BOOK REVIEWS
CHRONIQUE BIBLIOGRAPHIQUE

A.W.B. Simpson, ed. *Biographical Dictionary of the Common Law*. London: Butterworths, 1984. Pp. xxv, 560 [£29.50]. Reviewed by Michael G. Bridge.*

There is an old joke concerning a man who, when asked about his reading of a telephone directory, replies that his enjoyment is marred in only one respect: the plot keeps changing. While abandoning the undiscriminating equality of the telephone directory, this biographical dictionary supplies a selective and constantly changing cast of characters located in predictable alphabetical order (except where the conferment of a peerage has confused the issue), and it has some pretensions to comprehensiveness, though a few suprising names seem to have gone ex-directory. The style of entry varies from the barest abbreviation of vital information (*e.g.*, Walton) to the full-blown and informative two- or three-page entry (*e.g.*, Kelsen, Llewellyn), and there are numerous vignettes (*e.g.*, Bramwell and the two Sweets). The selections are generally well done and the book is well produced, but there are too many typographical errors (or spelling mistakes — "abberations", "prceeding") and an arresting example of dropped lines in the case of Lord Stowell. Lord Tenterden appears twice as Lord Tenderden, and anyone looking for Lords Eldon and Nottingham had better remember their maiden names (Scott and Finch) since a double entry is unaccountably absent for them. And is that youthful figure in the costume of the 1630s really Sir Edward Coke, who must have worn ruff collars well into his later middle age? Was Powell really only about ten years old when he wrote his treatise on mortgages? Lombroso may well have been the author of *After Death — What?* but can he really be credited with statements made two years after his death?

It is evident from a reading of the whole that the editorial hand has been imposed lightly on the lengthy and distinguished list of contributors. In some cases, one may legitimately suspect that a contributor has preferred hero worship or a subjective slant on legal culture to objectivity. On the whole, the length of a particular entry is a most unreliable guide to the significance of the relevant actor's part in the development of the common

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law. Entries are confined to deceased jurists achieving prominence before 1939, but this limitation has not been consistently followed: Fifoot and Yntema are included but there is no reference at all to Falconbridge. A number of non-common-lawyers are included "for fun". Some of these, such as the Roman jurisconsults, have had a discernible influence on the common law *via* the Digest, while others, such as Portalis, have not.

The dictionary deals primarily with English common lawyers, providing also a selected list of American and Commonwealth figures. Granted that the latter group is thus limited, some surprising choices have been made. Why should Beale (an obviously unfashionable figure today in the United States, where the heroes of yesteryear tend to be buried near the Kremlin wall instead of in a glass coffin) be out when Kocourek is in? There is no reference to Sir Isaac Isaacs in the Australian batch. As for Canadian omissions, Falconbridge has already been noted and there is a distinct shortage of judges from Western Canada, such as Stuart and Lamont. The English list, on the other hand, is generally comprehensive and well-balanced. The major treatise writers are present (with the exception of Dart) and common law judges are to be found in force (but not Vaughan Williams or Cockburn), but there is a gaping hole in the ranks of Chancery judges: there is no mention of Lords Justices Knight Bruce and Turner, perhaps the strongest of the nineteenth-century Chancery appeal judges, nor indeed of the first Lord Parker of Waddington, some of whose more obscure brethren like Lord Atkinson are included. The book is clearly designed, at least in part, to entertain and interest its readers, but it does also claim to be a dictionary and the editor's power of selection should therefore know some limits.

The best parts of this book are the handful of really informative essays, such as those on Ellenborough, Kelsen and Llewellyn, and the large number of incisive and amusing entries, many of which are the work of the editor. The Irish contributions are disappointingly lacking in whimsicality and the Australian pieces have a distinct tendency to be long, dull and earnest. This pantheon of latter-day legal saints provides role models for all kinds of legal careers. Those of us who have chosen to spend our professional lives in law schools or as legal writers (not necessarily polar opposites) can take comfort from the presence of "obscure" (Snell, Perkins, Holloway, Powell) and marginally competent people (Pollexfen was "perplexed", Pigott wrote a "learned but baffling" book, E. Christian died "in the full vigour of his incapacity", Hill was "utterly confused by his own learning" and Bevers wrote an "extremely dull" book). We can sympathise with those who took to scholarship because of matrimonial difficulties (Twiss) or lack of success at the bar (Benjamin, Pollock, Blackstone), and we can well imagine the travails of those whose lectures repelled students (Austin, Kent) or who were unable

to inject life into their legal prose (Chambers wrote a "dreary treatise" and Garrow wrote "lifeless prose compensated by clarity and accuracy").

But there are success stories too. Pollock managed to intimidate his pupils while Fifoot stimulated the minds of even his weaker students; Halsbury was paid 10,000 guineas in pre-devaluation currency for his editorship of the *Laws of England* and Accursius grew fat on student fees. Nor is it all material success. Lords Sumner and Macnaghten secured entry in the *Oxford Book of English Prose* and Maitland produced enduring works of scholarship without notes.

And who said that lawyers are dull? Kelly was "beaten up by roughs", Popham was reputed as a child to have been kidnapped by gypsies, Thurlow fought a duel and Grotius escaped from imprisonment by hiding in a chest. They are also capable of going out in style — like Glanvill at the Siege of Acre, Ulpian and Papinian, who were murdered by Roman guards, W. Macnaghten, who was killed by Pathan tribesmen in the Kabul expedition of 1842, Pashukanis, who was liquidated by Stalin, and Stallybrass, who fell out of a railway carriage. Could the same claims be made for chartered accountants?

Lawyers can achieve canonisation despite personal shortcomings: Saunders was notorious for his body odour (a "fetid mass that offended his neighbours at the bar in the sharpest degree") and Howard sent his son to a girls' boarding school. Lawyers have also been known to flirt with the seamier side of life: Lord Holt had his 1698 salary paid in lottery tickets, Macclesfield was excessively avaricious in the sale of offices and Bacon accepted bribes. Nor is sainthood reserved for those, like Pattishall, who work single-mindedly day and night at their law. Keith, Jones and W. Macnaghten were distinguished scholars of oriental languages (Jones rates a mention in Gibbon's *Decline and Fall*), Lord Macnaghten won the Diamond Sculls at Henley, Lee wrote histories of the Popes and Archbishops of Canterbury in Latin hexameters while Bowen translated Virgil into English hexameters, and Fry and Moulton were accomplished in the sciences (zoology and electricity). On a slightly less-elevated plane, J. Mansfield shot his own breakfast, Shadwell issued *ex parte* injunctions from the swimming pool (with less than full disclosure one hopes), Jervis was an expert at spotting marked cards, Lord Thankerton practised knitting while on the bench and Gibson manufactured his own false teeth.

In sum, despite certain shortcomings, this book is a most enjoyable antidote to boredom and it can be guaranteed to enliven a dull weekend.

An inexpensive soft-cover edition will, however, be necessary if the book is to reach its market. In the course of reading the book from cover to cover, which by no means required self-mortification, I was able to find only one outrageously false statement: namely, that Osgoode Hall is the best-known law school in Canada.

