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## Book Reviews

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## BOOK REVIEWS

### **Defining Status: a Comprehensive Analysis of United States Territorial Relations**

By Arnold H. Leibowitz. Dordrecht, Boston: Martinus Nijhoff, 1989, pp. 757, \$189.00.

This book is a major contribution to the literature of international federalism and national self-determination, as well as being the definitive work in the field of U.S. territorial jurisprudence. The Western world is reacting with excitement to the emergence of the suppressed political nationalism and democracy in Eastern Europe yet at the same time expressing concern at the ethnic nationalism that has arisen in its wake. In Russia, in Yugoslavia, and, indeed, in Germany, issues of federalism and self-determination press upon the national government and upon the world.

We have assumed these issues were not ours, but as *Defining Status* shows, the issue, even if considerably transformed, is present within our political structure as well. The United States now governs the largest overseas empire in the world: over 4 million people, including the Commonwealth of Puerto Rico, the Territory of the Virgin Islands, the Territory of Guam, the Commonwealth of the Northern Marianas, and the Territory of American Samoa. In addition, the United States retains major defense and foreign policy authority with respect to the Freely Associated States of the Federated States of Micronesia (FSM) and the Marshall Islands and over Palau, the last remnant of the Trust Territory of the Pacific Islands.

The author has given us a comprehensive study of the struggle for self-determination within our own polity, examining in detail the novel relationships between the United States and its island territories, Commonwealths, and Freely Associated States from a cultural, sociological, economic, and legal perspective. This exposition is an immense task, chronicling a struggle that has gone largely

unnoticed in either our national literature or in the international arena. But as this book shows, the serious effort at self-determination and nation-building in our Pacific areas deserves our attention.

Our earlier territorial acquisitions, all on the continent, followed a pattern set by the Northwest Territories and embodied in the Northwest Ordinance: (1) total governmental authority in an appointed governor; (2) continuance of an appointed governor, but with an elected legislature and local courts; and, eventually, (3) statehood.

The courts interpreted federal authority very broadly, but this evolutionary pattern served as a check on the exercise of unrestrained federal power and prevented exploitive congressional action. Given the transitional nature of the intermediate stages and the eventual equality and self-government to be found in the third stage, the broad discretion to federally appointed officials during the first and second stages was not a major problem.

The United States came late to empire, beginning to acquire its island areas at the turn of the century when imperialism was already on the wane. Most of our insular areas were acquired after the Spanish-American War of 1898 (Philippines, Puerto Rico, Guam). Others (Hawaii and Samoa) came as a result of a combination of U.S. pressure and local request or purchase on the basis of perceived military need (Virgin Islands).

These acquisitions led to a bitter debate within the United States that was settled by the judiciary in a series of decisions, *The Insular Cases*,<sup>1</sup> by the United States Supreme Court in 1901. The debate revolved about the shorthand question: Does the Constitution follow the flag? In sum, did the constitutional restrictions on congressional authority applicable to the states serve as a check on the exercise of federal power with respect to the territories? If the Constitution applied in full wherever the U.S. flag flew, colonial subjugation was impossible. If it did not, expansionist goals of glory and prestige, combined with vague assessments of military security benefits and much more definite assessments of commercial advantage, could be attempted.

After the *Insular Cases*, and even today, federal power over the territorial governments, initially limited in time and substance by the Northwest Ordinance and the goal of statehood, became theoretically unlimited. The Supreme Court came down on the side of the expansionists. It held by the narrowest of margins (5-4) that Congress, as a result of the U.S. power to acquire new territory, had plenary authority over these territories. The Constitution applied to the territories only when Congress specifically legislated to that effect, and then only to the extent so indicated, except for fundamental personal rights.

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1. *De Lima v. Bidwell*, 182 U.S. 1 (1901); *Goetze v. United States*, 182 U.S. 221 (1901); *Armstrong v. United States*, 182 U.S. 243 (1901); *Downes v. Bidwell*, 182 U.S. 244 (1901); *Huus v. New York & Porto Rico S.S. Co.*, 182 U.S. 392 (1901).

The issue for the insular territories of today and the federal government is to formulate similar limitations for the national government in relation to the territories in order to permit the full economic and political participation of the U.S. citizens in the territories and to foster their locally elected governmental institutions. This legal issue is still unresolved.

After these new territories broke with the standard Northwest Territory evolutionary pattern, the issue ceased to be domestic and became international. We had to structure these relationships not only within our own constitutional structure, but within a United Nations (UN) sanctioned system of self-determination for non-self-governing territories. We resisted doing that, seeking to preserve our ability to structure relationships that the UN would have to accept even if the relationship did not meet UN standards.

We did succeed in 1952 in having our Commonwealth relationship with Puerto Rico accepted by the UN, but only after a battle and a remarkably close vote: twenty-four to seventeen, with seventeen abstentions. Despite the closeness of the vote, the United States continued to reject UN visits or reviews of its administration of any of these islands, even those admittedly dependent, such as Guam, American Samoa, and the Virgin Islands.

Beginning with the Carter Administration that attitude changed. For the first time we permitted UN inspection visits to our areas and began to accept the UN version of "Commonwealth" and to permit the development of the Freely Associated States concept, which had at its core the right to withdraw unilaterally from the relationship and become independent.

After World War II the United States acquired the Trust Territory of the Pacific Islands (TTPI) as a strategic trust under the jurisdiction of the UN Security Council. The concept of the strategic trust was developed by the United States in order to obtain freedom of action. The Trust Territory government and its inhabitants sought, as did the U.S. territories, a check on federal power. Although the trusteeship agreement imposed obligations on the United States as a governing power, the U.S. courts, like the Supreme Court at the turn of the century, generally found ways to refuse to enforce the document.<sup>2</sup>

The TTPI saw major changes in status as its solution to the restraint of federal power. In 1976 the Northern Marianas broke away from the TTPI and negotiated a covenant with the United States under which it became a Commonwealth with its people becoming U.S. citizens. Its status was similar to Puerto Rico, but the restraint on federal powers was considerably clearer.

