BOOK REVIEWS


RONALD DWORIN, the foremost legal philosopher and one of the foremost political philosophers of his generation, has put together a major work in which he expounds his political vision more lengthily and systematically than in any of his previous writings. To be sure, most of the chapters have been published before (and are only lightly modified), and the seams in the book sometimes show. Moreover, despite the length and intellectual density of the volume, Dworkin does not provide any firm basis for believing that his central idea of equality-of-resources can be operationalized outside the exceedingly artificial context in which it is first developed. In addition, as is true in many of Dworkin’s other works, his arguments are sometimes annoyingly conclusion-driven. Nevertheless, the sweep and the philosophical dexterity of Sovereign Virtue should command the admiration of any interested reader.

The book is divided into two main parts, of which the first (containing seven general theoretical chapters) is considerably longer than the second (containing seven chapters that apply the theoretical reflections to contemporary political issues and controversies). This review will concentrate chiefly on the first part. The opening two chapters were originally published as a pair two decades ago, and each of them is a tour de force of philosophical sophistication. In those chapters, Dworkin brilliantly dissects the ideal of equality-of-welfare and introduces his own alternative ideal of equality-of-resources. With an array of subtle criticisms that have become staples of the philosophical literature on political and economic equality, he reveals the unacceptable implications of any doctrine that calls for equality among people in their levels of well-being or in the extent to which their preferences are satisfied. Having highlighted the major shortcomings in any such variety of egalitarianism, he goes on to present his own variety. He resorts to what he designates as an “enjoy test,” whereby equality prevails when things are distributed in a fashion that does not leave anyone with a bundle of resources which he or she would be willing to trade for anyone else’s bundle. Such a test, which operates within certain requirements concerning the variegatedness and disjoinability of the available resources, is aimed at ensuring that people are treated as equals in regard to the opportunity costs of their holdings. That is, when the bundle of resources at the disposal of each person P would (in effect) be forgone by every other person because the bundle at the disposal of every other person is worth at least as much to him or her as is P’s bundle, the ideal of equality-of-resources is realized. Every person has then been treated as an equal. Although the envy test may seem straightforward when stated so abstractly, it is in fact staggeringly complex—even when it is elaborated by reference to the extravagantly simple society which Dworkin
sketches. He explores the involuted ramifications of the idea with ingenuity, though at times in a contrivedly conclusion-driven manner.

More problematic is the third chapter of the book, which addresses the topic of political/legal liberty. For one thing, it becomes clear in this chapter that Dworkin’s earlier criticisms of a doctrine labelled as the “starting-gate theory” are based on a controversial distinction between persons and their circumstances. Whereas Dworkin classifies a person’s talents and capacities as elements of the person’s circumstances, proponents of the starting-gate theory classify those features as elements of the person himself. When the distinction is drawn in the latter manner, the starting-gate theory is a perfectly coherent egalitarian doctrine—pace Dworkin.

Even more important, Dworkin in his third chapter draws an erroneous inference from a solid premise. He correctly observes that the idea of a comprehensive auction of goods without a distribution of liberties is a non-starter: “[N]o one can intelligently, or even intelligibly, decide what to bid for in an auction, or what price to bid for it, unless he makes assumptions about how he will be able to use what he acquires.” Dworkin infers that the auction must proceed from a baseline of liberties and constraints: “So a background or baseline liberty/constraint system is essential, and that system will specify whether parties do or do not begin the auction with any particular liberty in hand” (p. 143). What we should instead conclude is that any references to the auctioning off of goods are instances of loose shorthand for the auctioning off of entitlements or sets of entitlements that pertain to the various goods. That is, although Dworkin is correct in rejecting the notion of a two-stage auction where assets first and entitlements afterward are apportioned, the untenability of such a picture is due to the fact that (strictly speaking) the only direct distribuenda in the auction are the entitlements. Having recognized as much, we can then recognize that the singling out of certain entitlements as a baseline would be an arbitrary impairment of the ideal of equality of resources. To be sure, an acknowledgment of this point will leave intact many aspects of Dworkin’s theory. In particular, we should accept the substance (though not the precise wording) of his claim that “the true opportunity cost of any transferable resource is the price others would pay for it in an auction whose resources were offered in as abstract a form as possible, that is, in the form that permits the greatest possible flexibility in fine-tuning bids to plans and preferences” (p. 151). Moreover, we can endorse the gist of Dworkin’s assertion that “participants to the auction would want both an opportunity to form and reflect on their own convictions, attachments, and projects, and an opportunity to influence the corresponding opinions of others, on which their own success in the auction in large part depends” (p. 160). Nonetheless, if the distribuenda are specified for the auction in a fashion that maximizes the flexibility of the combinations and disjunctions of entitlements that can be attained by the parties in the bidding, there would seem to be no reason (within the ideal of equality) for setting aside certain entitlements as lying beyond the auction’s reach. Dworkin appeals to a principle of authenticity, whereby he maintains that the equality-preserving role of post-auction transactions will not be fulfilled if people’s choices “depend on a view of their personality, and of the personalities of others, with whose formation they remain dissatisfied” (p. 160). However, if the distribuenda of the auction are specified in a suitably adaptable manner, and if the auction itself satisfies the envy test, there does not seem
to be any reason for thinking that the equality-preserving role of post-auction transactions will be threatened in the way that Dworkin broaches. At any rate, he will have to supply further argumentation if he hopes to make his case persuasively.

Chapter 4 explores the distribution of political power, as it asks what form of democracy is most appropriate for an egalitarian society. The chapter contains many insights, but is marred by Dworkin's insistence on reconciling all political desiderata. Near the end of the chapter, for example, he submits that the practice of judicial review in the United States does not detract from the ideal of equality of voting power, "because it is a form of [electoral] districting." Such a characterisation is outlandish rather than illuminating.