L.C. Green. *International Law: A Canadian Perspective.* Toronto: Carswell, 1984. Pp. vii, 352 [$35.00]. Reviewed by Ivan A. Vlasic.*

The ancient subject of international law was taught in Canada for more than a century before the publication in 1979 of the first Canadian textbook, *An Introduction to International Law* by Professors Williams and de Mestral.[1] Only five years later, a second Canadian textbook of the same size and of roughly comparable coverage has now appeared on the market.[2] Professor Green's book, like the Williams and de Mestral book, places special emphasis on the "Canadian approach" to international law and is replete with footnote references to Canadian sources. Like its predecessor volume, the book is primarily directed to students and practitioners. In terms of pages, it may be modest (three hundred and fifty pages) when compared with certain widely used one-volume English textbooks,[3] but in terms of the topics covered it is quite comprehensive. Thus, in addition to the standard topics, such as the sources of international law, jurisdiction, state territory, and the law governing treaties, the book also deals, *inter alia*, with environmental law, extradition, the status of minorities, air law, international organizations, and the law of armed conflict. No major area of international law has been omitted, although certain important subjects, including some of special interest to Canadian jurists, have received less than adequate attention, as will be detailed below.

Professor Green presents his chosen subject matter in a readable and straightforward fashion. The text is, for the most part, well documented with appropriate references, and potentially controversial legal concepts and rules are treated with caution. For a work originally prepared for the *Canadian Encyclopedic Digest*, this approach is understandable and justified. Yet in a separate manual on international law, addressed to a much wider readership, such a neutral and largely descriptive account of a lively, constantly evolving and often controversial subject makes the reading a somewhat disappointing experience, particularly to those familiar with the author's previous writings and public appearances. Professor Green is known for his strongly held, and even more strongly voiced, views on many international

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[1]S. Williams & A.L.C. de Mestral, *An Introduction to International Law* (1979).

[2]L.C. Green, *International Law: A Canadian Perspective* (1984).

[3]See, *e.g.*, I. Brownlie, *Principles of Public International Law*, 3d ed. (1979); J.G. Starke, *Introduction to International Law*, 9th ed. (1984); D.W. Greig, *International Law*, 2d ed. (1976).

law issues; pungency, at times pugnacity, a zest for polemics, and an unshakeable belief in the rightness of his position have long been his trademarks — endearing to some (including this reviewer) but infuriating to others (more than a few of whom share Professor Green's sense of infallibility). One suspects that nothing short of a herculean effort in self-control (or the stern dictates of his publisher) could have produced such a tame result. By refusing to question both the "mainstream" as well as the "newly emerging" positions on many controversial issues, Professor Green has substituted ecumenism for liveliness.

While the overall quality of this publication is good, it does suffer from a number of shortcomings, ranging from the substantial to the mildly irritating. The reader should be warned, however, that the following observations necessarily reflect this reviewer's own biases and preferences.

A major and immediately noticeable weakness of the book is its index which is uncommonly frustrating and all too often quite useless. One will search in vain among the index's major headings for such standard entries as "aggression", "human rights", "jurisdiction", "Arctic", "sovereign immunity", "nationality", "responsibility of states", "sea", "high seas", and so on. References, for example, to concepts of the law of the sea will be found under the heading "maritime frontiers", sovereign immunity under "state jurisdiction", nuclear testing under "environment and pollution", and outer space under "air law". Yet marginal topics for a book of this size such as "international civil service" and "armed conflict" are accorded major headings with a number of sub-headings.

On the content side, it is disappointing to discover some serious omissions in a book so wide in coverage. A more discriminating approach to various subjects would have closed all these gaps without the addition of a single page. For example, it seems inconsistent, in a short volume aimed at Canadian students and practitioners, to give the law of armed conflict forty-four pages[4] and the international law of human rights only three pages,[5] or to devote a whole page to the interpretation of a relatively minor dispute between Egypt and the World Health Organization while reducing the Arctic and Antarctica to a few casual references. Surely both Canadian and foreign readers have a right to expect a much fuller account of the legal status of the polar areas, especially the Arctic, from a Canadian textbook on international law. The author's (mis)treatment of Antarctica is particularly regrettable. This vast ice-covered continent, currently governed by a unique legal regime established under the *Antarctic Treaty* of 1959, is reduced to a

[4]Green, *supra*, note 2 at 267-311.
[5]*Ibid.* at 231-3.

brief footnote reference.[6] Despite the puzzling indifference of successive Canadian governments towards this continent, the peculiar legal and political features of Antarctica, its potentially enormous resources, and the fact that it represents the only part of our planet which remains, by command of international law, totally demilitarized, surely merit some commentary.

As noted above, the meagre space given by the author to human rights, clearly a topic of great interest to Canadians, is another disappointing feature of the book. The *Universal Declaration of Human Rights* receives minimal attention, apparently because, as a resolution of the United Nations General Assembly, "it imposes no obligation on any state and confers no legally enforceable rights".[7] Elsewhere (under the general title "State Jurisdiction") the author concedes that the *Declaration* is "looked upon as the standard of measurement of human rights instruments and the behaviour of states", but he nevertheless contends that it "lacks any legal obligatory force".[8] As if to underscore his downgrading of this most influential of all human rights texts as a valuable source of guiding principles for the conduct of states, Professor Green reduces the vast literature on the international law of human rights to a few footnote citations. Even in a slender volume, one would expect some indication of the views on the legal and political significance of the *Declaration* held by many eminent jurists and a good many governments who regard at least some of its principles as being part of international customary law. While strict constructionists such as King Fahd of Saudi Arabia will readily agree with Professor Green's assessment of the *Declaration*, proponents of human rights will be distressed and those interested in obtaining balanced information about this body of international law will have to look elsewhere.

In contrast with the paltry three pages given to human rights, the lengthy coverage accorded to the law of armed conflict might lead the uninformed reader to conclude that Canada is set to abandon its traditional role as a peacemaker, adopting a posture in favour of foreign military adventures. In a book of this size and scope, forty-four pages devoted to a branch of law of marginal usefulness to Canadian "students" and "practitioners" is plainly unjustified, especially when contrasted with the scant space allocated to other more deserving subjects. However, anyone interested in the law of war will find this account fairly thorough and lucid, with particularly informative discussion of the *Geneva Conventions* of 1949 and the 1977 additional Protocols on Humanitarian Law Applicable in Armed Conflict.[9] Copious footnotes containing a wealth of relevant information, as well as

[6] *Ibid.* at 94 n. 14.
[7] *Ibid.* at 231.
[8] *Ibid.* at 192.
[9] *Ibid.* at 267-311.

special emphasis on Canada's role in the drafting of the 1977 Protocol II, enhance the value of the narrative.[10] As the laws of war are known to be honoured more in the breach than in the observance, at least a brief commentary regarding compliance with these laws in more than a hundred armed conflicts since World War II would have been welcome. A mere description of various conventions and regulations without reference to practice can be particularly misleading in this branch of international law. One would also wish to find some discussion of the legality of nuclear weapons, which have for decades exerted a profound influence on international life. In view of the many treaties discussed in the book which are designed to limit or prohibit the use of certain weapons because of their particularly inhumane nature, this seems an especially glaring omission. A laconic statement (in the chapter on "State Jurisdiction") that "there is no treaty forbidding the use of nuclear weapons during armed conflict"[11] is hardly adequate.

