BOOK REVIEWS

Conventions, the Australian Constitution and the Future by L. J. M. Cooray, (Legal Books Pty Ltd, 1979), pp. i-xix, 1-235. ISBN 0 959 6568 12.

> This book has been written in language and manner such that while it seeks to discuss constitutional principles and issues slanted towards lawyers and law students, at the same time a careful and anxious attempt has been made to express ideas in a manner which the politician, political scientist, historian and concerned layman will find interesting and worth reading.[1]

It is a characteristic of this book that the author sets out his objectives very clearly. He does not always seem to succeed in carrying them through to completion. In this introductory remark there is a record of one of the difficulties which the work fails to overcome: the extent of the material it covers and the breadth of its audience prevent it from fully satisfying any of its intended readers.

Dr Cooray writes about the Australian Constitution in the light of the constitutional crisis of 1975. In many ways he is ideally suited to the task. He is an experienced constitutional lawyer and teacher and, more unusually, was not involved in the debate at the time — he came to Australia from Sri Lanka in 1976, where he had acted as a consultant in the drafting of that country's autochthonous constitution in 1970-1971. With this background, the author makes a number of important observations. He writes, for example, about the theoretical basis which can underpin the approach of Murphy J. to the 'British connection' — the question of the authority of the United Kingdom Parliament to legislate for Australia, and the effect of previous enactments of 'paramount force'.[2] This, and a number of other contributions, show the benefit of comparative constitutional studies and experience. Equally there are dangers in such an approach. The author is less than convincing when he relates experience under the new Sri Lankan constitution in aid of an argument against change of the Australian constitution.[3] This forms the bulk of the concluding chapter, 'Whither Constitutionalism?', with the remainder being taken up by a valid but uninspired plea for greater tolerance in political (and academic) debate and, more questionably, a case for checks and balances on power through limits in the constitution.

The argument of the book may be summarized simply. The constitution cannot be interpreted literally.[4] It assumes the existence and awareness of institutions like Cabinet and a Prime Minister and of practices like Responsible Government.[5] Accordingly, there are conventions which are, at least in part, said to be 'non-justiciable' rules.[6] These are incorporated by reference in the Constitution as necessary for its construction.[7] Reviewing all the events of 1975 (loans, Senate vacancies, supply) and the actions of the principal parties (Governor-General, Chief-Justice, Prime Minister, Leader of the Opposition, Speaker), Dr Cooray concludes that existing conventions were breached by the manner in which the Senate vacancies from New South Wales

[1] Cooray L. J. M., *Conventions, the Australian Constitution and the Future* (1979) vii.
[2] *Ibid.* 95-100. *Cf.* 79-80.
[3] *Ibid.* 212-5.
[4] *Ibid.* 1 ff., 29-38.
[5] *Ibid.* 34, 61 ff., 152-6.
[6] *Ibid.* 38, 85.
[7] *Ibid.* 35, 68-9.

and Queensland were filled and by the threats of refusal of supply.[8] He suggests that while the exact scope of the Governor-General's power to dismiss a Prime Minister is too difficult to define, it is clear that the Governor-General acted too early in 1975. Dr Cooray's chief concern, which is handled well, is to isolate the events of the period in order to prevent new precedents being created from them.[9]

This is a rather bald outline of the author's conclusions on matters over which dispute still rages in the meeting places of Australia. However, they are not the most important points made in the book, nor the matters which seem most interesting to this reviewer.

The book begins with an examination of bases for the interpretation of the Constitution. By collecting a chain of *dicta* from judges of the High Court since Federation (a process frought with dangers, since such broad statements may justify any number of contradictory conclusions, depending on the circumstances of the case and the subjective perception of the *dicta's* meaning), and by argument from first principles, the author successfully argues that literalism is not tenable. But the author remains wedded to the *legalism* which Dixon C.J. combined, at high levels of abstraction, with literalism.[10] How far removed from that which he condemns is Dr Cooray? He offers the fascinating suggestion that sections of the Constitution fall into one of three types. In the first category the sections are interpreted according to the 'plain meaning' of their terms, for they are said to be 'substantially complete'. Examples of the first category include sections 13, 15, 16, Chapter III and Chapter IV. Next are sections which are statements of principle; the courts expand their meaning in ways consistent with the principle. The author refers to sections 92 and 51 at this point. Finally are sections which contain, and can only be sensibly understood when reference is made to, 'unstated assumptions regarding responsible government'. Here the author refers to sections 5, 28, 58, 59, 60 and Chapter II.[11]