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2. *Gale v. Andrus*, 643 F.2d 826 (D.C. Cir. 1980); *Groves v. United States*, 533 F.2d 1376 (5th Cir. 1976). *But see* *Kazuo v. Palau*, 1 ROP Intrm. 154 (Sup. Ct. Palau 1984) (Palau law requiring a penalty of fifteen years for possession of firearms held to be violative of the cruel and unusual punishment section of the Bill of Rights promulgated pursuant to the UN Trusteeship Agreement); *People of Saipan v. Department of Interior*, 502 F.2d 90 (9th Cir. 1974) (trusteeship agreement can be a source of rights enforceable by an individual litigant in a domestic court of law).

The TTPI continued to dissolve. In 1981, after twelve years of negotiations, the Compacts of Free Association with the FSM and the Marshalls were signed and approved by the people of these islands in UN observed special referenda establishing these entities as Freely Associated States.

Still we resisted. Congressional committees, particularly the House Interior and Insular Affairs Committee, delayed approval for over two years, holding hearing after hearing until the heads of state of the Federated States of Micronesia and the Marshall Islands would no longer appear before the House committee.

Palau became a special case. Although its compact was generally the same as the FSM and the Marshalls, its constitution required a 75 percent vote by the people of Palau to gain approval of the compact. This provision initiated the almost decade-long fight, still going on, to ratify the compact. (On February 6, 1990, Palau voted for the seventh time to ratify the compact and once again failed to obtain the 75 percent super-majority.)

This struggle revolved around the U.S. assertion of its power to affix nuclear military capability on Palau. The history of the Palau compact is highly dramatic. It involves the murder of Palau's first president and the apparent suicide of his successor and a good deal of litigation. The cases are astutely described by Mr. Leibowitz, who has firsthand knowledge of the subject matter, having represented the Palauan government in its major legal entanglements flowing from U.S. efforts to secure passage of a Compact of Free Association with the people of Palau.

Mr. Leibowitz describes, as a fascinating aside, the conflicting local and international forces (the Minority Rights Group in Great Britain, Greenpeace from Canada, the Center for Constitutional Rights in New York, and the Japanese Socialists from Nagasaki) who, for a variety of political purposes, involved themselves in the ratification process of Palau's compact with the United States.

For the first time, we have in the literature a complete, thorough exposition of the negotiations that led to these Compacts of Free Association and the Covenant of Commonwealth with the Northern Mariana Islands. In addition, Mr. Leibowitz discusses the Marianas covenant in contrast with the Commonwealth Federal Relations Act for Puerto Rico.

This treatise is essential reading for anyone with a professional interest in U.S. territorial relations, but it is also a major contribution to our knowledge of the complex considerations that must be overcome to build a national status of identification within the U.S. political structure and the UN standards.

No publication in the field comes close to *Defining Status* in depth and multi-disciplinary coverage of subject matter. This book, over 700 pages in length, is unusual in that it sheds light on the gamut of economic, social, political, tax, and legal factors that affect the U.S.-island relationship. Mr. Leibowitz discusses in detail the UN standards of self-government and the effect on U.S. activity. He is critical of the U.S. agencies, particularly the Interior Department, and congressional committees who have had primary responsibility with respect to the ter-

ritories. He sees in this bureaucratic control the building up of strong territorial resentment, which has begun to express itself in strong, nationalistic, and racial statements in territorial politics.

The wealth of knowledge presented in this treatise should, on balance, be welcomed by the U.S. governmental bureaucracy to improve our relationship with these areas.

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## **International Advertising Handbook: A User's Guide to Rules and Regulations**

By Barbara Sundberg Baudot; Lexington, Massachusetts: Lexington Books, 1989, pp. xxx, 359, \$49.95.

It is more than two hundred years since Adam Smith launched his attack on the protectionist philosophies of the mercantilists and argued that a policy of free trade works to the benefit of the importing nation and exporting nation alike. Smith used a domestic analogy: "It is the maxim of every prudent master of a family, never to attempt to make at home what it will cost him more to make than to buy . . . . What is prudence in the conduct of every private family, can scarce be folly in that of a great kingdom."<sup>1</sup>

In his advocacy of free trade Adam Smith did not inquire into the process by which the members of the family (or its prudent master) came to the decision that the goods or services in question were worth acquiring. Demand (to use the jargon of economics) was taken as given. Modern marketers do not leave the formation of consumer preferences to chance. Advertising, typically persuasive rather than informative, is now an essential part of trade. Particularly when advertising crosses national frontiers, and techniques of promotion that have been devised in industrialized societies are injected into less materially sophisticated developing societies, there may be reason to question the assumption that any resulting trade will be to the mutual advantage of all parties.

Barbara Baudot's *International Advertising Handbook* addresses the ethical issues raised by international advertising in its first and last few chapters. For the most part, however, this book is, as its title promises, a handbook. The arche-

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1. ADAM SMITH, *AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS* bk. 4, ch. 2 (1776).

typal reader, in the mind of the author, is a person working in a multinational advertising agency contemplating expansion of the business into new countries. In a single volume Dr. Baudot has provided the international advertiser with a brief guide to the laws and policies set by individual governments, the advertising industry, and international organizations.

Part I is background. A history of the development of advertising is followed by a profile of the advertising industry and a general discussion of the policy issues that have been significant to the development of regulation of advertising.

Parts II, III, and IV make up the bulk of the book. The nations of the world are divided into three groups—industrialized market-economy countries (dealt with in Part II), socialist countries (Part III), and Third World countries (Part IV). Features of the regulatory systems common to the group are identified. The groups are then broken down by regions. Within each region, representative countries are discussed in turn. Part II, for instance, gives separate treatment to the regulation of advertising in the United States, the European Common Market, the United Kingdom (followed by a joint section on Australia, New Zealand, Canada, and South Africa), France, Scandinavia, and Japan.