The discussion of sovereign immunity, clearly a subject of considerable practical interest to Canadian jurists, especially following the adoption in 1982 of the *State Immunity Act*,[12] is another disappointing feature of this book. To begin with, three pages of text cannot do justice to this important, complex and much litigated doctrine.[13] Professor Green mentions neither the United States' *Foreign Sovereign Immunities Act* of 1976 (*FSIA*),[14] nor any of the dozens of cases since decided by the American courts. One would also expect to find more than just a footnote reference to the United Kingdom *State Immunity Act 1978*.[15] In view of the paucity of Canadian cases dealing with sovereign immunity (none have been decided so far on the basis of the 1982 *Act*), and the rather concise guidelines given to courts by the statute, Canadian judges will rely heavily on American and British law and practice. The long excerpt from *The Schooner Exchange* v. *M'Faddon*,[16] decided in 1812, is immeasurably less relevant to a modern lawyer than would be a reproduction of, for example, section 1605 of the *FSIA* or section 3 of the United Kingdom *Act*. A claim to sovereign immunity is the type of issue involving international and foreign law which is most likely to confront Canadian judges and practitioners. Unfortunately, they will find the book to be of little assistance.

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[10]*Ibid.* at 307-8.
[11]*Ibid.* at 163.
[12]S.C. 1980-81-82-83, c. 95. For a brief discussion see Green, *supra*, note 2 at 158.
[13]Green, *ibid.*, note 2 at 156-9.
[14]28 U.S.C., s. 1602 (1976).
[15](U.K.), 1978, c. 33. See Green, *supra*, note 2 at 158 n. 6.
[16](1812), 7 Cranch 116 at 118. See Green, *ibid.* at 156 n. 98.

Although Professor Green makes frequent references to American sources, he fails even to mention the revised, tentative draft of the "Foreign Relations Law of the United States", most of which has been available since the middle of 1982. Despite its unofficial character, the first edition of this great codificatory effort of the American Law Institute[17] has continuously provided guidance on the rules of international law for American judges, government officials and practitioners. When adopted in its final form, the new *Restatement* will doubtless continue to be treated by United States jurists as an authority of considerably greater weight than the writings of any individual "most highly qualified publicist". Canadian readers should have been alerted to this influential publication.

The treatment of the law governing activities in outer space is also less than satisfactory, both in terms of coverage (one and a half pages) and quality, for it consists mainly of excerpts from the *Outer Space Treaty* of 1967.[18] Informed readers will surely be surprised by the author's assertion that states "are entitled to object if the satellite is used for espionage".[19] In support of this questionable assertion, Professor Green cites the Soviet destruction of the American U-2 reconnaissance aircraft in 1960 (not in 1962, as the book has it).[20] In another section, referring to the Soviet spacecraft *Cosmos-954* which crashed in Canadian territory in 1978, the book overlooks the subsequent Canadian initiative in the United Nations Outer Space Committee aimed at supplementing the norms of international law relating to the use of nuclear power sources aboard satellites.[21] The regulation of space telecommunication is ignored altogether.

Evidence of careless writing can be found in the author's definition of the territory of states. According to Professor Green, the sovereignty of states extends to "either land or water".[22] May it not be both? And what about airspace? Similarly, his claim that "a number of ... principles [in the *Stockholm Declaration on the Human Environment*] may be regarded as declaratory of customary law"[23] is plainly wrong, except for Principle 21. Not surprisingly, he neither specifies those Principles nor offers any evidence in support of the claim. Further, the absence of any discussion of the concept of the "Common Heritage of Mankind", debated for many years in the U.N. Conference on the Law of the Sea and now enshrined in the 1982 *Convention*

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[17]American Law Institute, *Restatement (Second) of Foreign Relations Law of United States* (1965).

[18]See Green, *supra*, note 2 at 200-1.

[19]*Ibid.* at 200.

[20]*Ibid.* at 200 n. 75.

[21]*Ibid.* at 162.

[22]*Ibid.* at 203.

[23]*Ibid.* at 162.8

on the Law of the Sea as well as the *Moon Treaty* of 1979, is inexcusable. Quite apart from the fact that two recent international treaties incorporate this new concept, which also enjoys the support of more than one hundred states, its legal, political, and economic implications are so great that no book on international law can afford to ignore it, regardless of the author's own views on the matter.

As the above observations illustrate, this book suffers from a number of weaknesses. Nevertheless, as noted in the beginning of this review, the book covers a large number of subjects and most of them are treated adequately. By offering the reader a panoramic view of international law in its application, Professor Green's text should prove useful as a quick reference for its intended readership.

P.G. Stein & A.D.E. Lewis, eds. *Studies in Justinian's Institutes in Memory of J.A.C. Thomas.* London: Sweet & Maxwell, 1983. Pp. xii, 209 [£25.00]. Reviewed by Richard J. Cummins.*

Those of us who recognize the immense value of studies in Roman Law and wish to see them promoted will be greatly encouraged by this excellent collection of essays by friends and colleagues of the late Professor J.A.C. Thomas of the University of London.[1] It is a particularly fitting honour paid to a scholar who, on the evidence of the biographical note[2] and the bibliography[3] contained in this book, was a tireless promoter of Roman law teaching and an important contributor to its literature. Professor Thomas's strong concern for teaching was clearly reflected in his edition of the Institutes of Justinian[4] and his very clear and useful *Textbook of Roman Law.*[5]

Fifteen essays are collected covering issues in the most important fields of Roman law scholarship relating to the Institutes. Prominent continental and British scholars have made contributions; Professor Alan Watson of the University of Pennsylvania is the only contributor from a North American university.[6] Two articles, "*Divisio Obligationum*"[7] by Professor Max Kaser, Emeritus Professor of Roman Law at Hamburg and Salzburg, and "*Der Schatzfund in Justinians Institutionen*",[8] by Professor Theo Mayer-Maly of Salzburg on treasure trove, are in German; the rest are in English.

The volume is attractively and accurately printed. There are, however, some small defects in its formal presentation. It has an index of sources (*Index Fontium*) but lacks a subject matter and name index. Also, it would have been helpful to organize the book into sections, putting together articles covering the same subject matter rather than following an order which, for the most part, seems random. Some articles translate Latin quotations and

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[1] P.G. Stein & A.D.E. Lewis, eds, *Studies in Justinian's Institutes in Memory of J.A.C. Thomas* (1983) [hereinafter cited as *Studies*].

[2] *Ibid.* at 1.

[3] *Ibid.* at 187.

[4] J.A.C. Thomas, *The Institutes of Justinian: Text, Translation and Commentary* (1975).

[5] J.A.C. Thomas, *Textbook of Roman Law* (1976).

[6] A. Watson, "Justinian's Institutes and Some English Counterparts" in *Studies, supra,* note 1, 181.

[7] *Studies, supra,* note 1, 73.

[8] *Studies, supra,* note 1, 109.

others do not; these days authors should always do so. These are, however, minor defects which the rich subject matter makes one forget immediately.

Roman law scholarship is properly a branch of historical rather than legal studies as narrowly defined. It represents an attempt to describe legal institutions at a particular point in time and to trace their evolution. The study of an ancient institution is not only inherently interesting, but may contribute to an understanding of contemporary ones, whether etymologically related or not. The interest a non-specialist legal scholar will have in Roman law scholarship is less direct than that which a contemporary philosopher, for example, might have in an ancient argument which may still be pertinent in its original form to the question he is studying. The long history of Roman law offers, nevertheless, an immense laboratory for comparative research.

