BOOK REVIEWS
REVUE DES LIVRES

Traité de Droit Comparé, par LÉONTIN-JEAN CONSTANTINESCO, Paris: Librairie Générale de Droit et de Jurisprudence, 1972-1974. 2 Vols. Pp.283 ($27.85).

Le droit comparé, à l'époque moderne, connaît de plus en plus d'adeptes et de plus en plus de succès. Le réseau complexe des communications entre les hommes, l'universalisme des problèmes auxquels nos sociétés sont confrontées, font que le juriste va souvent chercher ailleurs soit des modèles pour sa propre réglementation, soit un élément de comparaison qui lui permet de dénoncer les carences ou les lacunes de son propre droit. Notre pays, plus que bien d'autres, est peut-être l'un de ceux pour lesquels le droit comparé est une réalité concrète et sensible, puisqu'il est au confluent de deux grandes traditions juridiques, la tradition de droit civil romaniste et la tradition du common-law.

On a souvent cependant l'impression que le droit comparé se résume à une comparaison primaire d'éléments de solutions, de textes ou de concepts juridiques et donc qu'il n'existe pas à proprement parler une méthode et encore moins une science du droit comparé. À ceux qui penseraient ainsi on doit conseiller la lecture du *Traité de Droit Comparé* du Professeur Léontin-Jean Constantinesco. Cet ouvrage marquera certainement une étape importante pour le droit comparé en tant que science pour deux raisons. D'une part il démystifie enfin le caractère «simpliste» du droit comparé que tant de juristes non avertis lui attachent, en montrant combien «comparer» n'est pas seulement se livrer à l'analyse superficielle d'éléments de droit étrangers pigés sans discrimination dans les divers droits nationaux. A cet égard, principalement dans le premier tome, l'auteur pose le dilemme classique qui a, pendant si longtemps divisé les comparatistes eux-mêmes: le droit comparé est-il simplement une méthode ou est-il vraiment une science autonome? Les observations et les conclusions personnelles de l'auteur sur cette question à la suite de ce que l'on pourrait appeller l'autopsie de l'échec du développement du droit comparé en tant que science (p.207 *et seq.* du Tome I) sont particulièrement intéressantes en ce qu'elles se rattachent à une analyse rationnelle et systématique des motifs sous-jacents aux difficultés éprouvées par le droit comparé.

D'autre part, l'ouvrage de M. Constantinesco est la démonstration vivante du fait que pour «faire» du droit comparé il est nécessaire de se plonger aux racines philosophiques et sociologiques du droit. La très grande érudition dont fait preuve l'auteur et sa bonne connaissance du droit et de la théorie juridique allemande, montrent l'importance des connaissances de base qui doivent servir de fondement tant à la micro qu'à la macro comparaison.

Le premier de deux tomes d'un ouvrage que l'auteur annonce en trois volets est consacré à une introduction au droit comparé, le second à la méthode comparative. Dans le tome premier, l'auteur justifie tout d'abord l'intérêt, pour ne pas dire l'engouement, des juristes de l'époque moderne pour le droit comparé; puis, dans le Livre II, il retrace d'une façon très vivante et très perspicace l'histoire du droit comparé antérieurement et postérieurement au célèbre congrès de 1900. Enfin, dans le Livre III, intitulé «Incertitudes du droit comparé», il fait état de la controverse que nous signalions plus haut, pour enfin conclure en nous livrant sa pensée sur les véritables objectifs du droit comparé.

Le second tome s'ouvre sur l'examen de ce que l'auteur appelle la «comparabilité» pour ensuite traiter à fond de la méthodologie du droit comparé que l'auteur divise, d'une façon fort intéressante, en trois phases: la *connaissance* des termes à comparer, la *compréhension* de ceux-ci et enfin la *comparaison* elle-même. Pour chacune de ces phases, l'auteur nous propose une série de règles méthodologiques. Enfin, ce second tome se termine par un long développement sur les buts et les fonctions de la méthode comparative (buts et fonctions pratiques et théoriques).