Notwithstanding the foregoing criticisms and quite a few other objections that can be levelled against sundry lines of reasoning in *Sovereign Virtue*—not least against a number of its remarks about the nature of liberty—the book as a whole is extraordinarily impressive. It is a flawed work, but a profound work. Though analytically the first two chapters are particularly powerful, the most arresting portions of the volume are the closing pages of Chapter 5 and some parts of Chapter 6. Therein, Dworkin rises to heights of eloquence as he affirms the importance of societal justice as an element of each individual's well-being; to live in a society disfigured by manifest injustices is *pro tanto* to lead a life that is diminished. One clearly gains the sense that these pages express not only general theoretical insights, but also Dworkin's own feelings of frustration and exasperation at the failure of the United States to live up to the ideals which *Sovereign Virtue* delineates. In these sections of the book as well as in some of the later chapters that deal with practical political controversies, the keen analytical sharpness of the volume is matched by its passion. Few legal or political philosophers during the past century have been capable of such a feat.

MATTHEW H. KRAMER


In 1998, the International Academy of Comparative Law named Professor Glenn's newest book, then in manuscript form, the winner of the grand prize at the XVth International Congress of Comparative Law. In so doing, the Academy made no mistake, for this is an exceptional and eminently readable book. Combining a historically accurate analysis with a distinctly contemporary sensibility, Glenn invokes not only jurisprudential concepts as he explains the different legal traditions, but religious and sociological ideas as well. It is difficult to imagine an interdisciplinary team of authors taking on a project of this scope, but Glenn, working alone, successfully integrates strands of thought from these different disciplines into a single cohesive whole.

The book's brilliance belies its slightly slow beginning. The first two chapters initially appear to contain the type of general theorising that is, in many cases, promptly ignored as an author moves to more substantive
discussions. Glenn, however, defies this unfortunate convention and refers back to ideas contained in these early chapters throughout the book. One theme, that of tradition as information, becomes a standard touchpoint in later chapters, as does the idea of corruption, meaning criminal corruption, institutional corruption, and intellectual corruption. Glenn illustrates the differences in legal cultures by showing whether and to what extent those cultures incorporate tradition and tolerate corruption in legal and social norms.

What the author does not do is take a certain field of law—tort, for example, or contract—and compare it across systems. His emphasis is less on delineating particular laws or procedures and more on contextualising the ideas and historical accidents that motivate lawmakers in the different societies. While this technique does not yield the sort of detailed analysis of particular laws that one finds in other comparative works, Glenn’s more holistic approach allows him to indicate certain global differences between the systems. For example, he notes that the chthonic tradition (which can be described roughly as oral, customary and/or indigenous law, although Glenn distances himself from any one of these particular definitions) puts little emphasis on the law of obligations, whereas the civil law tradition, with its roman influences, typically includes a highly developed law of delict and contract.

The book’s core consists of the seven chapters that discuss the different traditions. Beginning with the chthonic tradition, the book continues with the talmudic tradition, the civil law tradition, the islamic tradition, the common law tradition, the hindu tradition, and the asian tradition. Each section sets the legal discussion within the context of a particular religious worldview, which helps explain the rationales supporting different legal cultures. For example, the chthonic tradition is said to “resist[ ] individual powers or entitlements . . . because of the higher form of obligation owed to the cosmos,” while the talmudic tradition, on the other hand, acknowledges the role of the individual in society, although it still avoids engaging in any language of rights, per se (p. 101). Similarly, because hinduism does not incorporate “any general principle of equality . . . and given the pervasive presence of dharma [which assigns every person a place in life], the notion of rights, as individual power, or as anything else, is not inherent in hindu thought” (p. 265). In each case, the religious faith of the constituent members of society informs and influences the shape and direction of the law.

Because the author proceeds in roughly chronological fashion, he is able to illustrate how later traditions incorporate and modify elements of earlier traditions. For example, he notes that “[w]hen English commerce began to emerge, talmudic practices, known because of jewish-gentile commercial relations, were a natural model for common law development” (p. 214). Not only does this information demonstrate the interconnectedness of the various legal traditions, but it brings into the mainstream ideas that have often been limited to specialist literature.

As illuminating as this book is, some shortcomings exist. First, there is the occasional tendency to gloss over important jurisprudential concepts, perhaps in an attempt to avoid overwhelming non-lawyers. While Glenn’s brief references to the command theory of law and the debate between the interest theory and the will theory of rights will make sense to those who are already familiar with the work of Austin and others, the richness of
Glenn’s analysis will be lost on the novice reader, particularly since Glenn sometimes fails even to provide footnotes to indicate where further materials on these subjects may be found. Although it is not necessary to engage in a detailed discussion of each of these points, the current approach is somewhat disappointing in its brevity.

Second, in attempting to be contemporary and accessible in his language, Glenn sometimes overshoots the mark, referring, for example, to trespass as “the mother of all writs” (p. 213) and defining non-factual assertions as “non-observable or, to be fancy again, metaphysical” (p. 137). While such colloquialisms may put students at their ease, they appear flippant to others and mar the overall tone of the book. Because Glenn expresses even the most sophisticated ideas clearly and simply, he has no need to resort to slang to appeal to the younger members of his audience.

One of the most striking aspects of this book is that, although it was clearly written with students and non-specialists in mind, it will also appeal to experienced comparativists. Few academics are able to undertake the kind of global, interdisciplinary analysis that Glenn does, and this book will undoubtedly give readers a fresh, vigorous outlook on their own work. While there is a price to be paid for taking such a broad-based approach, in that the book does not contain the type of detailed analysis of specific problems that some specialists would appreciate, there can be no greater achievement than to reinvigorate interest in an area in which one has worked for years. In this, as in so many things, Glenn has succeeded magnificently.