While much of the text is devoted to domestic law of general application to advertising within the particular jurisdiction, the focus is on international advertising—advertising in connection with international trade and foreign investment in advertising firms. Thus, to take a few examples, the section on the U.S. advertising law includes a segment on the international reach of that law; French law, we are told, stipulates that written advertising be cast in the French language (p. 135); and the section on Malaysia mentions that the Ministry of Information's Advertising Code specifies that all television advertisements must be filmed in the country and use local actors (p. 268).

Part V deals with international initiatives aimed directly or indirectly at advertising—guidelines and codes debated or adopted within the United Nations and its specialized agencies.

Only a masochist, one would think, would have taken on a project of such ambition. And yet the book does not read like a work written with grim determination. On the contrary, the text is lively in tone, and the author's enthusiasm for her subject is apparent in every section.

Only a team of experts, one would suppose, could manage to cover so wide a field without leaving a trail of blunders. It must be acknowledged that Dr. Baudot (whose training, so far as one can guess from the biographical note, appears to have been in economics rather than in law) does make some mistakes when she gets down to the specifics of the law. Quite inaccurate, for example, are her description of the Misrepresentation Act 1967 (U.K.) as giving purchasers the right to sue "for a breach of contract or for tort of negligence or deceit" (p. 121), the statement that for the Act to apply, a misrepresentation "must be found to be an offer rather than an invitation to treat" (p. 122), and the description of the remedies under the Act as arising "under administrative law" (p. 126).

The presence of errors like this means that the book cannot be relied on as a compendium of the law applicable in any particular foreign system. But to point this out is only to point out that the work fails to do something that it never set out to do and something that no single volume of 350 pages could do. Notwithstanding its failure to cope with the intricacies of the Misrepresentation Act, the ten-page section on the United Kingdom both conveys a general impression of the U.K. regulatory regime and identifies the relevant statutes and regulatory agencies so as to provide a starting point for a reader wanting an authoritative account of the law. A list of "Further Reading" would have been a helpful addition to each section, but Dr. Baudot's plentiful endnotes go some way towards meeting this need.

However accurate the information is in such a work at the time of publication, the laws and institutional organizations in any country are, as Dr. Baudot cautions in her preface, in a continual state of flux. "Flux" is an understatement for the dramatic shift in attitudes to private enterprise, and so too advertising, that is occurring in Eastern Europe. The author has coped with these changes better than might have been expected in a book that must have gone to press before the middle of 1989. In its discussion of the ways in which *perestroika* is being felt in increased openness to foreign advertisers and advertising agencies, the section on the Soviet Union includes developments as recent as the December 1988 Decree of the Council of Ministers, which lifted old restrictions on foreign ownership of businesses.

The "Rules and Regulations" of its subtitle are only part of what this book is about. The biographical note on the author discloses that she is associated with a firm of consultants advising U.S. business on overseas markets and regulatory policies. The book she has written reflects this advisory role in its reach. First, there is a lot of material designed to help an advertising agency to assess the chances of successful entry into each foreign market. Discussion of the various governments' policies or laws on foreign investment in local advertising businesses is complemented by descriptive material relating to the market for advertising. There are tables of demographic information, bar graphs showing per capita GNP and per capita advertising expenditure, and bar graphs showing how much of the advertising expenditure is accounted for by multinational agencies. Second, the advice about how to do business within each country goes way beyond advice on the legal constraints. Also discussed are cultural traits affecting the kind of advertising messages that are acceptable or effective. For instance, the section on the Arab Middle East advises that the value attributed by Islamic audiences to obligations to family makes those audiences receptive to advertisements that stress family roles and parental approval and avoid allusions to children as decision makers (p. 221). And guidance on the choice of medium for commercial advertising does not end with the mention of any government restrictions. Pie charts showing advertising expenditures broken down by media are accompanied by such



practical information as the rate of literacy and the market penetration of the various media.

The distinctive character of this work springs from its mix of hard-nosed economic data, information about the cultural characteristics and public priorities that influence regulations, and the overview of the regulations. It is the combination that makes this book a useful first port of call for advertising practitioners.

But this is not merely a handbook for advertising practitioners. Dr. Baudot is also an academic (assistant professor in Politics at St. Anselm College), and her past experience includes service as an economic affairs officer with the United Nations where she participated in north/south negotiations in UNCTAD and prepared studies on problems of foreign investment. She draws on this experience to give a fair account of the concerns that have been expressed about international advertising. The three chapters on international control are particularly useful as a brief exposition of the strengths and weaknesses of international solutions. This dimension makes the work (or parts of it) of value to students of marketing and international relations.

Although Dr. Baudot's coverage of the law has the shortcomings to be expected of the work of a person who is not legally trained, lawyers concerned with international trade will find her book worth skimming through and dipping into. Her thesis is that laws regulating international advertising can be properly understood, and their likely evolution foreseen, only if there is an understanding of the social, political, and economic characteristics of the environments from which they originate. That thesis seems incontrovertible, and this work makes a contribution to that understanding.

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## **Jahrbuch des Öffentlichen Rechts der Gegenwart (Neue Folge)**

Edited by Gerhard Leibholz (Associate Justice of the German Federal Constitutional Court) up to volume 31; from volume 32 on by Peter Häberle. Tübingen: J.C.B. Mohr (Paul Siebeck), vols. 16–35 (1967–1986).

Since the last entry on this yearbook by the present reviewer,<sup>1</sup> twenty additional volumes have brought the Annual to thirty-five ones altogether. It remains

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1. 17 J. PUB. L. 201 (1968).

true that the *Jahrbuch's* subject matter has no geographic limitations nor does it address itself to the German reader only. This is borne out by the large share of contributions in English (77) and French (23), which amount to one-third of the 300 articles and reports carried in volumes 16 to 35. The entries deal with sixty-three different States. The Federal Republic of Germany heads the list with thirty-nine contributions, immediately followed by the United States with thirty-five. Yet fourteen entries deal with France; ten each with Austria and Spain; nine each with Canada and Switzerland; eight each with India, Italy, Japan, and the United Kingdom; six with the Soviet Union; five each with South Africa and Yugoslavia; four each with Argentina, Chile, the Czecho-Slovak Socialist Republic (C.S.S.R.), Greece, and Hungary; three each with Belgium, Israel, the Netherlands, the People's Republic of China, Poland, and the Republic of China (Taiwan); two each with Brazil, Iraq, Ireland (Eire), Finland, South Korea, Tunisia, Turkey, and Sweden; and one each with Albania, Bulgaria, Ecuador, the German Democratic Republic, Portugal, and Romania. Furthermore, seventeen articles and reports relate to the process of European unification.