The initial purpose of this classification is to reconcile different judicial approaches to interpretation. What the end product reflects, without the author seeming to be aware of it, is not variation in drafting technique but three schools of interpretation very familiar to students of European and United States constitutional law and interpretation. Each school represents a different perception of the judicial function and the nature of the value choices which are inherent in every court decision.[12] Dr Cooray highlights and criticizes the dominant and narrowest approach — the 'plain meaning' approach founded on legal positivism.[13] More importantly, his notion of classification, fixing on *types* of clauses as its starting point rather than the presence or absence of certain words, should be welcomed as helping to broaden and clarify the range of meanings and sources available to the Court. That not all cases are reconcilable with the framework, or that not all politicians, party members or judges will find the classification valid, or even that the idea puts the cart before the horse by deriving the pattern of the Constitution from cases decided over many years by benches differently composed and in manifestly different contexts, is not really important. However, the author's argument only takes us so far — having performed the initial task of introducing the idea of 'unstated assumptions', questions as to the sources and the extent of incorporation and definition of these assumptions remain. This is the level at which anyone arguing a 'non-literalist' case must begin if the hold which traditional theory maintains is to be countered.

[8] *Ibid.* 107-23.
[9] *Ibid.* 127-44.
[10] Howard C., 'Sir Owen Dixon and the Constitution' (1973) 9 *M.U.L.R.* 5; Dixon O., *Jesting Pilate* (1965) 245, 247.
[11] Cooray, *op. cit.* 35.
[12] See Bredimas A., *Methods of Interpretation and Community Law* (1978). The three schools are (1) literalism, (2) sociological jurisprudence, (3) teleological interpretation (*effet-necessaire*), or in the U.S.A., (1) strict constructionism or plain meaning, (2) interest balancing, (3) advocates of 'preferred freedoms'; see Ducat C. R., *Modes of Constitutional Interpretation* (1978).
[13] Cooray, *op. cit.* 1, 29-38; Bredimas, *op. cit.* 4-5, 23; McWhinney E., 'Judicial Positivism in Australia: the Communist Party Case' (1953) 2 *American Journal of Comparative Law* 36.

The author introduces a theory of 'implied incorporation by reference' of certain conventions, which he describes as 'not a novel theory'.[14] Where the wording of the Constitution permits, that is, where discretionary powers are accorded which at the same time 'are based on assumptions and are therefore not meaningful in themselves', then conventions may be called in aid in construction.[15] The author classifies conventions into two types, *constitutional* and *governmental*, in an endeavour to anticipate criticism of their vaporous nature. It is only those of the first type which form part of the Constitution.[16] These include conventions relating to the exercise of the Queen's and Governor-General's powers under the Constitution, the British connection, the filling of Senate vacancies and the exercise of the power to reject supply. Governmental conventions have a similar origin to those in the first category, but are to be distinguished on the basis that they are less directly linked to (or are supplementary to) the 'rules stated in the Constitution'.[17]

In sketching the types of constitutional conventions, explaining their origin and operation in England, and suggesting possible sources for Australian law, the author seeks to answer criticisms of the general nature of conventions.[18] This last area is somewhat unconvincing, but is, at least, a thorough attempt. The possible sources, examined in turn, are public opinion (not sufficiently informed), political parties, and constitutional writers (not sufficiently concerned).[19] The problem encountered here is one familiar to public international lawyers, as the development of customary international law is based on the consistent practices of states, and a rather metaphysical but necessary 'willingness to be bound'. The difficulty in the area of domestic constitutional law is, as the author points out,[20] that too little attention has been paid to the questions of defining and making binding 'conventions of the Constitution'.[21] Dr Evatt predicted accurately many years ago, in a far more technical work, that great dangers and uncertainties existed as long as the Royal prerogatives and reserve powers remained undefined and uncodified.[22] Dr Cooray eschews Evatt's ideas of codification or wholesale constitutional amendment to effect this (or any other) reform,[23] but to this reviewer Evatt's argument still warrants respect.

Overall the book contains much useful and diligent groundwork, especially on the points outlined above, and should stimulate further work to rigorously expound its basic ideas. As noted earlier the purpose of the present work is to build these ideas into an argument regarding the state of constitutional law and practice after 1975. The author's method of exposition is generally suited to this task, using discussion of case law at a general and summarized level, references to a wide variety of sources, pertinent examples to illustrate the arguments, and some interesting analytical classifications. However, the book lacks the depth of detail or the simple felicities of style which would be required to make it a 'good book'. It is rather a book good in parts.