Le lecteur comparatiste, ou celui-là même qui aime le droit comparé, trouvera intéressante la lecture de cet ouvrage. C'est plus qu'un traité de droit comparé traditionnel; c'est en fait un traité de la philosophie du droit comparé et une systématisation précieuse de la méthode comparative. On y trouve une foule de renseignements, de nombreuses observations et constatations personnelles à l'auteur. Le style en est parfois ardu mais on comprend aisément ce fait lorsque, après les premières pages, on se rend compte de l'optique théorique et philosophique de l'auteur. En bref, un excellent ouvrage et un apport certain à la science comparative. Le lecteur partagera sans doute notre impatience dans l'attente du troisième volet de ce traité.

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Tribunals and Government, by J.A. FARMER, London: Weidenfeld and Nicholson, 1974. Pp.250 (£5.75).

Tribunals and Government is a short book by a New Zealander about administrative tribunals in the United Kingdom. After a brief Introduction, Dr Farmer discusses the role of statutory tribunals in four areas of government intervention: economic policy, labour relations, social welfare and rented housing. These four chapters are followed by what is described as a case study — a more detailed examination of the use of a particular tribunal in the regulation of economic policy. Finally, in his last two chapters, the author compares administrative tribunals with the regular courts and assesses the role of administrative tribunals.

This is the seventh book in Weidenfeld and Nicholson's The Law in Context Series and the dust jacket describes the series as embodying "a radical departure in scholarly legal writing", as "treating legal subjects from a broader base than has been normal in the past, using material from other social sciences, from business studies and from any other discipline that helps to explain the operation *in practice* of the subject under discussion", an orientation which "will be at once more stimulating and more realistic than the bare exposition of legal rules".

After reading this, my immediate reaction was that Dr Farmer was going to assess the usefulness of administrative tribunals as a means of effective government. Do they really work? What have been their accomplishments? The author, however, in his Preface and Introduction was somewhat less ambitious. He saw his role as one of first, providing information and material about administrative tribunals and secondly, of dispelling the traditional myth that tribunals are "little more than cheaper, quicker, more informal courts" (Preface, p.XI) and demonstrating that tribunals are a very "mixed lot " (p.2), properly regarded as forming "a part of the administration" (p.4) rather than as an offshoot of the judicial system.

Certainly, in the very last sentence of the Introduction (p.14), it is stated:

> It is a thesis of this book that tribunals (of considerably differing kinds) provide an increasingly important instrument of management by which all [governmental] functions can be exercised.

The description that follows does indeed establish that tribunals are important in the United Kingdom in that there are a lot of them, an ever-increasing number for that matter, making an ever-increasing range of decisions affecting as ever-increasing spectrum

of society. However, whether those decisions are being made effectively is seldom assessed. Is regulation by this tribunal having the deserved impact? Would it have been better to have left this decision with the appropriate department of state? Of course, Dr Farmer records the obvious failure of the National Industrial Relations Court, a court which has subsequently been abolished by the *Trade Union and Industrial Relations Act*, 1974. However, even in his detailed case study (ch.6) of the use of Industrial Tribunals to decide whether a particular business qualified for exemption from the now-repealed Selective Employment Tax (S.E.T.), Dr Farmer goes no further than demonstrating that the Tribunals approached their decision-making functions in a reasonably sensible fashion. Whether the Tribunals furthered the S.E.T.'s objectives of diverting manpower resources from service to manufacturing and whether the use of a tribunal with that particular mandate was the best way of deciding upon entitlement to exemption are not assessed, except that it is concluded that using the Tribunals was "taking an awful chance" (p.165).

