Nonetheless, Professor Christensen has performed a most meaningful study of a subject matter which cries out for solution. She is to be commended for an excellent analysis of certain aspects of a complex issue. Her suggestions for solution are deserving of serious consideration and debate by those who can make the necessary decisions by amending existing legislation.

While Professor Christensen does not pretend to advance a text for lawyers, it is a publication nonetheless which is deserving of attention by practitioners who may be, directly or indirectly, involved in public sector bargaining. She has achieved considerable success in delineating the problems of the present system (which has been often attempted) and, more importantly, suggested a possible alternative.

The answer to the dilema undoubtedly rests with sufficient public opinion motivating politicians to act. Public apathy sadly appears to be the current mood of the nation.

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***Law and Legality: Materials on Legal Decision-Making, Cases, Notes and Materials,* John E. Claydon and J. Donald Galloway, Toronto: Butterworths, 1980. Pp. 560. $25.50 (paperback).**

In an effort to acquaint students with the role of the courts in the Canadian legal system, law schools have generally offered courses at some point during the three years of instruction which attampt to delineate and analyze the phenonemon decision-making. Whether classifided under the rubric of "legal method", "legal process" or "public law", it appears fair to assert that while the aspirations of such programmes of study are laudable, the objectives — presumably the inculcation of some appreciation and comprehension of the relationship of the legal system to other modes of social organization and the role of law as a reflection of certain communal values and as a medium of reconciliation of antagonistic interests — are only imperfectly realized.

No doubt the disssatisfaction experienced by student and professor alike when confronted by a subject of the magnitude of the legal system may be attributed, at least in part, to the character of the phenonemon under examination. Categories of law such as "torts", "contracts", "constitutional law" and the like superficially present the appearance of completeness and integrity. Such subjects offer the illusion of discreteness and appear capable of apprehension as individual and well-defined wholes with readily perceptible boundaries. On the other hand, any investigation of the legal process is hindered by the inherent expansiveness and inclusiveness of the topic which does not easily admit facile reduction and simplification. What, indeed, is not an aspect of the legal process? The subject is an amorphous one, potentially encompassing all elements of law, in the broadest sense, in society.

The response of Canadian law schools when encountering the difficulties of conveying to the student some notion of the role of the courts and the quality and impact of judicial decision-making upon the evolution of the law has assumed one of two forms. Recognizing the necessity of such instruction, law schools have created a dichotomy by electing either to engage in a detailed and primarily description presentation of the components of the legal system, the institutions which exercise a decision-making authority and the techniques utilized in such decision-making, or, alternatively, have chosen to emphasize the general by isolating for analysis the theoretical premises underlying judicial activity without a corresponding reference to the tangible consequences of such conceptual suppositions: specifically, the effect of decision-making upon the rights and obligations of individuals, social groupings and more formal species of associations.

Both methods, the descriptive and the analytical, represent extremes and for that reason reveal certain defects. The former perspective too often engenders a sense of disunity and fragmentation. A methodology of instruction which relies upon the compilation and dissemination of an array of varied and dissimilar cases, comments and statutes, in the absense of any integrating philosophical thesis creates only confusion. The latter approach, while it avoids the lack of clarity occasioned by a visual barrage of miscellaneous, uninformed and indiscriminate sources manifests contrary deficiencies. A concentration upon abstract reasoning to the exclusion of a discussion of more pragmatic or functional considerations constitutes an unnecessary divorce of "law-in-books" from "law-in-action" and fails to recognize that the legal system cannot be abstracted from the social context in which it operates. Any undertaking directed solely to a study of the various definitions of law appears abstruse without significance to the degree that the stated mandate of a course based upon the legal process would appear to entail examination of the workings as well as the theoretical foundations of the legal system. A debate as to the nature of law can never be conclusively resolved in favour of one doctrine or school of thought as opposed to another. Such

a jurisprudential inquiry while provoking critical discussion presents a less than satisfactory resolution to the problems in instruction alluded to previously. The reader may retain only the impression of intellectual musings unrooted in any institutional framework.

The assertions contained in the previous paragraph may be unduly exaggerated and certainly have not been intended as an overly harsh critique of Canadian legal education. Any depiction of the techniques and consequences of legal decision-making involves certain problems which are exacerbated by, and which, no doubt, contribute to the lack of satisfactory course materials in which theory and institutional practice are synthesized within an intelligent, lucid and coherent whole.