S.I. Strong


Lord Bingham of Cornhill is no stranger to the business of judging. Senior Lord of Appeal in Ordinary, former Lord Chief Justice of England, former Master of the Rolls, he has been sitting on the bench in one capacity or another for the last twenty years—twenty-five if one counts his tenure as a recorder. Although he began his career at the bar in 1959 as a commercial and civil lawyer, his appointment in 1996 as Lord Chief Justice placed him at the apex of the criminal justice system. In becoming senior Law Lord, Lord Bingham has expanded his purview yet again, thus enabling him to write about all aspects of the law from a unique position of knowledge and experience.

The current collection of lectures, speeches and essays makes full use of Lord Bingham’s wide range of insights. The thirty individual items are arranged in nine sections, which include The Business of Judging; Judges in Society; The Wider World; Human Rights; Public Law; The Constitution; The English Criminal Trial; Crime and Punishment; and a miscellaneous section which touches on some earlier themes as well as some new ones, including the future of the common law and the history and future of legal aid. The pieces, which were written between 1985 and 2000, are published in their original form, a device that is not without potential pitfalls, since, in some cases, events have not turned out as anticipated. Still, Lord
Bingham writes that he “hope[s] that these blemishes will not deprive the contents of any interest there may be in the contemporaneous response of one senior judge to what seemed to him to be topics of concern, interest, and importance” (p. v), and, in fact, the historical aspect of the book is one of its more captivating qualities, providing a snapshot view of how matters ranging from judicial ethics to the right to privacy were debated at the time.

This is not to say that every essay is of equal weight and interest. Some, such as “Mr. Perlzweig, Mr. Liversidge, and Lord Atkin,” which recounts the admittedly seminal *Liversidge v. Anderson* and Lord Atkin’s important dissent in that case, and “The Old Despotism,” which effectively reviews Lord Hewart of Bury’s 1929 book, “The New Despotism,” lack a sustained connection to contemporary affairs and could have been omitted without diminishing the overall effect of the book. It may be that the pieces were well-suited to the occasions at which they originally appeared, but the need for their re-publication is not immediately apparent. Indeed, the inclusion of these primarily historical pieces detract from stronger and more topical offerings such as “The Mandatory Life Sentence for Murder.”

“Anglo-American Reflections,” which is one of the two articles in the section entitled “The Constitution,” illustrates a second shortcoming common to the publication of lectures and speeches, namely that of uneven presentation. In this case, the article sets forth a number of arguments concerning the differences between English and American law. Unsurprisingly, the English position is presented more fully and more persuasively. While the form of the original presentation—a lecture at King’s College, London—may have precluded detailed comparisons between the two systems at the time, one expects a written article to discuss both sides of a debate in equal measure. The countervailing arguments are readily apparent to those working in the field, but the essay could unintentionally mislead novices in this area of law by presenting one position as stronger than it really is. The problem could be easily solved through the inclusion of a short footnote referring the reader to sources discussing the US position more fully, thus eliminating the possibility of confusion while still respecting the author’s desire to retain the form and content of the original lectures. Although unevenness in presentation is not a major problem in the collection as a whole, it is a concern in a book that is primarily aimed at non-specialists who might not be aware of the ongoing debate in any particular field.

These two minor flaws are not sufficient to mar what is, in many respects, a thoroughly enjoyable book. The author himself notes that the collected materials “are not the result of deep scholarly or profound original thought” (p. v), and it is no mark of disrespect for the author’s formidable talents to agree with him on this count, since none of the essays goes into great depth. However, this is a collection which is ideally suited to the general reader, whether lay person or lawyer, who wants to know a little about a lot of subjects. The book is well written—always clear and concise, often insightful and amusing—and well researched, and the fact that it is not aimed at an academic audience does not diminish its value. Indeed, an overview of the issues and an insight into one of England’s
leading legal minds is, and should be, more than enough to justify perusal
of Lord Bingham’s writings.

S.I. Strong

*Human Rights and Legal History: Essays in Honour of Brian Simpson. By
University Press. 2000. viii, 291 and (Bib) 22 pp. Hardback. £40.00
net. ISBN 0–19–836496–8.]*

Essays in law, history, philosophy and fun was considered as a subtitle for
this volume of essays in honour of Professor Brian Simpson, and certainly
a great warmth shines through the collection. As an inspiring teacher,
explains Professor John Tiley, “Brian always took us further—with that
quiet questioning—‘I wonder why …’. And in a lengthy footnote to his
contribution, Professor Gareth Jones writes, “If we were asked why we find
Brian such entertaining company, we could produce a catalogue raisonné
of his many talents and virtues. But his most endearing qualities are his
loyalty and kindness, his enormous sense of fun (a raconteur of the most
extraordinary stories!), his sense of adventure, and his insatiable human
and intellectual curiosity.”

The editors see their title as offering alternative themes for contributors,
whom they hoped would agree “either to ‘do a Simpson’ on a case in
modern legal history or to write on a human rights’ theme” and they have
arranged the twelve essays accordingly, moving as they see it from human
rights to legal history. The one sorely disappointing aspect of the book is
that it contains no attempt to give a clear account of the main ideas and
themes of Simpson’s distinguished contributions to medieval and early
modern legal history and to legal theory (nor of some of the principal
criticisms), although the book does conclude with a brief outline of
Simpson’s academic career in the United States (a tribute from Professor
Dick Helmholtz) and an impressively well indexed bibliography of
Simpson’s published works, compiled by Jules Winterton.

