

—————Book Review—————

John Mark Keyes, *Executive Legislation*, 2d ed (Markham: LexisNexis, 2010), pp 611. ISBN 978-0-43-346025-1.

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Arthur Allen Leff once said that there can be a real joy in “doing something very well which is very hard to do at all.”<sup>1</sup> As I put down this book, I could not help but feel that John Mark Keyes must be a very happy author. The second edition of *Executive Legislation* is a real triumph. Several features, both substantive and technical, stand out: the comprehensiveness of the coverage, the quality of the analysis, the rigour of the organizing framework, the care with which the subject of the book is delineated, the detailed and well-organized index, and the extraordinary bibliographical apparatus (legislation considered, cases cited, textbooks and treatises referenced, articles discussed).<sup>2</sup> Together these characteristics guarantee that this monograph will be an outstanding resource for judges, lawyers, public servants, agency administrators, legal academics, and law students.

The foreword by Professor Ruth Sullivan, herself the reigning doyenne of Canadian scholars of statutory interpretation, notes the experience and insight that John Mark Keyes brings to this endeavour. Following years of service as a legislative drafter and later director of professional development in the Department of Justice, he has for some time now been chief legislative counsel of Canada. His erudition, good judgment, on-the-ground experience, policy wisdom, and theoretical insight into what might be called “the law and practice of law-making” are evident on every page. Before I turn to some brief comments about the monograph itself, I should

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<sup>1</sup> Arthur A Leff, “Afterword” (1981) 90:5 Yale LJ 1296 at 1296.

<sup>2</sup> I have only one small critical point to note in this respect. In addition to extensive footnotes, which are sometimes helpfully discursive as well, Keyes provides a table of legislation and a table of cases cited. However, for a scholar seeking to trace the pedigree of an idea, although perhaps not for an advocate seeking primary material for a memorandum of law or a factum, the absence of a table of authors referenced is regrettable.

like to insert an aside. It is worth noting with pride, and feeling gratitude about the fact that the cause of law and justice in Canada is so well-served by public servants like John Mark Keyes.

Let me now discuss several commendable characteristics of *Executive Legislation*. First, the author deserves compliments on the structure of the work. The sophisticated division of the narrative into five general parts, fifteen chapters, and eighty-seven sections comprising twice that number of highly detailed subsections, is a model of how a complex subject can be made accessible and comprehensible through a well-conceived, rigorously elaborated organization. This conceptual structure, when combined with a carefully constructed ten-page analytical index that crosscuts the subject matter headings of the table of contents, enables the reader to quickly locate where a given topic is discussed, even when the specific location of the theme one seeks to explore does not figure nominately in the traditional doctrinal vocabulary of delegated legislation. Here is an example. Some years ago I had the occasion to submit a brief to a parliamentary committee examining proposed revisions to the *Statutory Instruments Act*<sup>3</sup> that would have permitted the executive to circumvent the constitutional requirement of bilingualism in delegated legislation by incorporating unilingual instruments by reference. I scanned the index of *Executive Legislation* to see whether there had been further developments in this field and was pleased to discover a specific notation under the heading “incorporation by reference—process requirements” to the topic “unilingual incorporation by reference” (pages 466-69). Due to the care with which the index was assembled, it was possible to quickly find a substantial discussion of an arcane but constitutionally important question that does not figure in any orthodox conceptual organization of the subject.

Moreover, this monograph is no mere “user’s manual” about an extremely technical area of the law. Technical matters are, of course, dealt with thoroughly, but always within an overall theoretical, policy, and legal-constitutional context. Keyes begins with basic constitutional principles, exploring both the how and why of delegated rule making, and the manner in which the deployment of delegated legislation has evolved over the years. In part 1, the meaning of the expression “executive legislation” is carefully analyzed and placed within a general theory of legislation in the Canadian constitutional tradition. Thoughtful reference to practices in the United States, the United Kingdom, Australia, and New Zealand help to situate the legal framework of current Canadian approaches to the use and interpretation of executive legislation.

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<sup>3</sup> RSC 1985, c S-22.

Third, parts 2 through 4, comprising just over half the work (some 320 of 600 pages of the text), give a step-by-step detailed accounting of the nuts and bolts by which executive legislation is made and brought into force. An enlightening chapter on participation requirements prerequisite to the final drafting of executive legislation (chapter 4) is followed by a detailed review of process requirements relating to filing and publication of instruments (chapter 5). This second topic contains a revealing examination of implicit publication requirements, as well as judicial notice. Of particular note in Keyes' review of the *cuisine* of executive legislation is his detailed discussion of what he calls "required rule making" (chapter 9). Four different hypotheses are analyzed: (i) whether government authorities can ever have a legal obligation to make executive legislation; (ii) whether there can be an obligation to bring legislation into force (not, strictly speaking, an occasion where executive *legislation* is in issue); (iii) whether a statutory definition or, as is more often the case, exemption, can be operative when the necessary regulations defining the exemption have never been enacted; and (iv) whether an administrative scheme managed by an agency can operate even when regulations envisioned by the enabling statute have never been promulgated. For the scholar seeking insight into how courts balance the desirability of the executive specifying by regulation the conditions under which a discretionary power is to be exercised, with their suspicion of agencies fettering their discretion by self-created policy rules, Keyes' discussion of the cases (pages 384-93) is a real eye-opener. Indeed, these ten pages are one of the best examples of how Keyes brings together disparate themes in a subtle assessment of competing policy objectives being pursued through the use (and non-use) of executive legislation.