Finally a number of minor errors may be mentioned: Barton J., to his personal regret,[24] was never elevated to the Chief Justiceship (p. 32); the (Geneva) Convention on the Territorial Sea and the Contigous Zone was signed in 1958, not 'entered into in 1963' (p. 4); the Appropriation Act is not signed into law by the Speaker of the House of Representatives — a certificate is required from the Speaker

[14] Cooray, *op. cit.* 35.
[15] *Ibid.*
[16] *Ibid.* 68-71.
[17] *Ibid.* 69, 71-4.
[18] *Ibid.* 69-74, 59-66, 74-8.
[19] *Ibid.* 78 ff.
[20] *Ibid.* 81-2.
[21] *Cf.* the exhortation of Mason J., in (1977) 8 *Federal Law Review* 502, 506, for legal academics to take the 'challenging task of designing new and alternative approaches to the resolution of Constitutional problems'.
[22] Evatt C. V., *The King and His Dominion Governors* (2nd edition, 1967).
[23] Cooray, *op. cit.* 90-1 and ch. 5, especially 192-202.
[24] *Cf.* Cowen Z., *Isaac Isaacs* (1967).

before the Governor-General signs the Act into law (p. 141);[25] and the Appropriation Bills listed in the Table of Statutes (XVII) for 1864 and 1952 should be placed under 'Victoria' and not 'Commonwealth'.

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Torts: Cases and Commentary by H. Luntz, A. D. Hambly and R. Hayes, (Butterworths, Sydney, 1980), pp. i-xxxii, 1-1158. ISBN 0 409 44350 6.

No self respecting law teacher will ever totally agree with the way any particular case book is put together. One lives with a case book far more than a text and thus becomes familiar with its foibles. Case books are like one's spouse; texts are more like passing acquaintances. Perhaps also, as with one's spouse, teachers see great room for improvement in most case books. Few though, accept the challenge of attempting to produce the perfect case book.

I have lived with the Luntz, Hambly and Hayes case book for a year. It has been a prescribed case book at the Australian National University Law School since the beginning of the 1980 academic year. The first year is supposed to be the most difficult. Naturally, we have had disagreements but generally I find it to be a happy match.

The availability of the book now gives consumers a real choice in case books. Professor Morison's case book, now into a fifth edition,[1] exclusively occupied the territory until the appearance of this book. Professor Morison's book takes a traditional approach. Its structure is taken from the historical development of tort law; the materials lend themselves to analytical discussion of the law. It is a book of quality. The new edition seems to sustain that tradition. On the other hand, the Luntz, Hambly and Hayes book takes students directly to questions of social policy. Chapter 1 establishes unequivocally the tone of the book. It asks the student to ponder the purpose and function of tort law, and especially the law of negligence. The case for reform of the law of negligence is stated boldly and reiterated throughout. This on the whole has been accomplished with no sacrifice of rigour. The chapter on Causation (Chapter 4), for instance, contains an extremely clear presentation of an analytically difficult branch of the law.

The book promotes views that are well within the mainstream of ideas about tort law that have emerged predominantly since the Second World War. In Negligence the emphasis has been on compensation. As a compensation system the inadequacies of negligence have been consistently shown. The book brings home forcefully the inequities and the inefficiencies of negligence as a compensation system. However, I was disappointed that more emphasis was not given to the economic analysis of tort law. After an excellent discussion of the basic premises of economic analysis[2] it is scarcely discussed again.[3] Whatever one's views are about the Law and Economics movement — whether you hate it or love it — it cannot be ignored. It is the most intellectually challenging development of the last thirty years of scholarship in private law. In contrast to most Australian scholarship to date, and to their credit, the editors do acknowledge the Law and Economics literature, but in my view insufficiently.[4]

[25] See 'Safeguards to ensure that the wrong Bill is not assented to', (1977) 51 *Australian Law Journal* 800.

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[1] *Morison, Sharwood, Phegan and Sappideen's Cases on Torts* (5th edition, 1981); Dr Sharwood has retired from active editorship.

[2] See 56-61.

[3] Oblique reference is made to economic analysis as it applies to nuisance, at 940.

[4] It may be mentioned that this gap may be partially filled by the publication of the proceedings of a Law and Economics Workshop sponsored by the Research School of Social Sciences, at the Australian National University, November 1980. The forthcoming book will be edited by Dr Ross Cranston, Senior Fellow, R.S.S.S., A.N.U.