Four articles deal with obligations: two with the classic question of how they are divided into categories,[9] one with the formation of contract,[10] and one with the delict of *furtum*.[11] Several papers treat the areas of property and successions: Professor Robert Feenstra's piece, "The 'Poor Widower' in Justinian's Legislation"[12] (which concerns the issue of forced shares and includes an interesting discussion of a South African case in which the relevance of the texts at issue was argued); an interesting article on *alluvio* (additions to land by deposit of silt) by Professor Andrew Lewis of the University of London;[13] the article on treasure trove mentioned above;[14] and an article entitled "Concealing a Servitude", by Alan Rodger of the Edinburgh bar.[15] Two articles deal with actions, one on *actiones mixtae* by Professor Hans Ankum, Professor of Roman Law at Amsterdam,[16] and one on *actio de posito* by Professor William Gordon, Professor of Civil Law at Glasgow.[17]

Several articles examine broader developments and the subsequent history of the Institutes. Professor O.F. Robinson of Glasgow deals with the

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[9]These include Kaser, *supra*, note 7 and P. Birks, "Obligations: One Tier or Two?" in *Studies, supra*, note 1, 18.

[10]G. MacCormack, "The Oral and Written Stipulation in the Institutes" in *Studies, supra*, note 1, 96.

[11]B. Nicholas, "Theophilus and *Contrectatio*" in *Studies, supra*, note 1, 118.

[12]*Studies, supra*, note 1, 39.

[13]A. Lewis, "*Alluvio*: The Meaning of Institutes II.1.20" in *Studies, supra*, note 1, 87.

[14]Mayer-Maly, *supra*, note 8.

[15]*Studies, supra*, note 1, 134.

[16]H. Ankum, "Gaius, Theophilus and Tribonian and the *Actiones Mixtae*" in *Studies, supra*, note 1, 4.

[17]W.M. Gordon, "The *Actio de Posito* Reconsidered" in *Studies, supra*, note 1, 45.

impact of developments in public law on the Institutes.[18] The earlier evolution of the Institute form, of which the work prepared under Justinian is the most famous example, is addressed by Professor Peter Stein in his article entitled "The Development of the Institutional System".[19] Professor Paul Van Warmelo describes the history of the Institutes as a students' manual.[20] Finally, Professor Alan Watson contributes a short article comparing the method of organizing material in the Institutes with that of "some English counterparts" including Blackstone's treatises.[21]

The collection illustrates a broad range of useful approaches to dealing with Roman material. Some articles are close analyses of a single or several texts, aiming to arrive at a more accurate and complete statement of the law on a particular point. Others deal with broader, more jurisprudential themes. I will refer to several of them, chosen almost at random (for there are many outstanding ones), in order to illustrate the kind of writing found in the collection.

Professor O.F. Robinson finds interesting evidence of the intrusion of public law concerns into the private legal life of Justinian's times by comparing his Institutes with those of Gaius written approximately 350 years earlier (although both deal almost exclusively with private law).[22] This development seems to him to parallel that in western countries during this century where, as in Justinian's Rome, "one can observe the state at work trying to make the citizen good, or at least intervening in the private sphere because it knew better than the individual what was good for him".[23]

Each of the Institutes was an elementary textbook designed to be used by first-year law students. While a perfect comparison is not possible since Gaius' work is not complete, Justinian's emphasis is clearly different in several important ways. A young lawyer of Justinian's time would be more likely to plan a career in public administration rather than in private practice as at the time of Gaius. In Justinian's work, the law is divided into "public" and "private" branches,[24] a distinction not used by Gaius, and issues of constitutional, administrative and sacral law are treated. In discussing *tutela*,

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[18]O.F. Robinson, "Public Law and Justinian's Institutes" in *Studies, supra*, note 1, 125.

[19]*Studies, supra*, note 1, 151.

[20]P. Van Warmelo, "The Institutes of Justinian as Students' Manual" in *Studies, supra*, note 1, 164.

[21]Watson, *supra*, note 6.

[22]Robinson, *supra*, note 18.

[23]*Ibid.* at 126.

[24]*Ibid.* at 129.

Justinian's Institutes emphasize the public nature of the burden; the administration is protected by providing that *usucapio* cannot run against it.[25] Justinian's work is also characterized by a tendency to criminalize offences as well as a preference for treating problems by focussing on the needs of the system rather than the individual.[26] This interesting way of dealing with historical material could, it seems to me, usefully be applied over a longer time period and to a larger body of texts.

Professor Peter Stein has contributed a rich essay on the development of the institutional system,[27] that is to say, on the gradual definition of the categories which make up the structure of the Institutes. Professor Stein reminds us that even distinctions which seem fundamental, like that between public and private law or that which divides legal subject matter into law concerning persons (*personae*), things (*res*) and action (*actiones*), did not come down from heaven but are working divisions which have evolved through the application of rhetorical learning. As such, they do not represent a final scientific achievement to be defended against the disorder of real life.

The first known rational organization of the civil law is that of Q. Mucius Scaevola (Consul, 95 B.C.) whose order was practical, treating the more important concerns first: thus, problems related to wills, legacies and intestate succession are dealt with at the beginning of his work.[28] As primitive as it may seem, even this early collection shows, in its detail, the influence of Greek rhetorical techniques of classification.[29]

Masurius Sabinus (first century A.D.) refines this structure somewhat.[30] But it is Gaius who, in the second century A.D., imposes on the traditional material a coherent superstructure of rhetorical origin which, in its broad outline, still characterizes modern civil codes. Gaius' tripartite division of material is not, as far as we know, found in earlier legal literature.[31] Although he recognizes that no exact equivalent has been discovered, Professor Stein follows an early author cited by Jhering[32] in suggesting that "the tripartite

[25]*Ibid.* at 130. See, in general, Thomas, *supra*, note 5 at 453-4 (*tutela*); B. Nicholas, *An Introduction to Roman Law* (1962) at 122-5 (*usucapio*).

[26]Robinson, *supra*, note 18 at 131.

[27]Stein, *supra*, note 19.

[28]*Ibid.* at 152.

[29]*Ibid.*

[30]*Ibid.* at 153.

[31]*Ibid.* at 157.

[32]*Ibid.* at 157 n. 18. This discussion is found in the French translation, R. von Jhering, *L'esprit du droit romain*, trans. O. de Meulenaere, 3d ed. (1887) at 91-2 n. 66. To the regret of many, Jhering's great work has never been made available in English. See Nicholas, *supra*, note 25 at 1; H.L.A. Hart, "Jhering's Heaven of Concepts and Modern Analytical Jurisprudence", in H.L.A. Hart, ed., *Essays in Jurisprudence and Philosophy* (1983) 265.

classification was not designed for law but was adapted to it from another discipline".[33] Further work will no doubt need to be done on the relation between rhetorical theory and legal classification.

A substantial account shows how the compilers of Justinian's Institutes used Gaius' categories[34] but interpreted them in a way "which was more acceptable to them".[35] As Stein points out:

> For Gaius, the civil law was something static. ... The arrangement of... material under three heads enabled him to present a neat, concise scheme. For Justinian's compilers its attraction was different. They saw law more dynamically, as an activity. For them Gaius' three parts of the law could be understood as referring to the persons of the law who engaged in actions at law concerning the things of the law, and so all the law could be viewed from these three points of view.[36]

Essays dealing with the basic distinctions on which the structure of works is based are often unexciting; this one, on the contrary, is a model of the kind, full of provocative ideas and sharp writing.