Contributions to the Annual continue to be of two kinds. The first group consists of articles on the various domains of public law, notably constitutional law. The significant elements of democracy, republican governance, and the rule of law are given pride of place. Civil and human rights, parliamentarianism, political parties, and separation of powers are thus dealt with rather frequently. The second group consists of reports on the evolution of constitutional law in various States and on pertinent judicial practice rendered by appellate and supreme courts in those States. Each volume carries separate and comprehensive studies by eminent scholars that analyze the constitutions of specific States. The basic instruments, whether a named constitution or otherwise, are reprinted in their entirety. In addition, monographic analysis of singled-out constitutional issues in the same and other countries supplies in-depth consideration of acutely interesting subjects in the legal order of the jurisdictions concerned. This makes the Annual, each year and even more so in the medium- and long-term, a privileged tool of comparative appreciation across the continents. Such urbane treatment and geographic proliferation is unlikely to stagnate in the future. Accordingly, in addition to the sixty-three States that have benefitted from a close look at their constitutional law, others will profit from the same assessment. Thirty-seven contributions familiarize the reader with the holdings of German, U.S., British, and other courts on constitutional issues, and specifically on the constitutional review of statutes and other law-making instruments subordinate to constitutions.

Until his death in 1982, Gerhard Leibholz was the editor of the Annual. He was an eminent scholar and judge at the Federal Republic's highest tribunal (the *Bundesverfassungsgericht*) from the latter's inception. Leibholz resigned in 1980 but remained in academic pursuits as professor Emeritus at Göttingen University. The yearbook's reputation was largely the fruit of Justice Leibholz's vigorous

standards concerning the quality of contributions, which have endowed the year-book with the institutional status it continues to enjoy under the editorship of Peter Häberle, Professor at the Universities of Bayreuth and St. Gallen, from volume 32 (1983) on.

The first volume under review, volume 16 (1967), stands in testimony to the ubiquity of the Annual. Professor Dietze (John Hopkins University) opens with a critical assessment of President Lincoln's government and looks at its influence on constitutional evolution in the United States. Professor Galvao de Sousa (Sao Paulo University) follows with "Remarques sur l'idée de constitution et de la signification sociologique du droit constitutionnel." Professor McWhinney (at the time McGill University, Montreal) provides an entry on "Federalism, Nationalism and Constitution-making" and Professor Gaudemet (Paris) adds an article on "Le pouvoir exécutif dans les pays occidentaux." Three reports relate to judicial practice of the German Federal Social Security Court, the Federal Labour Court, and the Federal Constitutional Tribunal (*Bundesverfassungsgericht*) regarding the Basic Law (*Grundgesetz*) of the Federal Republic of Germany. There are statements on constitutional evolution in Italy, Austria, and the C.S.S.R. by authors from these countries. A presentation on London and its local government follows. Professor Heidenheimer (Washington University, St. Louis) compares public subsidization in West Germany and the United States. Finally, there are articles on Canadian election finance and on constitutional issues in Chile, India, Japan, and Tanzania.

Volume 17 (1968) offers a similar variety. Successively, academics from the United States (Aikin, Berkeley), Greece (Dendias, Athens), Switzerland (Keller, Bern), and Italy (Passigli, Padova) offer articles on constitutional theory and administrative science. Professor Hollerbach (then of the University of Mannheim) traces the more recent evolution of the law relating to concordats (agreements of the Holy See), followed by an ample study by Dr. Reis (Munich) commenting on constitutional provisions that contain confirmatory statements on concordats, on the one hand, and agreements with religious authorities other than the papacy on the other. Nineteen fundamental charters, among them the Constitutions of Poland, Venezuela, Bavaria, Portugal, and the Federal Republic of Germany, are thus looked at with a view to subordinate the terms used to a system of legal concepts and thus open them to comparative assessment. Another article deals with judicial practice of the European Communities' Court in Luxemburg under the provisions of the treaties considered as comparable to constitutional canons within the meaning of domestic law. Alpheus Th. Mason pictures "The American Supreme Court under Fire." Another entry updates reports on judicial practice of the German Federal Supreme Court in civil and criminal matters under the Basic Law of the Federal Republic. Offerings on constitutional evolution in Hungary and Yugoslavia are rounded off by an assessment of "The Commonwealth and European Unification," by Kinnas, and a look at "Financing

Presidential Elections," by Hubert E. Alexander (Director of Citizens' Research Foundation) on the funding of the U.S. 1964 campaign.

Volume 18 (1969) comprises a multitude of monographic assessments ranging from "Ordinance in the Law of the European Communities," by Wolf Dietrich Möller to "The United States Supreme Court: The Judicial Dissent," by Charles Aikin. In between, Hans Huber traces the judicial practice of the Swiss Federal Tribunal in terms of its function as constitutional court, Kulic discusses the constitutional court of Yugoslavia, and Holger Stephan presents professional associations and their influence on institutions of the French Republic. The position of political parties under the Italian constitution is the subject of a fifty-page statement followed by an entry on the constitutional guarantee of equality under the same constitutional charter. Rounding off the volume are surveys of Swedish public law from 1954 to 1969, the constitutional situation in the C.S.S.R., the Greek Constitution of November 1968, and an appraisal of the constitutional situation in the German Democratic Republic, in Argentina, and in Australia since 1954. Volume 18 also includes articles on "Constitutionalism, Legitimacy and the American Supreme Court," by Warnecke and the "Protection of the Citizen in American Administrative Procedures," by Walter Gellhorn.