So much for what the book is not and possibly what it could not have been, particularly without much more research and in just 199 pages of text covering a multitude of tribunals. As an account of some of the major administrative tribunals in the United Kingdom, the book contains valuable factual reading for an outsider as well as for the British law student at whom this series is particularly aimed. It builds upon the description of British administrative tribunals found in such standard texts as Griffith and Street, *The Principles of Administrative Law* and Garner, *Administrative Law* in that it contains far greater legislative detail and frequently looks at the legislative and general political history as well as the actual functioning of the tribunals being studied. As such it will hopefully generate many more specialized tribunal studies.

The second objective of the book, to dispel the myth that tribunals are no more than mini-courts, is also achieved. However, I do question whether this objective is anything more than one of destroying a straw castle. When it is asserted that "[t]raditionally, in fact, tribunals have been seen as a part of, or at most complementary to, the judicial system" (p.3), I am very curious as to who has traditionally viewed them in that light. Perhaps for an Administrative Law teacher in a Canadian context, who is familiar with Canadian and American regulatory agencies and their often broad economic objectives, the myth is somewhat more obvious, despite the court-like procedures frequently adopted

by those agencies. However, such British texts as Griffith and Street and Garner and even the review-oriented de Smith *(Judicial Review of Administration Actions)* do not see tribunals simply as mini-courts but are quite clear as to their important (quantitatively) and varied role in government and administration. Quite frankly, this seems no more than another Hewartism which did not deserve a second burial and, if this is the "newness" in Farmer's approach, it is disappointing.

Structurally, the book is somewhat confusing. Chapter 8 is entitled "The role of administrative tribunals" but all except the last six pages of that chapter discuss criteria for distinguishing administrative tribunals from courts. I would have thought this more readily fitted into chapter 7, entitled "How different are tribunals from courts?", which in fact concentrates almost exclusively on the place of precedent in the proceedings of administrative tribunals as opposed to the courts. Indeed, in so far as distinguishing courts from administrative tribunals relates to the scope of the whole study, it may well have been appropriately placed at the beginning of the book rather than the end. It is also strange that in the six pages of chapter 8, where the role of administrative tribunals is discussed, Dr Farmer draws upon a new example instead of drawing together the lessons, if any, to be learned from the relevant chapters of the book (chs.2-6).

Perhaps my view of this book is somewhat jaundiced by the fact that I read it with K.C. Davis's *Discretionary Justice — A Preliminary Inquiry* in mind and just after re-reading Professor G.E. Palmer's brilliant series of lectures, *Mistake and Unjust Enrichment* and just before reading Paul Weiler's *In the Last Resort*. I found the style somewhat pedestrian and at times clumsy. Perhaps despite the dust jacket's claim this was inevitable with so much descriptive material. However, even this does not excuse statements such as "This confusion which has resulted in the interpretation of the alternative offer provision can be seen from contrasting the following two sets of cases" (p.60) when the author's intention was not that the two sets of cases be contrasted one with the other but rather that the cases within each set be contrasted.

Also, a number of the assertions made by the author were either conclusory or cryptic. Why, for example, was the decision of the High Court in *Morton Sundour Fabrics Ltd.* v. *Shaw*[1] "unfortunate" (p.57)? Merely because the High Court interfered and reversed

[1] (1967) 2 I.T. R 84.

the expert tribunal or because reversing the tribunal led to an unsound result? If the latter, where was the unsoundness? It was certainly not self-evident to me. In another example, why is fair return on capital, a concept very familiar to observers of North American regulatory agencies, a "fairly unsound" method "of arriving at a fair rent" (p.139)?