Professor Alan Rodger's article, "Concealing a Servitude",[37] reflects the kind of digging in the sources which can lead to fresh insights. He reexamines the problem posed by the case in which the seller of a house conceals a servitude which is, however, in fact known to the buyer. In Justinian's time, the buyer had no cause of action and the weight of scholarly opinion discussed by Rodger suggests that this was always the case.[38] Rodger argues that a case presenting these facts described by Cicero in the *De Officiis* and the *De Oratore* was decided in favour of the buyer on the basis of the seller's lack of good faith, thus suggesting that the rule may have been different in Republican times.[39] Although his argument is convincing, I cannot accept his conclusion that this result is correct. He wonders whether the decision to award damages to the buyer may not reflect a "slightly penal approach" derived from earlier law.[40] This suggestion is not pursued here but might merit further investigation.

It is fitting to close this appreciation by referring to Professor Alan Watson's excellent short article, "Justinian's Institutes and Some English Counterparts",[41] in which he examines the extent to which the structure of

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[33]Stein, *ibid.* at 157.
[34]*Ibid.* at 159-63.
[35]*Ibid.* at 162.
[36]*Ibid.*
[37]Rodger, *supra*, note 15.
[38]*Ibid.* at 136.
[39]*Ibid.* at 138-9.
[40]*Ibid.* at 148.
[41]Watson, *supra*, note 6.

early writings on the law in England follows or departs from the organization of the material in Justinian's collection. He shows how early slavish imitation of the categories in the Institutes[42] evolved into a freer form of organization which had little relation to Justinian[43] only to return to the pattern of the Institutes once again in Blackstone's work (1765-69).[44]

This is a thoroughly fascinating collection. Like any body of good scholarly work, it provides confirmation of some old answers, reopens some old questions, poses some new ones and leaves plenty of further work to do.

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[42]See the discussion of the work of John Cowell (1605), *ibid.* at 182.

[43]See the discussion of the work of Sir Matthew Hale (1713), *ibid.* at 185.

[44]Blackstone's use of Justinian's structure is more sensitive to the nature of his material. As Professor Watson points out: "The overall arrangement thus is considerably influenced by Justinian's Institutes, but the topics treated, as well as the more subordinate arrangement, are throughly English." *Ibid.* at 185.

Martin L. Friedland. *A Century of Criminal Justice: Perspectives on the Development of Canadian Law.* Toronto: Carswell, 1984. Pp. 245 [$32.50]. Reviewed by Mr Justice G. Arthur Martin.*

The publication of this collection of essays by Professor Friedland is both timely and welcome. The essays deal with several areas which are of current interest in Canadian criminal law and include such diverse topics as gun control, national security, wiretapping, entrapment and the impact of the *Canadian Charter of Rights and Freedoms* on the criminal justice system. The unifying theme of these essays is the development of the law and the forces which shape that development.

Students of criminal law will, of course, be familiar with Professor Friedland's influential works, *Detention Before Trial*[1] and *Double Jeopardy.*[2] *Detention Before Trial* contributed greatly to changes in Canadian law relating to pre-trial release. Its influence can be seen in the recommendations of the Canadian Committee on Corrections which were largely embodied in the *Bail Reform Act.*[3] *Double Jeopardy* has also been influential, especially in the decisions of the courts where it has often been quoted as an authoritative text.[4] *A Century of Criminal Justice* promises to be an equally important work.

Professor Friedland's essay entitled "Pressure Groups and the Development of the Criminal Law"[5] examines an entirely different kind of influence on the development of the law and makes fascinating reading. He finds acceptable the definition of pressure groups offered by Pross: "Pressure groups are organizations whose members act together to influence public policy in order to promote their common interest."[6] He concludes that the process of government consultation with "pressure groups" is becoming increasingly institutionalized, that the trend is toward more open consultation and that pressure groups will play an increasingly important role in the development of the law.

The essay on gun control in Canada traces the history of gun control legislation in this country and contains a comprehensive analysis of the

*Of the Ontario Court of Appeal.

[1]M.L. Friedland, *Detention Before Trial* (1965).

[2]M.L. Friedland, *Double Jeopardy* (1969).

[3]S.C. 1970-71-72, c. 37.

[4]See, *e.g.*, *Gushue* v. *The Queen* (1979), [1980] 1 S.C.R. 798 at 807, 106 D.L.R. (3d) 152.

[5]M.L. Friedland, *A Century of Criminal Justice: Perspectives on the Development of Canadian Law* (1984) at 67.

[6]*Ibid.* at 68.

present legislation.[7] In Professor Friedland's view, if Canada had not carefully controlled the possession of hand guns during the past century, today's crime rate for serious offences would be substantially higher. He points out that, although pressure groups have been a potent force in the development of both Canadian and American law, Canadian pressure groups have been less successful in blocking gun control legislation than their counterparts in the United States. Professor Friedland attributes this to the fact that the Canadian political system has brought pressure groups more openly into the decision-making process. Canadian pressure groups have had the opportunity to present briefs before parliamentary and other committees, have been permitted to participate directly in an advisory capacity, and have often been provided with government grants to fund their activities.

The Law Reform Commission of Canada is currently engaged in the massive undertaking of preparing a new criminal code. The essay on national security,[8] which includes a section on wiretapping, and the essay on entrapment[9] should assist the Commission in this endeavour. The essay on national security was published before the judgment of the Supreme Court of Canada in *Lyons* v. *The Queen*.[10] Professor Friedland's prediction that the Supreme Court would, by a bare majority, interpret the present legislation as permitting surreptitious entry to engage in electronic surveillance if judicial authorization specifically permitted it proved to be somewhat conservative. The Supreme Court, by a substantial majority, held that where a judicial order authorized electronic surveillance of a kind that involved a trespass, the police were necessarily authorized to enter surreptitiously.

The essay on entrapment was prepared prior to the judgment of the Supreme Court of Canada in *Amato* v. *The Queen*.[11] In that case, five Supreme Court justices recognized the "defence" of entrapment, although they differed in their views as to the circumstances under which the defence operates. I found Professor Friedland's discussion of the "defence" of entrapment and its underlying principles of particular interest. It is clear that Professor Friedland is satisfied with neither the so-called majority or "subjective" test as applied in the United States nor the minority or "objective" approach, and instead recommends that the subject of entrapment be dealt with by legislation. The "defence" of entrapment will no doubt be included in the proposed criminal code.

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[7] *Ibid.* at 113.
[8] *Ibid.* at 141.
[9] *Ibid.* at 171.
[10] (1984), 15 C.C.C. (3d) 417, [1985] 2 W.W.R. 1 (S.C.C.).
[11] (1982), [1982] 2 S.C.R. 418, 69 C.C.C. (2d) 31.

In the essay entitled "Criminal Justice and the *Charter*",[12] Professor Friedland analyses the principal judgments under the *Charter* which had been delivered at the time the essay was written. He maintains that it would not be surprising for the courts to use section 7 in cases where there is a delay before the accused is charged, assuming that "dclay" in section 11(b) is limited to delay after the charge. His prediction was proven accurate in *R.* v. *Young*[13] where the Ontario Court of Appeal held that, under the circumstances, the laying of the charge violated the accused's rights as guaranteed by section 7. Professor Friedland's analysis of the double jeopardy provision in section 11(b) of the *Charter* is also, as one would expeet, extremely helpful.