Volume 19 (1970) traces the development of the European Communities from their foundation to the end of the transitory period. Andreas Sattler (Göttingen) furnishes pieces on constitutional complaints submitted to the judiciary (*Verfassungsbeschwerde*) under Austrian, German, and Swiss law, and on dissenting opinion in the procedure of German constitutional courts. Civil rights and constitutional review in Ireland, the status and powers of the President in Finland, and principles of the constitutional interpretation in The Netherlands are subjects of reporting and comment. Charles Aikin discusses "Freedom, Privacy and the Supreme Constitutional Court in the USA," and Professor Nadelmann (Harvard Law School) discusses "Disqualification of Constitutional Court Judges for Alleged Bias?" In addition, Professor McWhinney deals with the "Quiet Revolution" in French Canada and its constitutional implications for Canadian federalism. Entries on the structure and dimensions of election broadcasting in Canada, on constitutional evolution in Ecuador and Colombia, and on constitutional emergency powers in India round off the set.

Volume 20 (1971) opens with Manfred Zuleeg's study on the prerogatives of the European Communities vis-à-vis their Member States and a comparative assessment by Cappelletti and Ritterspach of constitutional review over statutes followed by an equally comparative entry on judicial review in Italy and West Germany by Kommers. Reports on the constitutional evolution in Spain, the German Länder Baden-Württemberg and Rheinland-Pfalz, Tunisia, Brazil, Chile, Uruguay, and Senegal attest again to the ubiquity of offerings as do the studies on racial discrimination in decisions by the United States Supreme Court by Heide Steinberger and on the Federal Convention of 1787 and its impact on the United States Constitution by Professor Hans Gustav Keller (Bern).

Volume 21 (1972) opens with articles by Knut Ipsen on the institutional framework of defense in the Atlantic Alliance and on the directive in the law of the European Economic Community by Oldekop. There are entries on theoretical problems of Soviet Socialism by Walter Meder, the evolution of Belgian public law by Jan de Meyer, and a survey of Spanish constitutional developments by Bothe/Hailbronner. Articles by Professors Kastari, Inge Gampel, and Herbert Schambeck, respectively, on the institution of the Ombudsman in Scandinavian jurisdictions, the legal status of churches and religious associations on Austria, and national electoral law in Austria are followed by reports on the constitutional law of the German Länder Hessen and Schleswig-Holstein, Morocco, Egypt, Lebanon, Syria, Iraq, and Jordan. Professor McWhinney deals with French Canadian nationalism in the Canadian federal framework, and William C. Olsen deals with the American Congress and foreign policy. Kommers discusses American civil liberties and the constitutional change, Rudolf Steinberg discusses United States Supreme Court decisions on lobbying and lobbyists, and Professor Yueh-Sheng Weng discusses the judiciary in the constitutional law of Taiwan.

Volume 22 (1973) opens with an entry on Swiss federal constitutional law up to 1971 by Professor Häfelin (Zürich), an analysis of the constitutional evolution in the Soviet Union since Stalin's death by Professor Meissner (Cologne), an analysis of the 1971 Constitution of Bulgaria by Lothar Schultz, and a discussion of European political parties in terms of pertinent electoral statutes and usages by Fenske. The volume also includes Professor Zieger's (Göttingen) updating of earlier reports on judicial practice of the Court of the European Communities in Luxemburg and the present reviewer's statement on the International Civil Service, delivered in testimony to the commission of the German Federal Government on the reform of the Civil Service generally. In addition, Edgar Tomson updates earlier reports on the constitutional evolution in mainland China, Walter Haller discusses the United States Supreme Court as a tribunal of last instance and political factors, Walter Gellhorn discusses equality in U.S. judicial practice, Kay Hailbronner analyzes the "clear and present danger" test in the assessment of "anti-constitutional" activities by the United States Supreme Court, and Meinhard Hilf writes about the tenth amendment in the evolution of U.S. federalism. A comparative study by Siegfried Magiera on primaries and democratic choice of candidates by political parties and an entry by Manfred Weib on judicial research in the United States conclude the set.

Volume 23 (1974) opens with an inquiry by Edgar Reiners into the hierarchy of legal principles and rules in the jural order of the States that founded the European Communities and a study by Hans G. Petersmann on the implications of British membership in the European Communities in terms of members' constitutional law. The volume includes entries by Udo Kempf on structural changes in the French system of political parties, by Professor Georg Ress on the protection of fundamental freedoms in France under the Conseil Constitutionnel, by Jürgen Bunge on judges and masters at the English High Court of Justice, and by Georg Brunner on new tendencies in the institutional evolution of Eastern

European States. Updating earlier reports on constitutional actuality, Michel Camau deals with Algeria, Ernst E. Hirsch with Turkey, William C. Olson and Wolfgang Knapp with the right to information and judicial opinions on the constitutional principle of equality in the United States, and Edward McWhinney on constitutional solutions for the racial-linguistic crisis in French Canada. In conclusion, Justice Kapur, Supreme Court of India, discusses recent amendments to the Constitution of India, and Professor Hideo Wada (Meiji University) pictures the Supreme Court of Japan as an adjudicating agency.

Volume 24 (1975) opens with entries by Bengt Beutler on the adhesion of the United Kingdom to the European Communities and by Hannfried Walter on the record of the European Human Rights Tribunal in Strasbourg from 1959 to 1974. Reports on the constitutional evolution in the German Länder, Poland, Austria, Romania, Hungary, and France follow. The record of the Bavarian Constitutional Court from 1964 to 1974 is traced by its Vice President, Theodor Meder. The volume also includes entries on the Supreme Court of Ireland, the role of the Argentine Supreme Court during periods of military government, and the jurisdiction of the Indian Supreme Court over electoral disputes. The volume also updates the reporting on the constitutional evolution in Israel, Tunisia, and South Korea. Finally, Edward McWhinney comments on the English and U.S. impeachment processes and the constitutional separation of powers.