Again, in dealing with the place of precedent in administrative tribunal proceedings, Dr Farmer, after citing such diverse authorities as Dworkin in his article *The Model of Rules*[2] and Adam Kuper in his work on African tribal councils[3] ("using material from other social sciences"!) for the proposition that principles are all important in any sensible decision-making process, goes on to give an example of how tribunals, like the courts, have applied the principle that a man should not profit from his own wrong (pp.178-179). The example given from tribunal decision-making is the burden that the applicant has in transport licensing cases to convince the Transport Tribunal that he has not "wrongfully abstracted" business from existing carriers. On further investigation, what seems to be in issue in such cases is whether the grant of the application will harm any existing carriers economically and whether the applicant has in his presently-licensed activities taken business away from other existing carriers which he is now seeking to use as an evidential basis for further licences. Against such a background the use of the word "wrongfully" by a tribunal to support a decision not to grant a licence assumes the correctness of a policy which is highly restrictive of competition and which penalizes efficiency and as such the word is both self-serving and question-begging. Indeed, a reading of the report of the case from which the "wrongfully abstracted" test allegedly emerges (*L.M.S. Rly* v. *Motor Carriers (Liverpool) Ltd.*[4]) reveals that the word "wrongfully" was never used in either the first instance or appeal decisions. Also, to assert that a licence will not be granted unless the applicant establishes that the grant of the licence will not affect the business of existing licensees is primarily aimed at preventing a perceived "wrong" in the future — not at preventing a person taking advantage of his own wrong.

To the Canadian reader, *Tribunals and Government* provides an interesting commentary on British administrative agencies though, in so far as it does not deal in any detail with local

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[2] (1967) 35 U. Chi. L.Rev. 14.
[3] Kuper, *Councils in Action* (1971).
[4] (1935) 23 Traf. Cas. 164.

government tribunals and such important national bodies as the Race Relations Board, it is somewhat incomplete. Also, it scarcely lives up to its billing as being "a radical departure in scholarly legal writing" though it does emphasize rightly that both in the United Kingdom and Canada there is need for more detailed studies of administrative tribunals in action, a need which in Canada is presently being met at least partly by the National Law Reform Commission's agency studies.

David J. Mullan *

Les grands arrêts de la jurisprudence constitutionnelle au Canada, par Herbert Marx, Montréal: Les Presses de l'Université de Montréal, 1974. Pp.761 ($24.00).

Si comme on peut lire dans l'avant-propos «l'étudiant et le juriste francophone se trouvent (donc) désavantagés par rapport à leurs homologues anglophones» du fait qu'il leur était impossible d'étudier le droit constitutionnel canadien dans des textes français, la traduction des grands arrêts de la jurisprudence constitutionnelle comblera un vide. Si cette traduction pouvait inciter les jeunes francophones à s'intéresser à ce droit et à en devenir spécialistes, l'auteur M. le professeur Marx en aura tout le mérite. Les jeunes francophones ne devront cependant pas oublier que seul la lecture du texte original permet de saisir vraiment la pensée exprimée par les juges dans les arrêts du Conseil Privé et (même à l'occasion) de la Cour suprême.

L'avantage le plus incontestable de cette traduction qui ne devra en aucun temps nous dispenser de consulter l'original sera de permettre une certaine uniformisation dans l'expression écrite ou orale chez ceux qui font du Droit Constitutionnel.

L'ouvrage qui est édité par les Presses de l'Université de Montréal est présenté et annoté par le Professeur Herbert Marx qui a utilisé les services de Me Alphonse Morissette, B.A., LL.L., ancien directeur du Service de traduction de la Cour suprême et de la Cour fédérale. Il contient un choix d'arrêts ou d'extraits d'arrêts répartis suivant un plan classique qui n'a rien d'original. La première partie a pour titre «Les principes fondamentaux du Droit Constitutionnel Canadien» et comporte quatre chapitres: Chapitre I — Le Contrôle

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judiciaire de la légalité constitutionnelle; Chapitre II — La Souveraineté du Parlement et la séparation des pouvoirs; Chapitre III — Le Fédéralisme et la délégation des pouvoirs; Chapitre IV — Le Principe de légalité.

La seconde partie, la plus substantielle, est intitulée «le partage des compétences»: on y retrouve des chapitres sur «la qualification des lois», «la paix, l'ordre et le bon gouvernement», «le commerce», «les compagnies», «le domaine du travail et la législation sociale», etc. La troisième partie est consacrée aux libertés publiques.

Le choix des décisions nous paraît convenable; il y en a près de 80 si l'on compte les arrêts résumés.