The above, I trust, indicates clearly my great admiration for *Executive Legislation*. Yet I would be remiss if I did not signal a couple of areas where, at least from the perspective of a law teacher, I would have liked to see additional development. To begin, the theoretical bases of executive legislation could be further elaborated. There is a rich literature on the general theory of legislative bargaining, notably by American scholars like William Eskridge, Philip Frickey and Elizabeth Garrett,<sup>4</sup> Richard Posner,<sup>5</sup> George Stigler,<sup>6</sup> Richard Stewart,<sup>7</sup> and Evan Criddle.<sup>8</sup> Yet to my

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<sup>4</sup> William N Eskridge Jr, Philip P Frickey & Elizabeth Garrett, *Legislation and Statutory Interpretation*, 2d ed (New York: Foundation Press, 2006).

<sup>5</sup> Richard A Posner, "Theories of Economic Regulation" (1974) 5:2 *Bell Journal of Economics and Management Science* 335.

<sup>6</sup> George J Stigler, "The Theory of Economic Regulation" (1971) 2:1 *Bell Journal of Economics and Management Science* 3.

knowledge there has been little effort to apply (or to demonstrate the inapplicability of) these analyses to executive legislation in Canada.<sup>9</sup> Questions that might be asked include, for example, whether there are particular constraints that apply to executive legislation that do not apply to primary legislation made by democratically elected legislatures.

A further point is this. Theorists like Jeremy Waldron<sup>10</sup> have devoted considerable energy to exploring the special character of legislation as a form of law with its own framework of justification. Here again, however, no effort has been made to apply these approaches to the specific case of executive legislation, although the more general question has attracted scholarly commentary in Canada.<sup>11</sup> It bears notice that in distinguishing executive legislation as a form of delegated legislation, Keyes rightly differentiates between delegated legislation made by subordinate legislative bodies like municipalities and school boards. What impact, if any, should this have on assessments of the appropriateness of using delegated rule making as a policy instrument and the extent of deference that courts should afford to municipal bylaws?<sup>12</sup>

Finally, although Keyes provides an introduction to some of the literature on instrument choice in chapter 2, this could have been developed further, especially as concerns the occasions for rule making as opposed to fiat, contract, and case-by-case adjudication as a means of developing administrative policy. Given that scholars like Fuller,<sup>13</sup> and Hart and

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<sup>7</sup> Richard B Stewart, "The Reformation of American Administrative Law" (1975) 88:8 Harv L Rev 1667 (critiquing the "conveyor belt" theory of regulation as the simple product of interest-group pressures).

<sup>8</sup> Evan J Criddle, "Fiduciary Administration: Rethinking Popular Representation in Agency Rulemaking" (2010) 88:3 Tex L Rev 441 (critiquing the view that the executive can automatically dictate regulation-making outputs of regulatory agencies).

<sup>9</sup> For rare exceptions, see Alice Woolley, "Legitimizing Public Policy" (2008) 58:2 UTLJ 153; Hoi Kong, "Towards a Civic Republican Theory of Canadian Constitutional Law" (2011) 15 Rev Const Stud 249; Hoi Kong, "Something to Talk About: Regulation and Justification in Canadian Municipal Law" (2010) 48:3&4 Osgoode Hall LJ 499.

<sup>10</sup> Jeremy Waldron, *The Dignity of Legislation* (Cambridge: Cambridge University Press, 1999).

<sup>11</sup> The Law Commission of Canada sponsored a Symposium on the topic in 2000. See Nathalie DesRosiers et al, "Legislation: Challenges and Potentials" (2001) 47:1 McGill LJ 1.

<sup>12</sup> For a recent discussion of why delegated decision making by elected bodies may be deserving of greater deference see Richard C Schragger, "Mobile Capital, Local Economic Regulation, and the Democratic City" (2009) 123:2 Harv L Rev 482.

<sup>13</sup> Kenneth I Winston, ed, *The Principles of Social Order: Selected Essays of Lon L Fuller*, revised ed (Oxford: Hart, 2001).

Sacks<sup>14</sup> have provided baseline understandings of the forms and limits of each of these processes of social ordering, is the time not now ripe for developing such insights in assessing the conditions under which legislatures might optimally choose executive legislation as a governing instrument?<sup>15</sup>

The above three points, of course, constitute observations about the book that Keyes did not write. I raise them not as a critique of the book he did write, which is a superlative contribution to our doctrinal understanding of this field. Rather I offer them as an invitation to Keyes to consider these themes either in a separate policy-oriented monograph or in an expanded next edition of *Executive Legislation*. After all, as this second edition shows, Keyes is committed to constant improvement and development of the treatise. More particularly, by the quality of this work, he shows that he is probably the best-placed author in Canada to undertake the kind of theoretical investigation that is now our greatest scholarly need. Be that as it may, the current edition of *Executive Legislation* is a triumph, and all jurists should be grateful to John Mark Keyes for the care and attention he has devoted to this excellent work.

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<sup>14</sup> Henry M Hart Jr & Albert M Sacks, *The Legal Process: Basic Problems in the Making and Application of Law*, ed by William N Eskridge Jr & Philip P Frickey (Westbury: Foundation Press, 1994).

<sup>15</sup> To my knowledge there has been little Canadian follow-up in respect of delegated legislation to lines of inquiry pursued by, among others, Cass R Sunstein & Adrian Vermeule, "Interpretation and Institutions" (2003) 101:4 Mich L Rev 885.