Volume 25 (1976) offers reports on the constitutional development in the European Parliament, in the Free Hanseatic City of Hamburg, in federal structures in the C.S.S.R., and in Yugoslav Constitutions. The volume also includes Klaus Stern's 1975 testimony before a parliamentary commission of inquiry advising against a constitutional amendment that would introduce an Economic and Social Council. In connection with this discussion, the volume presents a comparative survey of such councils in Germany and neighboring States. The European part of the volume concludes with an entry by Professor Gottfried Dietze (Johns Hopkins) on "Constitutional Conventions" in the United Kingdom, liberalism and the rule of law, and an item by Dietrich Schindler (Zürich) on the theory of government in Swiss teaching and publications. In addition, chronicles report on the United States with specific reference to congressional action in the field of U.S. foreign policy, on India relating to the constitutional emergency powers of the President, on Japan with respect to local government, and on Ghana and Ethiopia. The volume continues with articles by Ernst Petersmann on the act of state and the political question doctrines as criteria of judicial surveillance over the foreign relations power in the United States and West Germany and a companion piece by Franz C. Zeitler discussing judicial review and judicial restraint in the United States and West Germany as compared to the United Kingdom. The volume concludes with a survey of constitutional control in Latin American countries by a team of German and foreign authors.

The European section of volume 26 (1977) offers reports on constitutional changes to the charters of the German Länder, with regard to the German Federal Parliament (Bundestag), as well as the charters of Austria, Switzerland, Sweden,

and several Eastern European countries, notably Yugoslavia. Other contributions in volume 26 deal with the relationship between the U.S. President and Congress, self-determination for Quebec and the English-language question as discussed by Edward McWhinney, Indian federalism, and the constitutional revolution in Japan until 1976 with special reference to judicial practice. Professor Hummer (Innsbruck University) reports on cooperation and integration on the African continent by means of regional and subregional arrangements and entities.

Volume 27 (1978) gives pride of place to entries on constitutional developments in Europe. This discussion includes a statement by Professor Meissner (Cologne) on the 1977 Soviet Constitution with a German translation in the annex and a knowledgeable item by Jan de Meyer (Louvain) on communities and regions in Belgium. Other contributions deal with structural change in Israel's political parties, the 1978 Peoples Republic of China Constitution, constitutional evolution in Taiwan, the development of political parties in postwar Japan, and finally the North Korean Constitution. In addition, Reinhard Zimmerman reports on the constitution of Transkei and Bophutatswana, the draft constitution for the Republic of South Africa, and the concept of "separate development."

Volume 28 (1979) opens with a 300-page monograph by Hans Trossmann, the former director of administration of the Parliament of the Federal Republic of Germany, on the law of the Bundestag, the Parliament of the Federal Republic of Germany. Written on the occasion of the thirtieth anniversary of the Federal Republic of Germany, the entry will remain an essential tool for understanding the working of its legislative Assembly. Volume 28 also includes chronicles on the practice of the German Federal Administrative Tribunal relating to the Basic Law, the Federal Republic's Constitution, the German Länder Lower Saxony (Niedersachsen) and Schleswig-Holstein, and the C.S.S.R.; the section concludes with an article on human dignity as a constitutional principle in Switzerland. The remainder of the volume deals with a variety of U.S. and Japanese subjects. The volume concludes with an entry by Edward McWhinney on Quebec nationalism and Canadian federalism.

Volume 29 (1980) is striking due to the topical and geographical diversity of its content. The first section offers an article on the origins of political science in the Federal Republic of Germany and its present impact, a statement on representative government under the 1919 Weimar Constitution, and a piece on constitutional review as an element of the political process. Subsequent reports deal with the constitutional development of European Community law, the function of the Executive under the Italian Constitution, legal traits of the French Fifth Republic (with particular reference to regional administration), the 1978 Constitution of Spain with a German translation of its text, the technique of law-making in the Soviet Union, and the December 1976 Constitution of Albania. Surveys of constitutional evolution in two German Länder (Hessen and Saarland) are followed by entries on the impact of the United States Congress on international affairs, Mexican constitutional law, Latin American integration, and the

Argentine situation as of 1979. The volume is rounded off by items on India, Japan, and judicial review in the Republic of South Africa.

Volume 30 (1981) combines documentaries with comments covering, most notably, the Constitution of the French Fifth Republic (with special reference to the Conseil d'Etat), the parliamentary system of government in the German Länder, neutrality as an element of the Austrian constitutional order by Professor Köck (Linz University), the Hungarian 1972 constitutional revision in retrospect, judicial practice of the Bavarian Constitutional Court by its Secretary General Horst Tilch, and the case law of the German Federal Tribunal for Social Security under the Grundgesetz. The volume also includes a report of more than 100 pages on U.S. constitutional law from 1976 to 1981 by members of the Notre Dame University Law School Faculty; a statement on the distribution of powers in American Federalism; and an entry by Professor Blumenwitz (Würzburg) on the 1981 Constitution in Chile.

Volume 31 (1982) opens with an eulogy for Gerhard Leibholz, eminent editor of the *Jahrbuch* for the past thirty years and guardian of its sustained quality. Next, the volume carries an entry on the European Court for Human Rights, probably the last product of Gerhard Leibholz's pen. Companion pieces by Manfred A. Dauses on the protection of civil rights in the European Community and by Hideo Wada on continental systems of judicial review deal with allied national and international institutions. The European section of volume 31 includes reports on centralization in France, federalism in Anglo-Saxon countries, Parliament and parties in the Swiss political system, the impact of the 1977 Soviet Constitution on public law in the Soviet Union, and constitutional changes in Yugoslavia. Volume 31 concludes with entries on direct democracy in the member states of the United States, the emergence of federal structures in Argentina, constitutional conventions under the Indian Constitution, and the 1974 Burma Constitution. The useful list of German doctrinal theses on subjects of foreign public law for the period from 1970 to 1981 also merits notice.