L'aspect le plus décevant de cet ouvrage est incontestablement la faiblesse en qualité et en quantité des commentaires. Lorsqu'on acquiert ou consulte un ouvrage de cette nature, on ne s'attend pas à avoir la reproduction intégrale des arrêts. C'est d'ailleurs ce qui se produit ici: dans la plupart des arrêts l'auteur procède à un découpage qui oblige le lecteur sérieux à recourir aux Recueils de Jurisprudence. On s'attend cependant à avoir une présentation convenable des arrêts ainsi que des commentaires substantiels. Or, les quelques rares annotations sont soient insuffisantes, soient superficielles. Songeons par exemple au Chapitre VI intitulé: «La paix, l'ordre et le bon fonctionnement» (pp.201 à 281) on ne trouve qu'une note d'une page et un résumé d'une demi-page de l'arrêt *Wartime Leasehold Regulation* ([1950] S.C.R. 124). On ne retrouve aucun commentaire dans le reste de cette partie consacrée au partage des compétences (pp.283 à 597).

A part l'introduction de cinq pages, l'ouvrage de 761 pages comprend 14 ou 15 pages d'annotations, c'est-à-dire une dizaine de notes. De plus, certaines sont d'une faiblesse étonnante: par exemple le paragraphe de la page 99 sur «la notion générale de légalité» se lit ainsi:

> La légalité est un principe très général, sur lequel reposent plusieurs autres principes. Il est difficile d'en préciser exactement le sens, même s'il est accepté de tous. Certains n'y voient que la justice par opposition à la tyrannie, d'autres le conçoivent plutôt comme un ensemble de règles et de pratiques qui sous-tendent nos institutions. D'autres aussi affirment qu'il ne s'agit que d'un principe de justice consacré par notre Constitution. Dans notre contexte juridique, on peut adopter comme définition minimale de ce principe le fait que la puissance publique est, comme n'importe quel citoyen, soumise droit et qu'il doit exister des moyens pour le lui faire respecter.

La note de la page 34 sur la réglementation procédurale du contrôle judiciaire de la légalité constitutionnelle ne présente guère d'intérêt dans le contexte.

Qu'il me soit permis de mentionner que le Chapitre IV (pp.99 à 146) sur «le principe de légalité» pourrait, sans grave lacune, être supprimé car il s'agit de questions qui concernent avant tout le Droit Administratif: l'affaire de *l'Alliance* et l'affaire *Roncarelli* v. *Duplessis* traitent respectivement du fondement de contrôle judiciaire de la légalité administrative et des limites au pouvoir discrétionnaire de l'Administration.

On ne saurait comparer cet ouvrage avec le «Laskin» ou même l'excellent petit ouvrage de Peter H. Russell, *Leading Constitutional Decisions* (Carleton Library). Ces derniers demeureront indispensables pour l'étudiant francophone.

Il ne fait pas de doute que la traduction des arrêts peut faciliter l'enseignement et les travaux pratiques; toutefois, je crois qu'il est préférable d'inciter les élèves à étudier la jurisprudence dans le texte original sauf s'il s'agit de la traduction officielle que nous obtenons depuis 1970. La connaissance de la langue anglaise est à notre avis essentielle à l'étude sérieuse de notre droit public, notamment de notre droit constitutionnel.

En un mot, cet ouvrage est pour moi décevant.

Patrice Garant*

The Role of Judicial Decisions and Doctrine in Civil Law and in Mixed Jurisdictions, edited by Joseph Dainow, Louisiana: Louisiana State University Press, 1974. Pp.xvii, 350 ($US 16.00).

This book consists of a number of essays on the authoritative force of case law and doctrine in civil law and mixed civil and common law jurisdictions. It is edited by Professor Joseph Dainow, who is Director of the Institute of Civil Law Studies at Louisiana State University and an eminent modern exponent of civilian systems of law. The essays span the legal systems of Quebec, Louisiana, France, Germany, Italy, Scotland, South Africa, Israel and Mexico, the authors making up a list of distinguished names, many of them well-known.