Four of the essays in the collection concentrate on the history of
specific common law entitlements. Professor John Baker pins down the
origins of the sixteenth century dispute between the courts of the King’s
Bench and the Common Pleas over the use of assumpsit in lieu of an
action of debt on a contract—and so also the roots of the loss of a
debtor’s entitlement to “wage his law”, to defend himself by taking an
oath (supported by eleven ‘wager-men’) that he did not owe money.
Professor Bill Cornish analyses the leading eighteenth century copyright
case, *Donaldson v. Becket*, concluding that it teaches the virtue of practical
compromise, and that “no great harm flows from accepting the basic
linkages of interest between author and publisher as a justification for a
property right of ‘Copy’.” Professor James Oldham studies the “historical
test” that the US Supreme Court uses to determine the scope and meaning
of the Seventh Amendment right to a jury trial in civil cases. Using Lord
Mansfield’s trial notes, he concludes that many more things were lodged
with juries in England in 1791 (when the constitutional provision was
adopted) than American courts are prepared to acknowledge, and suggests
that dicta in eighteenth century case law could be used to bolster a
functional argument excluding juries in complicated cases (or perhaps even reintroducing special juries of commercial specialists); as it stands, the landscape of the Seventh Amendment is “strange indeed, almost upside down.” Dr. Joshua Getzler suggests that, despite of Simpson’s celebrated refutation, something can be saved from Professor Morton Horowitz’s theory that juries were eliminated from the English civil trial in pursuit of market efficiency: Getzler argues that judges and jurists were trying to enhance the efficiency of the legal process itself and that the right to jury trial for malicious prosecution was retained in the nineteenth century “to avoid spelling out the political implications” of balancing “a right to prosecute against a right not to be legally harassed”. In honour of Simpson’s work on nineteenth century legal history, Professor Gareth Jones offers a vivid sketch of the professional and personal lives of three eminent nineteenth century lawyers—John Singleton Copley Junior, Lord Lyndhurst; Thomas Denman, Lord Denman; and John Campbell, Lord Campbell—covering their physiognomy, their characters, their marriages, and their achievements as politicians, judges and law reformers.

Moving to the twentieth century, in tribute to Simpson’s analysis of Defence Regulation 18B, Professor Gerry Rubin offers a detailed study of the evolution of the War Zone Courts scheme, “a blueprint for a rough-and-ready criminal justice system” which never had to be put to the test, but a scheme which, Rubin concludes, Parliament had ensured would co-exist “with the still-flickering flame of constitutionalism”. Professor Katherine O’Donovan traces the different approaches taken by French and English legal systems to protecting a child’s right “to preserve his or her identity” under Articles 7 and 8 of the United Nations Convention on the Rights of the Child. While under English law a mother cannot refuse to be a legal parent in the sense of keeping her identity secret, under French law, secrecy of identity is currently respected beyond the ending of the child’s minority; O’Donovan aims to highlight the care needed in making cross-cultural comparisons in interpreting international human rights texts. (Reforms to the French position, in the name of Articles 7 and 8, are due to be considered by the French National Assembly later this year.) Nuala Mole, one of Simpson’s former students and now his professional colleague in his practice at Strasbourg, traces the role that Simpson has played in the development of Convention case law both at Strasbourg and in the House of Lords through his expert advice on the history of the sentence of detention during Her Majesty’s Pleasure for children convicted of murder, and on the drafting history of Article 13 (the right to an effective remedy). Professor Christopher McCrudden considers how contemporary judges draw on judgments from other jurisdictions when struggling their way through a series of conflicting principles or “rights”: since the issue of the “transfer of judgments” in the context of conflicts between particular substantive human rights is an issue that is “unlikely to go away”, he invites scholars to consider more carefully the empirical, political and jurisprudential questions that are raised. Professor Peter Fitzpatrick, writing from a post-modernist perspective, argues in his study of resistance to colonial laws in Papua New Guinea that lawyers’ interest in formulating tests for legal validity is not, as Simpson argues, “a symptom of the breakdown of a system of customary or traditional law” but “a variation of its form”. Professor William Twining, arguing that problems of interpreting legal texts are closer to theology than to literary theory, brings
out vividly both the analogies and the differences between interpreting parables and interpreting precedents in his study of “The ratio decidendi of the Prodigal Son”.

If the value of theories of law lies in “their power to illuminate a certain tradition of human aspiration”, Simpson has argued eloquently that that power can only shine through an elucidation of the nature of the elaborate structures of institutions and beliefs that buttress particular traditions of legal thought. In a review article nearly twenty years ago, Simpson argued that, far from having a clear vision of their place in the scheme of government or, in particular branches of the law, of where they are going, our judges have instead tended to be “undisciplined prima donnas, unable to cooperate or compromise, or act in a collegiate spirit”: “in the absence of any clear commitment to a theory of rights”, he concluded, “it is hard to see how the Lords could assert themselves” beyond their very modest role in British Government. Simpson’s forthcoming book, Human Rights and the End of Empire: Britain and the Genesis of the European Convention, and the impact it might have both on writers on human rights law and on our judges in interpreting the Human Rights Act 1998, are eagerly awaited.

Amanda Perreau-Saussine


These two books, hereinafter referred to as Spitz and Klug respectively, provide accounts of South Africa’s transition from an oppressive racial oligarchy, which preserved much of the form but little of the substance of western constitutionalism, into a vibrant functioning, albeit flawed, democracy which stands as a beacon of hope for much of Africa. The demission of power by the previous rulers and the peaceful vesting of that power in a popularly elected government was without doubt a joyful and very important event in world history. It could have been very bloody, it could have been protracted—taking perhaps decades—but it was not. And this is a cause for continuing gratitude whatever the disappointments, difficulties and dangers that lie in the future. Many books will be written about this transition of power. It was an event that historians, political scientists and comparative constitutional lawyers will ponder and wrestle over for many years to come. But is too early to write the definitive account, if one is ever written. Today one is still too close to the events to see them in their true perspective and there is a real danger in relying, as both these authors do, upon interviews (sometimes conducted by telephone) with leading actors in the drama. Of course, it is interesting to hear what the actors have to say and there is a certain vicarious thrill in feeling half-present on the cusp of history. But recollections are often flawed, all
experience is subjective and incomplete, and the written record will often be more reliable. More than this though, the actors, usually politicians and always politically aware, have their own reputations and their own futures to think of. All that they say must be taken *cum grano salis.*

Klug’s book sets the political transformation in South Africa in a broad international setting asking questions relevant to all constitutional transformations. Why is it, he wonders, that the transformation in South Africa took the form that it did? Why did the end of the racial oligarchy lead to the adoption of a constitution that embraced enthusiastically the judicial review of legislation, Bills of Rights and the rest. Why did it not lead to the kind of dictatorial power common in many other parts of Africa? Part of the reason for this, as Klug well realises, is the collapse of state socialism across the world. We may be sure that the transformation would have been very different had it taken place in the early 1980s rather than the early 1990s.