Volume 32 (1983), the first volume to appear under the editorship of Professor Häberle (Bayreuth University), gives pride of place to an entry by Georges Burdeau entitled "Alternance et Continuité," followed by Häberle's assessment of Europe in the perspective of a common cultural law and policy. The new editor introduces two novel features, namely portraits of judges with an adjudicative record in public law and constitutional law. The first two items under that heading focus on the first President of the German Federal Constitutional Court, Hermann Höpcker-Aschoff, and Justice Willi Geiger of the same tribunal. The second novelty is the introduction of self-portraits by university teachers of public law. Werner von Simson, Professor of Law Emeritus at the University of Freiburg in Breisgau, contributes the first pertinent entry. The European section is rounded off by items on the British party system, human rights in Finland, The Netherlands's Social-Economic Council (including a German translation of the 1983 Netherlands Constitution), the constitutional development of Greece with



specific reference to the 1975 Constitution (comprising a German translation of that text), the 1976/1982 Portuguese Constitution, and the 1982 Turkish Constitution (also with a German translation of its text). Edward McWhinney prefaces the English and French versions of the 1981 Canadian Constitution. Wilhelm Wengler contributes an item on lawmaking and normative evolution in the Constitution of Papua New Guinea.

Volume 33 (1984) begins with articles on German constitutional law, including one by Justice Willi Geiger on the dissolution of the Bundestag under article 68 of the Federal Constitution. Georges Burdeau offers his self-portrait, "Du droit à la science politique." Professor Theodor Maunz, renowned commentator of the Federal Constitution and the statute on the Federal Constitutional Court, traces the biography of that court's second president, Dr. Josef M. Wintrich. Reports on the 1983 Netherlands basic law, Austrian constitutional law regarding culture, French constitutional and administrative law with specific reference to the notion of statutory law follow. An entry on judicial practice of the German Federal Labor Tribunal regarding civil rights complete the European section. Volume 33 concludes with contributions on nondisclosure by the U.S. Executive and the entitlement of Congress to be informed, on the 1982 Constitution of mainland China (with German translation of its text and of the Statutes of the Chinese Communist Party), and on the 1983 Republic of South Africa Constitution Act with its English text and the explanatory memorandum on the Constitution of the Republic of South Africa.

Volume 34 (1985) continues the series of self-portraits with the autobiography of Hans Klinghoffer, whose life as a teacher of law was marked by his emigration to various countries and finally to Israel where he sought refuge from the Holocaust. There is also an entry on the third president of the German Federal Constitutional Court, Dr. Gebhard Müller, by one of his former colleagues on the bench, Walter R. Wandt. The volume traces the emergence of a common German constitutional law after 1750 in an entry by Professor Friedrich (Göttingen University). Helmuth Schulze-Fielitz traces the history of the annual meetings convening research assistants attached to chairs of public law in Austria, the Federal Republic of Germany, and the German speaking parts of Switzerland on the occasion of the twenty-fifth anniversary of such meetings. Volume 34 also offers reports dealing with constitutional evolution in Italy, Belgium, Spain (with specific reference to constitutional review), Switzerland, and Hungary and the role of law in Eastern European States. Ulrich Karpen looks at the 1980 Constitution of Chile from the viewpoint of the democratic opposition. Finally, Mr. Justice Faller traces the judicial practice of the German Supreme Court in civil and penal proceedings under the Federal Constitution up to 1984.

Volume 35 (1986), the most recent under review, offers the autobiography of Professor Hermann Jahrreiss (University of Cologne) and a memorial article on Professor Gerhard Leibholz by his disciple and later colleague Hans-Justus Rinck, which continues the two novel features introduced by Professor Häberle

on his assumption of the editorial task. The interaction of Federal structure in Member States and European integration is traced by Professor Meinhard Schröder (Trier University), and the possibility of a governmental maintenance and development guarantee for broadcasting on the part of public law institutions is discussed by Professor Bethge (Passau University). Human rights protection in Spain, the emergence of Mr. Gorbachev's political program, constitutional evolution in the German Land Rheinland-Pfalz, and the judicial practice of the Hamburg Constitutional Tribunal are other subjects discussed in the European section. Entries on the protection of human rights in Canada, safeguarding property in United States Supreme Court case law, executive agreements in U.S. constitutional law, and financing of federalism and municipal administration in Brazil precede items on constitutional evolution in Afghanistan up to 1986, the reception of German law in Korean constitutional law, constitutional change without amendment of the text in Taiwan's practice, churches and religious association under the 1983 Liberian Constitution (together with its English text), the achievements of Human Rights advocates in South Africa, and a documentary by Professor Albert P. Blaustein (Rodgers University) on the 162 national constitutions that he constantly surveys.

This sustained effort by the Annual's editors over the past twenty years and the fidelity of its publisher have transformed the *Jahrbuch* into a veritable institution endowed with German, European, and international recognition. As a unique tool of ubiquitous scholarship it has no equal. Again this reviewer wishes to note how enjoyable the twenty volumes were to read and to encourage the current perusal of these and the following tomes by many more of those whose professional concern or amateur interest comprises public law—national, international, and comparative.

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## **The 1989 Guide to International Arbitration and Arbitrators**

Parker School of Foreign and Comparative Law, Columbia University. Dobbs Ferry, New York: Transnational Juris Publications, Inc., 1989, pp. xv, 981, \$95.00.

Perhaps the most important difference between the resolution of disputes through international commercial arbitration, and the use of a judicial system is the opportunity ordinarily afforded to the litigants of participating in the selection of the individuals who will judge their case. The attractions of arbitration—

such as the elimination, or at least curtailing, of discovery and time-consuming motions—fade quickly in the face of justice being meted out by incompetent or biased arbitrators.

In most commercial arbitrations in which the stakes are not small, the parties are interested in participating in the selection of the arbitrators—and through them, in the selection of the third arbitrator, or chairman, of the arbitral panel.<sup>1</sup> The opportunity of participating in the selection of the persons who will determine the outcome of a dispute is one, however, that is not always fully appreciated or utilized by litigants and their counsel. Like jury selection, the selection of arbitrators should be the product of thoughtful and careful analysis and not of a passive acceptance of whatever the fates may bring. Indeed, it can be fairly stated that the selection of the arbitrators may be the single most important step that the parties may take in the course of an arbitration proceeding.