The first topic, "The Impact of the Common Law on the Civilian Systems of Louisiana and Quebec", is dealt with by Professor Jean-

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Louis Baudouin of the University of Montreal. The Law of Louisiana is further examined, this time from the point of view of the judge, in two subsequent articles, one by Mr Justice Albert Tate Jr and the other by Mr Justice Mack E. Barham, both of the Supreme Court of Louisiana. Professor A.M. Yainnopoulos of Louisiana State University writes on "Jurisprudence and Doctrine as Sources of Law in Louisiana and France", and the discussion of French law is rounded out by translations from *Droit Civil* by Professor Carbonnier and of "Supereminent Principles in French Law" from Professor René David's book *French Law*. German, Italian and Scots Law are dealt with respectively by Professor Karl Larenz, Professor John Henry Merryman of Stanford University and Professor David M. Walker, Regius Professor of Law at the University of Glasgow.

The Law of South Africa is discussed by Professor Ellison Kahn of the University of the Witwatersrand, Johannesburg, who writes on "Doctrine and Judicial Decisions in South Africa". The position in Israel, a jurisdiction in which English common law and principles borrowed from modern civil law jurisdictions mix with Ottoman law, is discussed in two articles by authors from the Hebrew University of Jerusalem. The first, "Codification and Case Law in Israel", is by Mr G. Tedeschi, Professor of Civil Law and Mr Y.S. Zemach, Lecturer in Law. The second, entitled "Judicial Lawmaking in Israel", is by Mr U. Yadin, Professor of Law and Deputy Minister of Justice. The final essay is "Stare Decisis, Doctrine and Jurisprudence in Mexico and Elsewhere", by Professor Woodfin L. Butte of the University of Texas. The book concludes with a "Selective Bibliography" by Professor Charles Szladits of Columbia University.

A chain is only as strong as its weakest link, and a multi-author book is liable to be judged by its weakest contributions. It is a pleasure to be able to say that there are none in this anthology of articles on the role of binding and persuasive authorities in civilian and mixed jurisdictions. Every article is interesting and informative, and makes within its special field an important contribution to jurisprudence.

In its entirety, the book allows us to compare the approach taken to the same basic problems of legal argument and judicial law-making by countries having little in common other than the civilian elements in the ancestry of their legal systems. Yet the impression gained is one of concurrence rather than divergence, not only among the various members of the civil law family, but also between the civil law and the common law. Without trying to minimize the differences between the two traditions, one can say that while there is a fundamental difference between their theoretical

conceptions of the role of judicial decisions, in practice the approach is quite similar. Courts everywhere follow precedents, their own or those of superior courts, not only because no judge enjoys being overruled, but also because litigants legitimately expect that in deciding their cases, the courts should follow established jurisprudence. Whether cases are decided the same way by "reason of authority" or by "authority of reason" makes little difference to the parties in the final result. Judges in both civil law and common law jurisdictions, though supposed only to "find" the law, in fact "make" and always have made it, even if only "interstitially"; indeed, they have no choice in the matter.

There was a time when it was believed that there was an unbridgeable gulf between civil and common law systems. Today it is widely realized that both form part of the same Western European tradition. The great Continental codifications — Code Napoléon, B.G.B., the Swiss Code — have become thickly encrusted with case law and it is no longer possible to find the solution to any significant legal problem without referring to the cases decided over the last three decades or so. Conversely, in the common law jurisdictions, statutes are growing in number, constricting the area based purely on precedent, and the doctrine of *stare decisis* is being relaxed. What was once believed to be a chasm turns out to be little more than a ditch, and one which is becoming filled in as time progresses. The process is greatly helped by *The Role of Judicial Decisions and Doctrine in Civil Law and in Mixed Jurisdictions.*

This is a stimulating collection of essays, which will appeal to the civil and common law lawyer alike.

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