But Klug uses this to found a different view of the judicial power in South Africa. He sees the ability of the judiciary to resolve irreconcilable political conflicts in a way that allows all participants in the political struggles “to imagine the possibility of sustaining their own visions of outcomes that they viewed as essential . . .” (at p. 179) as vital to constitutionalism.

There is some truth in this: the judiciary is able to take decisions which the politicians consider too difficult and the judges’ decision is then accepted. The classic example of this is *S. v. Makwanyane and Another* 1995(3) S.A. 391 (C.C.) where the Constitutional Court, in its first case, held that the death penalty was unconstitutional as “cruel, inhuman or degrading treatment or punishment”. The judgments of the court are unquestionably a huge contribution to humane jurisprudence but the point really is that the death penalty was (and is) popular with most South Africans. It was not practical politics for the incoming government, sensitive to public opinion, to espouse abolition, yet many of its leading members were doubtless abolitionists and pleased by the court’s decision. So the court provided the way in which death penalty was abolished. (It is difficult though to see how proponents of the death penalty could see in this “the possibility of sustaining their own visions of outcomes which they viewed as essential”. Perhaps they believe that the South African Constitutional Court will, like the US Supreme Court, change its views over time on this and other issues.)

The next question is that if the judiciary is to have this sort of role, what are the constraints within which it operates? Klug finds “the imagining and re-imagining of acceptable outcomes” reflected in “the interaction of local conditions and global options. While South Africa’s state sovereignty secures a space for the assertion of particular local visions and alternatives, the global discourse of democracy, rights and markets shape the boundaries of these internal options. This constraint on local autonomy is most explicitly revealed in the genealogy of the Constitutional Principles [i.e. the principles laid down in the Interim Constitution with which the Final Constitution had to comply] themselves” (*ibid.*).

Views will doubtless differ on the merits and reality of this “globalisation” of aspects of the constitutional dynamic. This reader found the thesis articulated at such an abstract level that practically any outcome might be justified in its terms. That global considerations—particularly the
demise of the USSR—played an important part in the transition is undeniable. But personal chemistry, low cunning, naked ambition, misjudgment, prejudice and good luck all had their part to play; and do not get the credit they deserve in this account.

But they do in Spitz and Chaskalson which is a very different book. These authors eschew the jargon that is ingrained in Klug and provide a factual account and analysis of what actually happened. The process was very complicated. There is an alphabet soup of acronyms that needs to be mastered if it is to be understood (and fortunately the authors provide a useful list of abbreviations and acronyms as well as a list of the dramatis personae and a chronology). But the authors guide the reader deftly through the process. It should be made clear that this book is about the negotiated settlement that underlay the adoption of the Interim Constitution and Bill of Rights of 1993. It is not about the Final Constitution of 1996 which has now replaced the Interim Constitution. However, the Interim Constitution is far from being of merely historical interest. Large parts of it have been carried over into the Final Constitution and from a political point of view the stratagem of having an interim arrangement during which the final constitution would be written within the constraints imposed by agreed Constitutional Principles was vital to the success of the whole process. Anyway the final chapter is a postscript on “The Final Constitution and the Legacy of the Interim Constitution” (pp. 422–427) and includes a clear account of the certification judgment—the process whereby the Constitutional Court first refused to certify the Final Constitution as complying with the previously agreed Constitutional Principles and then after appropriate amendment did certify the Final Constitution as complying.

Not all of the book is of the same value. “The Introduction to the Historical Background” (pp. 1–18) does not contain anything not well known although it may be helpful to the reader who knows nothing at all about the constitutional reform process in South Africa. And Chapter 18 on “Uncontroversial Rights and Freedoms” is, perhaps, sufficiently sensational to be omitted. But the heart of the book is very valuable.

This ranges over the structure of executive government including the device of the “sunset clause” imposing a multi-party government (Cabinet seats being allocated on the percentage of votes cast) for a limited period of time, the legislature elected by proportional representation. The representatives are drawn from a party list and there is an “anti-defection” provision which provides that a member’s seat is vacated if he ceases to be a member of the party that nominated him. This greatly enhances the power of the political parties and means in practice that the executive will dominate the legislature in ways that are bound to be unhealthy.

The judiciary—with a Constitutional Court set apart from the old judiciary tainted by its association with apartheid—is of perennial interest. There was a great battle over the process of judicial appointments. There was in fact an agreement between the outgoing National Party and the incoming African National Congress that the executive should have an almost free hand in the appointment of the judges of the Constitutional Court—and indeed Arthur Chaskalson, who went on to become President of the Constitutional Court actually defended an early version of this agreement! The Constitutional Court is, as already seen, very powerful and it is understandable that politicians should seek to ensure that the judges
were “politically acceptable”—in truth they wanted plum jobs for their supporters. But it is, of course, vital—particularly in a divided polity—that the judiciary should be truly independent and not beholden to any political interest. It is greatly to the credit of the small, liberal Democratic Party—the heirs to Helen Suzman—that it fought and substantially won the battle for a Judicial Service Commission. The DP gets little thanks and much criticism but it here made an important and noble contribution to the survival of the rule of law in South Africa.

Much more could be said about this fascinating read. The text is always clear and well informed and makes balanced judgments about the points of controversy. The constitutional principle and the low politics of the constitutional negotiations are blended in insightful and valuable ways. This book will be essential reading for those wanting to understand South African constitutional developments.