Professor Friedland concludes that the courts have taken a careful but broad approach to constitutional guarantees under the *Charter.* The essay was prepared prior to the landmark decision of the Supreme Court of Canada in *Hunter* v. *Southam Inc.*[14] dealing with the *Charter* guarantee against unreasonable search or seizure. It is, I think, clear that the *Charter* has, to date, had an impact on the criminal justice system that has exceeded the expectations of many. One might perhaps wonder why this has been so in a mature and democratic country. I think the answer is to be found in the gradual erosion of certain fundamental rights over a period of years in certain areas of the criminal law — a deterioration so gradual that it has passed virtually unnoticed. The chickens, so to speak, have come home to roost. The full impact of the *Charter* will be reflected, not only in the decisions of the courts, but also in legislation which will complement the various provisions of the *Charter.* For example, following the decision of the Ontario Court of Appeal in *R.* v. *Noble*,[15] which held that writs of assistance under the *Narcotic Control Act*[16] and the *Food and Drugs Act*[17] contravened the *Charter*, the government moved quickly in Bill C-18[18] to abolish writs of assistance altogether.

The book's final essay examines three murder trials which occurred a century ago. Professor Friedland's conclusions will be of interest to all students of criminal law. This series of essays will not disappoint the expectations of those who have long respected Professor Friedland's contribution to the reform of Canada's criminal justice system.

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[12]Friedland, *supra*, note 5 at 205.

[13](1984), 46 O.R. (2d) 520, 13 C.C.C. (3d) 1 (C.A.).

[14](1984), [1984] 2 S.C.R. 145, 11 D.L.R. (4th) 641.

[15](1984), 48 O.R. (2d) 643, 42 C.R. (3d) 209 (C.A.).

[16]R.S.C. 1970, c. N-1, s. 10(3).

[17]R.S.C. 1970, c. F-27, ss 37(3), 45(1).

[18]Bill C-18, *Criminal Law Amendment Act, 1985*, 1st Sess., 33d Parl., 1984-85 (assented to 24 April 1985) ss 196(2), 200(2).,

R. Romanow, J. Whyte & H. Leeson, eds. *Canada ... Notwithstanding : The Making of the Constitution : 1976-1982.* Toronto : Carswell/Methuen, 1984. Pp. xxi, 286 [14.95 $]. Commenté par Gérald-A. Beandoin.*

Les juristes, les politicologues et les historiens vont consacrer bon nombre d'ouvrages au rapatriement de la Constitution canadienne. C'est déjà commencé ![1] Cet événement crucial en lui-même s'est produit un peu plus d'un an après le célèbre référendum québécois du 20 mai 1980 sur la souveraineté-association. Ces deux événements font désormais partie de l'Histoire.

Les circonstances qui ont entouré l'adoption de la *Loi constitutionnelle de 1982* sont de nature à susciter des commentaires et des prises de position qui vraisemblablement ne feront jamais l'unanimité.[2] Trop de passions se sont soulevées, trop de points de vue se sont violemment affrontés pour qu'on en vienne rapidement à la sérénité. Il faudra compter avec le temps !

L'ouvrage *Canada ... Notwithstanding : The Making of the Constitution : 1976-1982* ne saurait passer inaperçu. L'un des trois auteurs, Roy Romanow, fut l'un des acteurs du rapatriement. Les deux autres, le professeur John Whyte, constitutionnaliste et Howard Leeson, politologue, firent partie de l'équipe de la Saskatchewan. Les auteurs s'en expliquent dans la préface de leur ouvrage.

Tout ouvrage important sur le rapatriement de la *Loi constitutionnelle de 1982* suscite l'intérêt. D'abord parce que cette loi constitutionnelle contient une formule d'amendement,[3] une charte constitutionnelle des droits,[4] des modifications à notre loi fondamentale,[5] reconnaît et confirme les droits des peuples autochtones.[6] C'est la plus grande révolution constitutionnelle depuis 1867 comme le temps qui passe ne manquera pas de l'illustrer. En

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[1]Mentionnons par exemple, R. Sheppard & M. Valpy, *The National Deal : The Fight for a Canadian Constitution* (1982) et G. Rémillard, *Le fédéralisme canadien : le rapatriement de la Constitution*, t. 2. (1985).

[2]*Loi constitutionnelle de 1982*, adoptée en tant qu'annexe B de la *Loi de 1982 sur le Canada* (R.-U.), 1982, c. 11.

[3]Il s'agit des articles 38 à 49 de la *Loi constitutionnelle de 1982, supra*, note 2.

[4]La *Charte canadienne des droits et libertés* constitute la Partie 1 de l'annexe B de la *Loi de 1982 sur le Canada, supra*, note 2. Elle comprend trente-quatre articles.

[5]L'article 50 de la *Loi constitutionnelle de 1982, supra*, note 2 ajoute l'article 92A à la *Loi constitutionnelle de 1867* (R.-U.), 30 & 31 Vict., c. 3. Cet amendement relatif aux ressources naturelles est loin d'être negligeable.

[6]Voir les articles 25 et 35 de la *Loi constitutionnelle de 1982, ibid.* ; voir aussi l'article 37.

second lieu, parce que les circonstances qui ont entouré son adoption ne laissent personne indifférent.

Les auteurs remontent à 1976. Bien sûr, ils auraient pu partir de 1968, de 1960, voire même de 1927 lorsque se tint la première conférence constitutionnelle sur le rapatriement et la formule de modification constitutionnelle, après la célèbre Déclaration Balfour de 1926.[7] Il s'est passé beaucoup d'événements entre 1927 et 1976, notamment l'amendement St-Laurent de 1949,[8] la formule Fulton-Favreau,[9] la formule de Victoria.[10] L'histoire complète du rapatriement remonte au moins à un demi-siècle.[11] Les auteurs ont concentré leurs efforts sur les années 1976-1982.

Les faits sont les faits, dit-on ! Cependant certains sont plus connus que d'autres. Quelques-uns demeurent encore inconnus. De plus, ils ne sont pas tous interprétés de la même façon, peu s'en faut, par ceux qui les ont vécus ou par ceux qui les ont observés. Il faut savoir gré aux trois auteurs de les avoir relatés et d'en avoir donné une interprétation. Nous souhaitons que d'autres auteurs et observateurs en fassent autant.

L'ouvrage comprend neuf chapitres. Je traduis les thèmes : « On se remet en marche », « À la recherche d'une solution rapide », « Une nouvelle bravade », « L'année de la confrontation », « La bataille d'Angleterre », « La bataille judiciaire », « La semaine historique », « La *Charte canadienne des droits et libertés* », « Regards en arrière, regards en avant ». Certains chapitres, on le voit, portent des titres aguichants.

Le chapitre 7, intitulé « The Week That Was » est certes l'un des plus intéressants. Les événements du 2 au 5 novembre 1981 et la nuit de 4 novembre ont donné lieu à plus d'une interprétation. Les auteurs relatent les événements avec force détails. Je souhaiterais lire la version de d'autres auteurs et observateurs crédibles. L'auteur de la présente recension a lui-même assisté à cette conférence comme observateur et commentateur pour

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[7]Voir G.-A. Beaudoin, *Le partage des pouvoirs*, 3e éd. (1983) aux pp. 451-9.