This textual lacuna has been remedied by the publication of *Law and Legality: Materials on Legal Decision-Making* (edited by J. Claydon and D. Galloway). The text, composed of case extracts, notes and articles signifies an effort by the editors to avoid the pitfalls of the conventional approaches adverted to earlier. Originally intended to form the basis of a first-year course in Public Law taught at Queen's University, the material is "designed to introduce first-year law students to the legal decision-making process in Canada and to augment and serve as a connecting link among other first year courses which focus on particular substantive and procedural problems."[1]

In an effort to integrate the descriptive and the critical, Claydon and Galloway have structured their exposition around "the dynamic concept of progress which focusses on the interactions among legal decision-makers rather than on the static rules which they create and apply."[2] By the adoption of such a perspective, the editors are enabled to realize two objectives: a determination of the functioning of the legal system and an appreciation of the values which such a system promoted and the purposes which are sought to be achieved. Such an inquiry is conducted with an interdisciplinary framework. The analysis of the adjudicative function as practised by courts, tribunals and other executive and legislative organs, both nationally and internationally, is undertaken in conjunction with a discussion of other factors — the historical, the economic and the political — which colour both the formal and the substantive elements of decision-making. Law is perceived by the editors as an expression of the consequence of liberal theory and it is against the primary tenets of this political belief that legal and non-legal decisions are evaluated. The materials are organized in a fashion which fosters critical analysis of the goals of law and the functional means by which these aims are attained, to whatever degree.

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[1] Claydon and Galloway, at v.

[2] *Ibid.*

Primary concern is directed to the articulation and influence of constitutive decisions which are defined by Claydon and Galloway as those

> which identify decision-makers (who they are and who decides who they are), specify substantive criteria for decision-making, allocate general decision-making competence on functional and geographic lines, establish the procedures for the making of decisions and in result, make sure that those decisions affecting values . . . are made.[3]

The process which embodies the sum of all constitutive decisions, the constitutive process, reflects certain presumptions as to the division of authority between the three branches of government, the distribution of powers between Parliament and the provincial legislatures and the role of the court in maintaining constitutional boundaries and in preserving to a greater or lesser degree the liberty of the individual in his relationship with the state. In short, the constitutive process, in the sense in which the phrase is employed by Claydon and Galloway, suggests and ecompasses all the parametres of the legal system in a shorthand fashion and indicates the criteria which establish rules governing the conferral of executive, legislative and adjudicative authority and stipulates the manner in which such power is to be exercised. Such constitutive decisions are crucial in dictating the content of those secondary decisions of both a formal and informal nature which define the rights possessed and obligations owed by individuals in their interactions with both the state and other citizens. In this respect, attention is given not only to the traditional sources of decisions — the opinions of the judiciary — but is extended as well to the actions of non-judical bodies such as the executive and legislative branches of government.

The text is divided into three sections. Part I entails an examination of what are described as the formal elements of decision-making. In this section, the editors address themselves initially to the constitution as the written embodiment of a particular political structure premissed upon a federal distribution of legislative powers and the manner in which the relatively abstract and static language of the formal document is imbued with flexibility through judicial review, the modifying effect of custom and convention and finally, by means of legislative amendment. Secondly, the editors delineate the relationship between the judiciary and other organs of government in order to establish the scope and ambit of judicial decision-making as it is limited and qualified by the philosopic belief in the supremacy of Parliament and by the exercise of decision-making powers by non-judicial bodies. Finally Part I concludes with an investigation of the constitutional indicia of decision-making, singling out such criteria as the federal distribution of powers, judicial acceptance of principles deriving from theories of the "rule of law" and "natural justice", and finally, the impact of Canadian Bill of Rights. Part I attempts to facilitate an understanding of the functioning of courts in

[3] *Ibid.*, at vi.

the Canadian legal system by an illustration of the limitations upon the exercise of judicial authority — whether those limitations be inherent in the institutional character of the judiciary, imposed by traditional practice or statute or consequential qualifications of specific philosophical presumptions. This analysis is presented by a number of cases, drawn primarily from the sphere of constitutional law such as *Nova Scotia Board of Censors* v. *McNeil,*[4] *Labour Relations Board of Saskatchewan* v. *John East Iron Works Ltd.,*[5] *Roncarelli* v. *Duplessis*[6] and *Regina* v. *Drybones*[7] to name only a few. Additionally, reference is made to extracts from writings by Hogg, Dawson, Dicey and Rankin which serve to provide a textual context in which the judicial opinions selected may be analysed. The materials chosen are consistently stimulating and controversial and enable the careful reader to obtain a relatively sophisticated comprehension of the constitutional framework in which the judiciary operates. In certain respects it improves upon many of the constitutional textbooks now available insofar as the materials reveal the judiciary in a political framework and often enable the student to perceive more completely the manner in which judicial decision-making is controlled by other elements in the constitutive process — the executive and the legislative. Claydon and Galloway are also to be commended for the use made of non-Canadian materials, both American and European, which encourage the development of comparative perspective.

While Part I may be described as a discussion of the institutional character of judicial review, Part II analyses the relationship between the constitutive process as identified in Part I and other types of decision-making regimes within and outside the national constitutive process: the international legal order, domestic agencies and private associations, religious and ethnic groupings and the individual citizen. Part II situates the national constitutive process within the framework of international politics and illustrates its relationship with internal patterns of social organization, ranging from the most formal to the most customary, the most public to the most private in order to assess the degree of impact exerted by the legal system upon various manifestations of union. While the initial chapters had concentrated primarily upon the formal, institutional aspects of the legal process, Part II stimulates an apprehension of this process in the broader social context in order to achieve a more complete appreciation of the role of law, of the legal system and of decision-making authorities in reconciling the competing interests in order and authority on the one hand, and autonomy on the other. While the struggle between order and liberty has traditionally been viewed in terms of the relationship between the

[4](1975), 55 D.L.R. (3d) 632 (S.C.C.).