Christopher Forsyth


South Asia comprises seven countries—India, Pakistan, Bangladesh, Sri Lanka, Nepal, Bhutan and the Maldives. In spite of a diversity of cultures and peoples, these countries share religious, cultural and social traditions and a history of many centuries of colonial rule. One of the legacies of the latter is the lasting impact it has had on their customary laws and social practices. Legal systems based on English law (and in the case of Sri Lanka, Roman Dutch law as well) were applied concurrently with a diverse range of indigenous laws and customs which prevailed at the time of colonisation. In the process of interpretation and codification, the latter were often changed and re-shaped to reflect 18th and 19th century European legal values.

In the present day these countries are contending with complex socio-economic issues, ethnic strife and political violence which in turn raise important issues of rights and justice. Some of the current debates on human rights are rooted in the argument that international human rights standards are Eurocentric in character and do not reflect the indigenous social and cultural practices of the region, and are thus inappropriate to them. Many writers however, oppose this claim. Savitri Goonesekere has noted “These arguments on the ‘relative’ rather than ‘universal’ nature of rights eventually support cultural autonomy and state sovereignty—the two key concepts that have been continuously undermined by developments in the area of international law and human rights. The relativist position invariably leads to cultural relativism. A strategy of rights based on ‘universal’ human rights norms is viewed with suspicion as an effort to impose universalism on the basis of essentially Eurocentric cultural and legal values.” She also points out that the relativist position fails to take into account the historical interaction of civilisations in Europe and regions of Asia and Africa throughout the centuries, and says that “it tends to ignore the reality that there is a core value base in the written laws of these regions which are derived from indigenous traditions as well as from

This collection of essays on concepts of rights and justice in South Asia is timely and will make a valuable contribution to this debate. The essays are based on case studies spanning a period of around 250 years up to the present day, each dealing with a distinct issue. They are thought provoking and help to throw light on notions of rights in South Asian societies and their social and legal basis. Sumit Guha for instance identifies assumptions of rights in societies in 18th century Maharashtra within a region of “shifting political boundaries, often indefinite jurisdictions” in which existed “several written and unwritten bodies of law and custom.” Citing such examples as rights to land, office and service, rights in the household and the right to use force, he notes that the primary source of rights was custom which was based on “past balances of social power” rather than a universal conception of rights.

Many of the essays discuss the re-shaping, and sometimes obliteration of indigenous laws and social practices of pre-colonial India by the imposition of a colonial legal system and concepts of justice based on European legal values, as well as on the exigencies of colonial administration. Radhika Singh analyses the divergent concepts of colonial and local administration of criminal justice in the context of the prevailing social hierarchies in the Banaras Zamindari in the late 18th century. She describes the process of adapting and incorporating the prevalent norms in this sphere to British notions of justice, retribution and reparation and the conflicting claims of victim and State. Sandra Freitag addresses a more specific issue—the marginalisation of peripatetic non-peasant groups in the changing social order of the time. She analyses the implications of the colonial state’s criminal tribc policy as applied to these groups and its system of meting out justice to members of the latter collectively as a group rather than as individuals.

Studies on gender issues are well represented in this collection and some of them continue the theme of the colonial legal discourse and its impacts on indigenous laws. Two focus on personal and family laws. G. Arunima discusses the status of women within the matrilineal community of the Nayars of Malabar and the way in which codification of customary practices negatively impacted on them. Archana Parashar addresses a similar issue in the context of Christian personal laws and their application in India. The question which then arises is what (and whose) values do these laws now truly reflect? Radha Kumar and R.S. Khare have focussed on the realities of rights and justice to the more disempowered sections of society, one dealing with sex and punishment among mill workers in 20th century Bombay and other, a particularly illuminating account, discussing perceptions of rights among untouchable women today.

Some of the most insightful and perhaps disturbing chapters are placed in more recent times. Two authors (Jani de Silva and Pritam Singh) deal with issues of human rights in the context of civil unrest and political repression in the latter half of the 20th century. They discuss the ambivalence with which rights and the role of law and of the State, are perceived by those directly caught up in political violence. De Silva’s chapter on the views of teenage students in secondary school in Sri Lanka on the violence perpetrated by both the State as well as the insurgents, is both enlightening and disturbing. In their view, armed insurrections are
justified (or rather not unjustified) when the State has failed in its role to
give the people what is owed to them, in essence, the realisation of their
basic rights. On the other hand, while there is a certain cynicism about the
established legal order, the students were equivocal about condemning
State terrorism as a response to the brutality unleashed by the insurgents.
It appears then that where both actors are perceived as morally flawed,
concepts of rights and justice become correspondingly blurred. Singh’s
article on the Punjab crisis also reflects the “sectarianism” of the human
rights movement. He points out that while theoretically human rights are
universal in character, because of the divisions which exist in society they
are often used for narrow and partisan ends. Placing his argument in the
context of three periods of violence in post-colonial Punjab, he contends
that enforcement of human rights were not seen as an end in themselves
but as a means to an end, the end being the agenda of the various actors.
It appears then that rights are relative not only culturally but also
politically. Nilanjana Dutta’s chapter on the history of the Indian civil rights
movement reinforces this view, as he points out that often a person’s stand
on justiciable rights and what constitutes a violation of such rights depends
to a large extent on which side of the political divide he/she stands at any
given time. As de Silva has observed, a person’s ethical standpoint can also
be influenced by the fact he/she is placed in a life threatening environment
of extreme violence.

One shortcoming of this collection which must be noted is that, contrary
to its title, it is not a book on concepts of rights and justice in
South Asia but rather on India with a single contribution on Sri Lanka.
The editors have attempted to pre-empt the inevitable comment by stating
that while the contributions are predominantly on India they offer insights
relevant to other South Asian societies. While this may be so, South Asia
is a diverse region and each country is grappling with issues of justice and
rights in widely differing political, social and religious environments.
Contributions on at least the other major countries would have considerably enhanced the value and interest of this volume. Nevertheless,
it is an excellent and very readable collection of essays and makes an
important contribution to the scholarly literature on this part of the world.