[8]L'alinéa 91.1 fut ajouté à *l'Acte de l'Amérique du Nord britannique (no 2) 1949* (R.-U.), 13 Geo. 6, c. 81. Ce paragraphe est abrogé par la *Loi constitutionnelle de 1982, supra*, note 2. Cet amendement est connu sous le nom d'amendement St-Laurent.

[9]Voir Beaudoin, *supra*, note 7 aux pp. 454-5.

[10]Voir la « Charte constitutionnelle canadienne 1971 » reproduite dans Canada, *Conférence constitutionnelle : délibérations* (Victoria, 14 juin 1971), appendice B. Le rejet de la Charte de Victoria en juin 1971 par les autorités québécoises à leur retour au Québec a fortement déplu au Premier ministre Trudeau. Ce n'est qu'après un certain temps que les conférences constitutionnelles ont repris. Dix ans plus tard, en novembre 1981, M. Trudeau cette fois passa outre au refus du Québec.

[11]Voir P. Gérin-Lajoie, *Constitutional Amendment in Canada* (1950). Voir Canada, Ministère de la Justice, *Modification de la Constitution du Canada* (G. Favreau) (1965).

les médias et croit que seul le recul du temps contribuera à replacer certains événements dans leur perspective propre.

Les trois auteurs illustrent bien le fait que les deux ordres de gouvernement ont fait des compromis. Le compromis n'est-il pas l'instrument des politiciens ? Monsieur Trudeau et certains premiers ministres provinciaux ont accepté des solutions qu'ils avaient clairement rejetées auparavant, comme en témoigne la *Loi constitutionnelle de 1982*. En matière de négociation constitutionnelle, rien n'est jamais sûr.

On demeure ici surpris de la façon dont les grands compromis politiques se font. Les passions sont vives dans l'arène politique et les intérêts conflictuels. Monsieur Trudeau a mis le prix pour obtenir le rapatriement : il a accepté une formule d'amendement qu'il n'aimait guère, la possibilité d'un statut particulier auquel il s'est toujours opposé, et, enfin, une clause dérogatoire pour trois secteurs de la charte. Cette clause faut-il le dire n'était pas de sa création !

Les provinces pour la plupart tenaient à l'agrandissement de leurs pouvoirs plus qu'à une charte constitutionnelle. Elles ont accepté cette dernière après avoir fait quelques gains, notamment avec l'article 92A et après avoir imposé leur formule d'amendement. Les constitutions seront toujours à base de compromis, même si on ne s'y habitue pas.

Le ton de l'ouvrage est narratif, bien sûr, et parfois plus politique que juridique. En ce sens, on peut dire qu'il intéressera les historiens et les politicologues tout autant que les juristes.

Les auteurs consacrent quelques pages à la Commission Pépin-Robarts,[12] au célèbre Bill C-60.[13] Ils ne manquent alors pas de souligner que le Québec n'a pas donné son accord. Ils terminent leur ouvrage sur une interprétation : « We have reinvented Canada. Did we lose its soul ? »

Ce n'est pas une mauvaise façon de terminer pareille étude. En effet, il reste beaucoup à accomplir, malgré tout ce qui a été réalisé. Comme le soulignent les trois auteurs dans le neuvième chapitre, il reste *inter alia* à obtenir l'accord du Québec, à faire la réforme du Sénat, à identifier les droits des peuples autochtones.

Le compromis reste donc clairement inachevé. Il existe plus d'une façon d'y arriver. Le Québec s'y emploie. Péquistes et libéraux provinciaux y vont de leur suggestions. À l'automne 1984, le Premier ministre Mulroney avait ouvert la porte. Le Premier ministre Lévesque après son virage de janvier

[12]Canada, Commission de l'unité canadienne, *Se retrouver : observations et recommandations* (janvier 1979).

[13]P.L. C-60, *Loi constitutionnelle de 1978*, 3e sess., 30e Lég., 1977-78.

1985 se déclarait prêt à prendre le « beau risque du fédéralisme »[14] et en mai de la même année faisait des propositions constitutionnelles.[15] Le projet d'accord ne comporte pas trop de surprises. Certaines demandes s'inspirent du rapport Pépin-Robarts. La plupart reprennent les revendications traditionnelles du Québec, comme les limites au pouvoir de dépenser, le droit du Québec de déterminer sa langue officielle, un droit de veto en ce qui concerne les institutions fédérales, l'écart du pouvoir de réserve et de désaveu, le rapatriement de la compétence relative au mariage et au divorce, un nouveau partage en matière de communications, un amendement à l'article 96, et bien sûr, la pleine compensation financière en cas d'exercice du droit de retrait.

Cependant la démission de Monsieur Lévesque en juin 1985 et la course à la chefferie du parti québécois ont reporté cette discussion à plus tard. On s'interroge. Aura-t-elle lieu avant les prochaines élections provinciales ? Qui sera à la table de négociation ? Les péquistes, les libéraux ? Le constitutionnaliste Gil Rémillard parle d'étapisme pour l'accord du Québec.[16] Il est permis de croire que cet accord prendra de longs mois. Son contenu final est impossible à prévoir.

Se pose aussi la question de la réforme du Sénat. La proposition du Ministre Crosbie[17] du printemps de 1985 s'inspire en principe de la réforme de la Chambre des Lords de 1911. Elle semble actuellement en suspens. Vu le changement de gouvernement en Ontario et l'absence du Québec à la table de négociation, il est improbable que le consensus prévu à la formule d'amendement soit obtenu.

La question de l'identification et de la détermination des droits des peuples autochtones va prendre un certain temps. Le problème est colossal. Il est dommage qu'au printemps de 1984 et de 1985 les onze premiers ministres n'aient pas tous accepté le principe du gouvernement autochtone automne. Il faut y arriver d'ici 1987.[18]

Cette recension nous suggère quelques réflexions que nous résumons en six points.

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[14]Voir B. Descôteaux, « Le 'beau risque', dernière édition », *Le Devoir [de Montréal]* (Supplément) (31 janvier 1985) 19.

[15]Québec, *Projet d'accord constitutionnel : propositions du Gouvernement du Québec* (1985), document de 39 pages comprenant 26 propositions.

[16]Voir l'article de M. Vastel, « Mulroney adopte, à son tour, l'étapisme : en s'adjoignant Gil Rémillard comme conseiller constitutionnel », *La Presse [de Montréal]* (25 juillet 1985) A 1.

[17]Dans un communiqué de presse du 7 juin 1985, le ministre de la Justice propose un droit de veto suspensif de 30 jours à l'égard des projets de loi de finances et de 45 jours pour les autre projets de loi.

[18]Le premier amendement constitutionnel depuis le rapatriement de la Constitution porte sur les droits des peuples autochtones et fut proclamé le 21 juin 1984.

A — Il est effarant de constater combien si peu d'acteurs en si peu de temps prennent des décisions qui affectent tant de monde pour si longtemps. C'est souvent le cas en Histoire. On discute encore des intentions de Sir John A. Macdonald et de Sir Georges-Étienne Cartier à Charlottetown, à Québec et à Londres. On a beau dire que les questions ont auparavant été discutées *ad nauseam*, il n'en demeure pas moins qu'à un moment donné une volonté ferme change le cours de l'Histoire en quelques heures.