[5][1948] 4 D.L.R. 673 (P.C.).

[6](1959), 16 D.L.R. (2d) 689 (S.C.C.).

[7](1970), 9 D.L.R. (3d) 473 (S.C.C.).

citizen and the state as expressed in judicial opinion, Part II extends this perspective through an investigation of other non-judicial bodies which also exercise a certain influence upon the exercise of individual rights and freedoms. The citizen is perceived not only as an individual unit, but as a being which may be classified by the state in a variety of ways — as a member of a particular ethnic group, as a member of a particular occupation, as a member of a particular association — all of which are subject to the intervention of the state to a greater or lesser degree. The multiple allegiances owed by the individual and the many perspectives in which the citizen may be viewed by the constitutive order are factors which affect the recognition of individual liberties and responsibilities and dictate the extent to which abstract notions of rights and obligations are given tangible expression by the courts, the executive and the legislature. It is the relationship between the state and the international order, and between the national government and public and private forms of association as articulated in the legal system which is subject of speculation in Part II. The legitimacy and degree of state intervention into international and domestic affairs and the influence of the many manifestations of social groupings upon the activity of the state is illustrated by a number of cases, both Canadian and non-Canadian, such as *Wisconsin* v. *Yoder,*[8] *Oil, Chemical and Atomoic Workers International Union* v. *Imperial Oil Ltd.*[9] and *Walter* v. *Attorney-General of Alberta.*[10] Additionally, the student is also encouraged to reflect upon the propriety of the courts as the institution by which fundamental rights are guaranteed and indeed, more generally, to critically evaluate the subjection of individual activity to the scrutiny of the courts and the more pervasive expansion of the state through control of what were originally essentially private matters, regulated by individual agreement.

The concluding section, Part III concentrates upon the techniques of decision-making employed by a particular institution, the judiciary. Case extracts illustrating conventions of statutory construction and the importance of principle and policy considerations are presented in order to enable the reader to achieve a specific and detailed comprehension of the formal methodology utilized by the judiciary in adjudicating upon disputes. An understanding of the techniques of judicial review is not, however, the objective of this chapter; rather, judicial review practices are analysed with reference to the substantive issues involved in any of the cases chosen for examination. The relative activist or restrained stances adopted by a court are expressed in the scope given to judicial review. Techniques of decision-making, therefore, are valuable indicators of social priorities and norms and become the means by which "progress" in terms of recognition of rights, duties and other incidents of membership in the state can be either frustrated or accelerated. In

[8](1972), 406 U.S. 205 (U.S.S.C.).

[9][1963] S.C.R. 584.

[10][1969] S.C.R. 383.

the view of the editors, then, formal elements of decision-making cannot be divorced from the substantive questions which are the subject of review and it is the tension between aspects of judicial review such as adherance to precedent, literal construction, on the one hand, and consideration of the claims of principle and policy, on the other, which ultimately colours the evolution of the legal system. The capacity of courts to manipulate the language of legislation through a selective reading, to distinguish awkward authority, to take cognizance, either overtly or covertly, of public opinion and of more fundamental values indicates the significant, the perhaps paramount, role of the courts in maintaining the integrity and stability of the constitutive order. Tools of decision-making adopted by any particular court also reflect most vitally judicial perception of this role. While most of these perceptions are presented through "public law" cases (constitutional, administrative, and criminal), the principles of decision-making which are extrapolated and discussed are equally applicable to decisions in the private law sphere as conventionally defined. As a further aid to a realization of the dimensions of judicial attention to precedent, principle, and policy, extracts from Wittingstein, Fuller and Frankfurter are presented. While it is a matter of some regret that the writings of R. Dworkin ae not also included, the perspective of these writers, particularly of the legal realists, provides novel and refreshing insights into the character of judicial review.

This text is a welcome addition to current casebooks and texts dealing with the legal process in Canada, and in my view, constitutes a marked improvement upon those currently available. An admirable synthesis of the theoretical presumptions upon which judicial review rests and the institutional framework within which judicial review is conducted has been attained. Claydon and Galloway have succeeded in illustrating the mechanics of the judicial system, not only in isolation, but in conjunction with other institutions of the legal system and other modes of social organization. The editors are also to be congratulated for their choice of materials which are uniformly thoughtful and stimulating. The cases are excellent vehicles of discussion and analysis as are the extracts from articles. Useful reference is also made to a number of statutes, such as various Labour Relations Acts, when appropriate. All the materials chosen are intelligent expositions of the central thesis advanced by Claydon and Galloway, discussed in the preface and contribute to the impression of coherency, intelligibility and clarity which is created by the textbook generally. Discussion is structured by the thoughtful notes and comments which follow each case. *Law and Legality* marks an important departure from previous treatment of the subject and is highly recommended as a text which has succeeded in imposing logic and lucidity upon an otherwise fragmented and diffuse area of law.

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