Camena Gunawardena

Professors of the Law: Barristers and English Legal Culture in the
0–19–820721–2.]

This book is a worthy sequel to Professor Lemmings’s earlier research,
published as Gentlemen and Barristers: The Inns of Court and the English
Bar, 1680–1730 (Oxford 1990), which provided a superb social history of
the bar from the late Stuart to early Georgian periods. The present study
carries the story through 1800 while also broadening the enquiry,
examining not only the bar from an internal perspective but also the
“traditions of common law and lawyers, as perceived and represented by
non-lawyers” (p. vii). Together, the two books establish Professor
Lemmings as the leading historian of the legal profession’s upper branch in the long eighteenth century.

*Professors of the Law* is divided into eight chapters. Chapter one (“Introduction: the two stories of law”) explains the book’s project: to study eighteenth century barristers “from the inside, via records of their lives, their institutions and the courts” yet also to discuss “the other, more critical story of private law and society” (p. 9), meaning popular perceptions of the legal profession and the common law. Chapter two (“The work of the bar and working life”) takes an internal view of the bar, analysing the range of work that barristers did, from pleading in court to counselling in chambers. It also explores the barristers’ typical working conditions in London and on circuit. Chapter three (“Barristers and practitioners: numbers and prospects”) examines changes in the supply of and demand for barristers across the eighteenth century. Professor Lemmings has mined the records of litigation from Westminster Hall to gather four “snapshots” (p. 62) of the working bar, in 1720, 1740, 1770, and 1790 respectively. Using this material, plus records from the inns of court, he persuasively demonstrates that the bar was “rather diminished in Georgian times, and the volume of lawsuits fell considerably during the century…. But despite the apparently worsening odds [of making a living at the bar], recruitment never dried up, and numbers [of those called to the bar] bounced back [in the 1770s and 1780s] when times got better” (pp. 61–62).

In chapter four (“Gentlemen bred to the law: induction and legal education”), Professor Lemmings considers how young men prepared for careers at the bar. The inns’ educational function having ceased in the seventeenth century, intending barristers looked elsewhere for training: “Some favoured a preparatory spell at the university; some were apprenticed to attorneys; some paid to spend a period in the office of a special pleader; and some formed debating clubs with their fellow students. … [T]here was no clear uniform pattern; rather a series of options, and much confusion among students and parents or guardians as to what was best” (p. 108). This reliance on a catch-as-catch-can education prompted periodic calls for reform, with little success in the eighteenth century, although Professor Lemmings rightly points to the efforts of Blackstone and subsequent treatise-writers to organise and rationalise English law, making its study “fit for gentlemen, not drudges” (p. 145).

The next two chapters present detailed accounts of legal practice. Chapter five (“Practice at the centre: Westminster Hall and its satellites”) concentrates on barristers’ appearances before the central royal courts. This business, as one would expect, was distributed among barristers based on their ability and seniority; Professor Lemmings examines the entire spectrum, “from the almost briefless juniors to KCs and law officers who were overwhelmed with work” (p. 189). Moving from the prestige of Westminster Hall, chapter six (“Practice at the margins: the Old Bailey and the colonies”) considers the work of barristers in the comparatively seedy Old Bailey and the distant courts of Ireland and America. Chapter seven (“Advancement and promotion”) examines barristers’ prospects for promotion, both within the inns of court and throughout the legal system. The chapter also discusses a related matter: judicial independence. Despite the oft-repeated ideal of judges untouched by politics, the reality of the Crown’s extensive powers of patronage ensured, in Professor Lemmings’s fine phrase, “a high measure of consanguinity between judiciary and
executive” (p. 291). Finally, Chapter eight (“Conclusion: the culture of the bar and recession of the common law”) explores the barristers’ collective life. In the wake of the inns’ decline, we see the growing importance of rituals on circuit and of the recognition and honours given by the state (for example, the rank of king’s counsel). The chapter ends with a sustained meditation on the role of lawyers and common law in an era increasingly dominated by legislation. By the end of the eighteenth century, Professor Lemmings concludes, “the rule of law could hardly be associated with the ‘regular administration and free course of justice in the courts of law’; and their lawyerly elite of barristers, king’s counsel, and judges were bit-part players in its continuing drama. It was left to Parliament to mediate those famous ‘rights, or as they are frequently termed, the liberties of Englishmen’ as and when it saw fit” (p. 329) (quoting Blackstone).

Professors of the Law is a superb achievement, an example of the highest quality of legal-historical research and writing. Based on an impressive array of manuscript and published sources and written with clarity and style, the book contains insights, elegantly expressed, on nearly every page. The brief section on the Old Bailey in chapter six, for instance, hardly central to the book’s concern, might be expected merely to reprise pre-existing scholarship. Instead, Professor Lemmings has ventured beyond the previous literature, offering interesting suggestions on, among other things, why the role of lawyers in criminal trials became more prominent after 1780. This is a small example, but it nicely captures how well-researched and thought-provoking is this book. Historians of the long eighteenth century, and of the legal profession, are strongly encouraged to read it.

T.P. GALLANIS


The second edition of a well-received monograph is often anticipated with expectations which are not always fulfilled. This monograph by Professor Usher, however, fully meets my expectations. This edition is also timely for two reasons. First, there have been major developments since the first edition (1994) in the two areas of Community Law which are considered. A monetary union, with a single currency following within a few years, was achieved in 1999 by most Member States: this development raises important legal, institutional and policy questions which need to be addressed. Also, many important legislative measures have been adopted in the 1990s in the field of financial services which require evaluation. Secondly, there are relatively few books or articles published in these core areas of Community Law. This is surprising since the free movement of capital is one of the four fundamental freedoms identified in the 1957 Treaty of Rome (EC Treaty) as essential for the creation of the common market. Furthermore, the financial services market has become the single most important exercise of another fundamental freedom, the freedom to provide services. However, academic literature tends to focus more on the
remaining two fundamental freedoms, namely the free movement of goods and the free movement of persons.