B — Certains se sont demandé pourquoi les Canadiens ne se sont pas donné ici même au Canada une nouvelle Constitution. Nous avons eu l'occasion de nous pencher sur ce problème avec les professeurs Orban, Bergeron et McWhinney dans un ouvrage collectif intitulé *Mécanismes pour une nouvelle Constitution.*[19] Le Canada a préféré la continuité juridique. Il a juridiquement réparé l'anomalie de l'article 7 du *Statut de Westminster* de 1931 en se servant du « vieux processus », pour employer l'expression de la Cour suprême dans l'avis sur le rapatriement.[20] À la réflexion, le constituant de 1981 a eu raison, même s'il reste de graves lacunes à combler ! Rien n'indique que nous aurions pu nous entendre sur la composition de la Constituante et sur les règles du jeu ; au contraire !

C — La Cour suprême a joué en 1981 et en 1982 un rôle dont on ne peut exagérer l'importance. En émettant l'opinion qu'un « appui substantiel » des provinces était nécessaire, sur le plan de la convention constitutionnelle, avant d'acheminer la Résolution aux autorités britanniques, notre plus haut tribunal forçait en pratique la tenue d'une conférence constitutionnelle et engageait les acteurs politiques à s'entendre. En émettant l'avis en 1982[21] qu'aucune convention ne reconnaissait un veto au Québec, la Cour prononçait ainsi la légitimité du rapatriement qui, sur le plan juridique, était déjà régulier.

D — Le compromis de novembre 1981 s'est fait rapidement. Trop rapidement ! La formule d'amendement laisse beaucoup à désirer. Elle protège mal le Québec. Il n'y a pas de compensation financière dans tous les cas de retrait mais seulement pour l'éducation et la culture et, surtout, elle offre peu de protection au Québec au sein des institutions centrales. On a

[19]G.-A. Beaudoin, « Mécanismes d'élaboration d'une Constitution nouvelle » dans G.-A. Beaudoin *et al.*, *Mécanismes pour une nouvelle constitution* (1981) 89 aux pp. 106-11.

[20]*Renvoi : résolution pour modifier la Constitution* (1981), [1981] 1 R.C.S. 753, 125 D.L.R. (3d) 1.

[21]*Dans l'affaire d'un renvoi à la Cour d'appel du Québec concernant la Constitution du Canada* (1982), [1982] 2 R.C.S. 793, 45 N.R. 317.

prévu l'unanimité pour changer la composition de la Cour suprême. Il faudrait faire de même pour le Sénat. Il y aurait ici tout un article à écrire sur les conditions d'acceptation du Québec.[22]

E — D'aucuns suggèrent que les amendements constitutionnels soient ratifiés par le peuple. Qu'en est-il aux États-Unis et au Canada ? La constitution américaine du 17 septembre 1787 fut ratifiée par des délégués des États désignés à cette fin par le peuple de chaque État.[23] Les dix premiers amendements de 1789 connus sous le nom de *Bill of Rights* furent ratifiés selon l'article V de la Constitution.[24]

L'*Acte de l'Amérique du Nord britannique de 1867* (maintenant désigné sous l'appellation de *Loi constitutionnelle de 1867*) ne fut pas ratifié par le peuple canadien. C'est une loi britannique qui donnait suite aux Résolutions des Pères de la Confédération. Cependant, les auteurs de cette constitution fédérale se maintinrent au pouvoir. Ils ne furent pas désavoués par le peuple. Mais il n'y eu aucun plébiscite aucun référendum sur les Résolutions de Québec et de Londres.[25] La *Loi constitutionnelle de 1982* qui prévoit une formule d'amendement n'impose aucun plébiscite ou référendum mais le consentement de la ou des assemblées législatives concernées.

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[22]Nous avons déjà esquissé une solution. Voir G.-A. Beaudoin, « Le veto et le retrait : esquisse d'une solution », *Le Devoir [de Montréal]* (23 janvier 1985) 9.

[23]Voir C.D. Bowen, *Miracle at Philadelphia* (1966). L'article VII de la Constitution du 17 septembre 1787 prévoit :

> The Ratification of the Conventions of nine States shall be sufficient for the Establishment of this Constitution between the States so ratifying the same.

Bowen, *ibid.* aux pp. 323-4 donne les noms des 39 personnes venant de 12 États qui apposèrent leur signature. Cinquante-cinq personnes avaient participé aux débats comme délégués.

L'entrée en vigueur de la nouvelle Constitution avait été fixée au 4 mars 1789. Comme le rapporte B. Schwartz, *Constitutional Law* (1972) à la p. 328, onze États avaient ratifié le texte à cette date ; deux autres suivirent rapidement ; un quatorzième le Vermont fut admis le 18 février 1791. Le processus était démocratique. Le peuple dans chaque État choisissait des délégués sur la recommendation de la législature ; et ces délégués se prononçaient sur la ratification de la Constitution.

[24]Voir A. Tunc & S. Tunc, *Le système constitutionnel des États-Unis d'Amérique*, vol. 2 (1954). Les auteurs écrivent à la p. 495 n. 13 :

> Les dix premiers amendements ont été votés ensemble par le premier Congrès du 25 septembre 1789 et, conformément à l'article V de la Constitution, sont entrés en vigueur le 15 décembre 1791, ayant été ratifiés par onze États sur quatorze.

[25]Voir J.-C. Bonenfant, *La naissance de la Confédération* (1969) aux pp. 21-2 où l'auteur relate que « [d]ès le lendemain de la Confédération, le gouverneur général [. . .] Lord Monck appela John A. Macdonald à former un cabinet.» Ce dernier une fois constitué comprenait treize ministres dont quatre du Québec. Les élections fédérales et québécoises furent fixées au début de septembre 1867. Elles furent remportées par les conservateurs qui étaient les partisans de la Confédération. « La Nouvelle-Écosse [écrit J.-C. Bonenfant] cependant envoya à Ottawa 17 députés sur 18 avec mandat de s'opposer au nouveau régime, mais l'habileté de John A. Macdonald allait bientôt vaincre cette difficulté.»

F — C'est le Québec, depuis sa Révolution tranquille, et même avant, qui a suscité la tenue des grandes conférences pour adapter notre Constitution aux réalités de l'heure. C'est pourtant la seule province qui n'a pas donné son accord en 1981. Cet accord doit venir. Le Canada anglophone se doit de saisir l'importance cruciale de cet accord et de faire les compromis qui s'imposent.

Il est heureux que l'ouvrage *Canada Notwithstanding : The Making of the Constitution : 1976-1982* ait été écrit. Il apporte un éclairage et un point de vue intéressant sur un épisode fort troublé de notre destin. Il est valable et il remplit un rôle.

Nous aurions préféré voir les renvois en bas des pages plutôt qu'à fin des chapitres. Il eût peut-être été souhaitable d'ajouter à l'ouvrage le texte de la *Loi constitutionnelle de 1982*, encore qu'il ne s'agisse pas là d'une nécessité absolue.

L'ouvrage comprend un index bien fait qui aide le lecteur à se retrouver dans le labyrinthe des démarches des acteurs du rapatriement.