Harbottle* [1] by Stanley M. Beck of Osgoode Hall Law School, and is also dealt with by Marc Giguère of the University of Laval and by Stuart G. Mackinnon of the University of Ottawa. Chapters on Quebec corporation law are contributed by Roger L. Beaulieu, Q.C., and by Yves Caron of McGill.

The more current corporate law problems have also been confided to experts. Philip F. Vineberg, Q.C., contributes a comprehensive explanation of income and estate tax considerations, supplemented by an essay by J. Thomas English, of the University of British Columbia, on the tax factors in corporate acquisitions. Harry S. Bray, Q.C., of the Ontario Securities Commission, deals with recent developments in securities administration in Ontario. J. Peter Williamson (the author of *Securities Regulation in Canada* [2]) discusses mutual funds and Edwin C. Harris of Dalhousie University discusses access to corporate information.

The foregoing paragraphs do not purport to list all the matters covered in *Studies in Canadian Company Law*. Rather, they list those chapters which at least one practitioner has found himself referring to and re-reading on specific points after first browsing through the book upon its publication some months ago. The other chapters include a discussion of the nature of corporate personality by David H. Bonham and Daniel A. Soberman, a pre-Confederation history of corporations by F. E. LaBrie and (again) E. E. Palmer, a study of pre-incorporation contracts by Francis J. Nugan and an extended examination of the constitutional aspects of Canadian companies by Professor Ziegel himself. The concluding chapter, by J. E. Smyth, Professor of Commerce at the University of Toronto, is entitled *The Social Implications of Incorporation* and constitutes an engrossing study in itself and a fitting close to the book.

To comment in any detail on the substance of a book such as this would be presumptuous. There is undoubtedly room for disagreement with some of the positions taken by some of the contributors and perhaps with the emphasis given to certtain aspects of the law. However, anyone disagreeing must be prepared to face an impressive array of arguments and authorities.

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[1] (1843), 2 Hare 461, 67 E.R. 189.
[2] (Toronto, 1960).

To attempt, by quotation, to give the flavour of a book with 21 authors, would be ridiculous. Let it be said merely that, despite frequent citations of applicable laws and a table of cases over twenty-five pages long, the material is presented throughout in synthesized fashion and not as a bald recital of legislative provisions nor a dry series of judicial decisions. A certain amount of overlapping is, of course, inevitable, and indeed constitutes one of the assets of the book; to watch, for example, Mr. Mockler, Mr. Neuman and Mr. Beaulieu each handle the *ultra vires* doctrine in his own way can be most instructive. On the other hand, very few important areas remain uncovered. Corporate financing is one of these and perhaps that lack can be remedied in future editions.

The editor, in his preface, states:

> ...there are now over a dozen fulltime Canadian law teachers with major interests in company law and their services have been freely employed in recent legislative studies at both the provincial and federal levels. This is not to say that the subject has attained intellectual maturity in our country. Much, very much, remains to be done, and this is to some extent reflected in our continuing preoccupation with old problems (such as the doctrine of ultra vires) which should long ago have been resolved by properly drafted legislation. A modest beginning appears, however, to have been made.

Studies in Canadian Company Law is considerably more than a modest beginning.

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