Professor Usher’s second edition closely follows the structure of the 1994 edition. It does provide a more detailed Contents page which is always helpful to the reader who wishes to consult rather than to read. The first three chapters focus on money, the first two being revised chapters placing money within the context of the EC Treaty and considering the Treaty provisions and secondary legislation governing capital movements. The third chapter is new and is a substantial contribution to this edition of the work. It deals with monetary movements, taxation and the Treaty freedoms, clearly showing the tension that exists between Treaty rules relating to taxation and those concerning the four freedoms. As the European Monetary Union (EMU) emerges and the freedom to move money across national borders without incurring substantial risks (i.e., exchange and interest rate risks) becomes a reality, impediments to a competitive investment market are found in areas which have primarily been considered to be within the competence of Member States, namely national (differential) tax systems. In this chapter Professor Usher considers various aspects of taxation (e.g. tax incentives; tax discrimination) that have a direct impact on financial services and the free movement of money. He considers the interaction between various Treaty provisions and he analyses the case-law of the European Court of Justice on tax discrimination issues in the context of the fundamental freedoms: the free movement of goods, the freedom to provide services and the freedom of establishment. The analysis suggests that the Court’s interpretation of tax restrictions, allowing the Member States to have taxation regimes which permit discrimination on the grounds of residence, results in treating taxpayers differently depending on which freedom they are exercising.

The author then proceeds to consider the financial services sector with revised chapters on the application of EC competition rules to financial services, the Treaty rules on cross-border financial services, and secondary legislation adopted on banking, investment and loans: a considerable amount of legislation has been adopted in this area since 1994.

The final section of the book concerns the European Monetary Union. It comprises revised chapters on units of account to the euro, the development of the monetary union, monetary institutions and external monetary relations and influences, and a new chapter entitled “The ‘ins’ and the ‘outs’.” The revised chapters bring the reader up-to-date on various developments relevant to the subject matter. In the new chapter Professor Usher examines the substantial legal difficulties that will arise in the practical operation of the EMU as envisaged, and he discusses the range of judicial remedies in respect of EMU measures that may be available to those Member States (and their nationals) who have opted-out of the EMU system.

As with the first edition of this work, Professor Usher has succeeded in making a difficult area of Community law accessible to the reader. Anyone interested in the operation of the European single market cannot ignore this area of Community law. The free movement of capital and the cross-border provision of financial services are central to the functioning of the European single market. The EMU will have an enormous impact on that market irrespective of whether all Member States participate in it. This
clear, readable and critical exposition of an important area of Community law is highly recommended.

Rosa Greaves


Dr. Benjamin has written an excellent book on the international securities markets. The first chapters giving an introduction to securities and interests in securities, to the markets themselves and covering the difficult area of the legal nature of securities are particularly good. Here is plenty of background information, attractively laid out and intelligently explained. Anyone who is working in this subject will benefit from a close inspection of these chapters. They are followed by chapters covering “delivery” of securities through transfer or by way of collateral, the creation of security interests and collateral transfers. This part is followed by chapters on the problems these bring to conflict of laws and clearing houses. Dr. Benjamin’s next chapters cover settlement and global custody (on which she has already written extensively), prime brokerage and straight through processing—on the latter there is precious little caselaw. She then covers depositary receipts and managed funds, followed by collateralised bond obligations. At the end are two chapters of conclusions. There is also a useful glossary and a few diagrams to enlighten especially complex points. It is not a book with a central theme, nor one meant to be read through. The chapters are relatively self contained and can be read in isolation. However, this means the chapters are often dislocated from one another. Although there are references to some of the markets that operate across borders, in reality this book is mostly concerned with English law and the markets in securities that that law has enabled. The chapter on security settlement is confined to the United Kingdom—by which the author really means England.

The penultimate chapter provides an interesting sketch through the difficulties that English law has had with determining the boundaries of “property”. This chapter is the author’s mostly successful attempt to show that the client enjoys “proprietary” rights against the intermediary, at least in English domestic law. She acknowledges that our continental European neighbours have adopted a definition of property that depends more on a physical asset which has led to problems with international markets which Chapter 7 on conflict of laws outlines. It may well be that there is no solution to these particular problems. An English lawyer will automatically think and characterise questions such as these in terms of a trust or security, and prefer the creative and commercially attractive solutions that English law allows. A civilian lawyer will find such answers completely alien. Ultimately and understandably Dr. Benjamin argues for the common law approach.

Few academics have the practical insight that Dr. Benjamin has from her years in practice with Clifford Chance and by publishing this work she has done academe a great service. However, anyone looking for in depth
questioning of the practical solutions to the difficulties in this area or of exposition of principle which should always underpin the rules may find this work frustrating. It is a “black-letter” work, elucidating an extremely difficult and complex area of law and practice. Nevertheless, one suspects that Dr. Benjamin is careful not to “rock the boat”, not to challenge the edifice which she is writing about. She is generally in favour of pragmatic solutions which favour the market use of these securities. There are remarkably few cases of the modern era to guide one so a good deal of the book is necessarily descriptive. That is not to say that there is not deep scholarship here. From Justinian to Birks, and from the eighteenth century to the present day, Dr. Benjamin has covered a wide range of material.

The world of international securities markets changes frequently in response to the needs and fears of the market. Law can take a very long time to catch up, as it is only when cases are brought that law is laid down. Describing its present state and practices is no mean feat and Dr. Benjamin is to be congratulated greatly on it.

Pippa Rogerson