Unfortunately, the selection of arbitrators ordinarily has been left to a process of extended personal networking—searching one's memories and those of one's colleagues for the names of persons of capability and stature who could and would serve effectively as arbitrators. There are two basic concerns in the selection of arbitrators, whether party-appointed or neutral: the establishment of criteria for selection and the identification of persons satisfying those criteria. The first concern is dealt with by careful analysis of the factual and legal issues and the drawing of a profile of the kind of person deemed likely to deal most effectively with those issues. For example, in contract disputes there are frequently "hard" and "soft" points of view, the first a strict-constructionist approach to interpretation of the terms of the agreement and the other a more flexible, equitable approach, emphasizing the particular facts of the case. A party whose case is supported by a strict view of the contract language in the face of sympathetic facts pointing to a different result will suggest the selection of a person believed, on the basis of the person's nationality, background, and training, likely to take a "hard" approach.

Then there is the issue of experience. Persons who have handled arbitrations before, either as advocates or as arbitrators, can be expected to have greater skill in conducting arbitration proceedings, including making determinations as to the extent of discovery as well as the manner in which evidence is presented in the hearing. Depending on their nationalities and backgrounds, arbitrators can have varied attitudes toward such matters as the availability of discovery, the use or not of prehearing memoranda, and the importance of cross-examination in the presentation of evidence in hearings.

While fitting these variables and criteria together with individuals will never be a process free from uncertainties, important help to commercial arbitration practitioners has arrived in the form of *The 1989 Guide to International Arbitration and Arbitrators*. The volume proves a valuable *vade mecum* for lawyers

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1. The notable exception to this process is the procedure used by the American Arbitration Association, which circulates lists of names of proposed arbitrators to the parties.

seeking, often under time pressure, to identify persons with professional backgrounds in international commercial arbitration. The book contains (in addition to a reprinting of the rules of national and international arbitral institutions) short, standardized biographies in outline form of persons—almost exclusively lawyers—with experience and interest in international arbitration. Many nationalities are represented, and an index is provided of such characteristics as language capabilities and specialties.

The *1989 Guide* gathers together, in the first part of the volume, a variety of materials that are ordinarily available only separately. The text of the rules of the United Nations Commission on International Trade Law (UNCITRAL), of the International Chamber of Commerce, and of various national arbitral institutions are included, together with discussions of their background, model clauses, and bibliographies. The discussion of the UNCITRAL Rules includes a useful listing of the national arbitration centers that have been using the UNCITRAL Rules, either as their own or as an alternative to their own rules. There is a list of institutions that have indicated their readiness to act as appointing authorities under the UNCITRAL Rules. The extensive number of institutions that are prepared to employ the UNCITRAL Rules or make appointments under those rules reflects at least the potential widespread use of those rules, and is perhaps an indication that they will become an international standard for rules for the conduct of arbitrations.

The volume contains both the American Arbitration Association and American Bar Association 1977 Codes of Ethics for arbitrators and the more recently formulated Rules of Ethics for International Arbitrators promulgated by the International Bar Association. In addition, the volume contains the text of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958, including national declarations and reservations made on ratification by signatory states. A useful bibliography on the Convention is included.

A few years ago, in a lecture before members of the Arbitration and the International Law committees of the Bar Association of the City of New York, I suggested the need for a compendium of biographical information of persons with professional experience in arbitration. I went so far as to suggest the utopian—the formation of an independent international institute that would not only gather and assemble data on qualified individuals but also provide information, on a confidential basis, based on “report cards” on the performance of the individuals as arbitrators. I observed and continue to observe, that recommendations of persons as arbitrators are frequently made on such bases as their participation in conference panels or as participants in bar association or similar activities, rather than as arbitrators. Since arbitration is, by its very nature, a private rather than a public process, information on actual performance of arbitrators is hard to come by.

The *1989 Guide* makes some efforts in this regard. In addition to standard background biographical data, it contains, for each person profiled, information provided by that person as to experience as counsel or arbitrator in specific

arbitrations. Unfortunately, again because of the private nature of arbitration, the information does not specifically identify the arbitrations, which remain confidential, as indeed are the awards.

The most valuable service performed by this volume is perhaps its very existence: the gathering in one place of the names and biographies of a large group of highly qualified professions in the field of international arbitration. Anyone searching for persons to serve as arbitrators, or perhaps even lawyers, in international arbitration proceedings, will be enormously aided, both in time saved and information obtained, by having this book as a reference. For practitioners in the field of international arbitration, it will serve as a reminder of persons known but not perhaps immediately recalled, and as an introduction to persons not encountered. For those less familiar with the field, it will provide an invaluable treasury of useful names. For both, it provides considerable useful biographical information, much of it not readily available in such sources as the various *Who's Who* volumes or in such directories as Martindale-Hubbell.

To be useful, of course, the directory will have to be updated frequently, and I understand that subsequent editions are to be issued. Inevitably, these editions will contain additional biographies, perhaps displacing the compendium of arbitral rules occupying the first part of the book. Such additions will enhance the book's usefulness, assuming, of course, that its editors exercise appropriate discretion in both the number and content of biographies. The index will, in succeeding volumes, become of increasing importance, and will need to be enhanced, both in detail and comprehensiveness. At present, it appears that the words chosen by persons in their responses to the questionnaires may have determined how they are treated in the index. For example, although virtually all arbitrations involve contract disputes, there is a category in the index for "Contracts in General," but by no means is every person listed under that index entry.

All in all, it can be safely said that the *1989 Guide* will become an indispensable reference book in the library of lawyers engaged in international commercial arbitration. Its usefulness will undoubtedly increase as experience leads its editors to introduce additional refinements in the kind of information provided and the way in which it is presented.

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