BOOK REVIEWS


When, in 1845, the Middle Temple resolved to provide teaching for aspirant barristers, they looked for a Reader in Roman law. An eccentric choice, undoubtedly, but in the perception of contemporary lawyers not an utterly irrational one. In the middle of the nineteenth century, legal history—Roman legal history at that—was a basic part of the intellectual apparatus of the legal practitioner. Things have changed since then. Nor is the displacement of legal history simply an English phenomenon. In his Clarendon lectures, Roman Law, Contemporary Law, European Law, Reinhard Zimmermann explores the theme from a German perspective and examines its implications in the wider context of twentieth and twenty-first century Europe.

The first lecture outlines the shift. In the first half of the nineteenth century, legal history (by which was meant predominantly Roman law) played an essential part in basic German legal education. By the first half of the twentieth, in Professor Zimmermann’s words, legal history had become historicised: it was a specialist discipline, with its own concerns and its own methodology. One aspect of this was its professionalisation, most obviously visible in the Roman lawyers’ concern to establish a proper textual basis for their historical studies (or, alternatively, their obsessive pursuit of interpolations in Justinian’s Corpus Iuris). In many ways this professionalism was thoroughly beneficent, in so far as it was associated with the testing of old orthodoxies and the debunking of old myths. But it had its negative side, too, in so far as it cut the link between legal history and modern law. Legal history—be it Romanist legal history or Germanist legal history—became just another subject that one might, or more normally might not, study in the course of one’s legal education. Legal history was no longer diffused throughout law faculties but was increasingly focused on the work of only a handful of individuals (most notably Ludwig Mitteis) and their students, and legal historians increasingly wrote for a specialised audience who shared their concerns and preconceptions. Meanwhile, law became a-historical.

It is all too easy to suppose that the changes in the German legal landscape from the second half of the nineteenth century were associated with the enactment of the BGB and its coming into force in 1900. Before this, one would expect Roman law to have a central position in German legal studies; after this, one would expect it to be superseded by direct study of the text of the Code. The truth is more complex. In the second lecture Professor Zimmermann demonstrates that the BGB did not operate as a stark discontinuity between the old order and the new; quite the contrary, private law continued to develop along the same pathways as it
had been travelling before 1900. This is visible, for example, in those areas of the law of delict where the courts seemed to be at their most inventive: the classification of protected interests, liability for omissions, liability for third parties. So too in the law of contract: the development of the clausula rebus sic stantibus, the exceptio doli generalis, the doctrines of culpa in contrahendo and “positive breach of contract”, and the rules relating to third party losses can all be traced back to movements that were already well under way before the enactment of the BGB.

It follows that if we are to adopt a historical approach to understanding the German law of the present day, it is wholly artificial, positively misguided, to begin our study in 1900. We need to go back before the BGB, through the nineteenth century pandecticism and the eighteenth century usus modernus pandectarum, right back to the fons et origo of German legal thought in the law of the Romans. And Professor Zimmermann is surely right in his supposition that it is only through the adoption of a historical approach that we can understand the law of the present day: law at any given moment is part of an ongoing tradition, and we err badly if we try to grasp its nature without taking this dynamic element fully into account.

The third lecture builds up on this conclusion. Since the BGB did not mark a new beginning—and the same is true of the French Code Civil and the other continental codifications—we can trace the historical roots of modern European private law(s) back into the more or less homogeneous ius commune which prevailed across continental Europe from the later Middle Ages onwards. For all the diversity that exists within the European legal tradition, at the root of it there is a substantial unity. Legal historians might quibble about the precise balance between diversity and unity, but none would deny the truth of Professor Zimmermann’s basic proposition. Importantly, it needs to be stressed that this is not just a rehash of the ultra-simplistic proposition that continental European legal systems are based on Roman law as a result of some sort of crude borrowing of Roman rules. It is more that, as a matter of historical observation, continental European legal systems have developed by the progressive adaptation of Roman law principles to changing circumstances, repeatedly taking advantage of the elasticity and potential for growth present within these principles themselves. It is not far-fetched to project this forward too: as we move towards the harmonisation (and this is not the same thing as uniformity) of European private law, it is not unreasonable to suppose that it is through the continuation of this process of the adaptation of Roman principles that this will be achieved.

But it is not just continental law that is held together in this way. At a deep level, Professor Zimmermann argues, the English Common law is part of exactly the same legal world. European legal history is European legal history; the harmonisation of European private law should be the harmonisation of European private law. No doubt this thesis will be unpalatable to the “England is England, England is Best” school of law, but there is a good deal of substance to it. The two great mixed systems of Common and Civil law, Scotland and South Africa, show how the two legal cultures can in reality intertwine; and we are given a wealth of examples (from recent research into comparative legal history) of English law itself developing along the same pathways as continental legal systems. Even the trust, it is coming to be argued, has a European aspect to it.
This is an important thesis, and one that has been the subject of debate amongst legal historians and comparative lawyers for some years. However—picking up the theme of Professor Zimmermann’s first lecture—the compartmentalisation of lawyers’ thinking has meant that much of this debate has by-passed the non-specialist audience. No doubt it still will. But the whole point of the Clarendon Lectures is to enable the best of modern legal thinking to be brought out into the wider domain of legal scholarship. Oxford University Press, the Oxford Law Faculty, and Professor Zimmermann have done their parts of the job; it is now for the audience to do its.

DAVID IBBETSON


A SIGNPOST does not give unambiguous guidance to one who has never before encountered such an object. One needs to understand the gesture of pointing, and to see that the signpost is meant to mirror that gesture. One needs to realise that the signpost is meant to give practical guidance, and not just gratuitous information: if, in a London park, we encounter a signpost saying “The Lake”, it is unlikely to be referring to Windermere, even if it happens to point in precisely the right direction. One also needs to realise that the signpost provides practical guidance but is not intended as an algorithm: to take a compass bearing along the line of the signpost, and then follow that bearing through bushes and flower beds, may not be the best way of reaching the lake. So following a signpost can be quite a complicated business, requiring a host of background understandings that may be hard to articulate.

Exactly the same is true of rules. Suppose that we are to be guided by a certain rule. Does that mean that we should take account of the rule along with many other considerations? Or does it mean that we should have regard only to the rule? If exclusive concern for the rule is what is required, does that mean that we must not interpret the rule in the light of our understanding of its purpose?

Lawyers who are familiar with the workings of a well-established legal system tend to be remarkably blind to the way in which their practices depend upon such background understandings. Being so thoroughly immersed in the relevant assumptions, they tend to view rules and signposts as completely self-explanatory, forgetting that these can function only in an intellectual context that it is the lawyers’ job to interpret and perhaps (on occasions) to question. Since the rules appear to be so self-sufficient, what need of legal theory?

This lack of lawyerly self-awareness finds a weird echo within the ranks of legal theory. For the post-Hartian generation of legal theorists is anxious to defend a supposed watershed that divides the questions of legal theory from practical questions concerning the proper application of the law. Legal theory, we are told, adopts an “external” perspective quite different from the viewpoint of the judge or citizen within a legal order. To confuse
an (external) “theory of law” with an (internal) “theory of adjudication” is to reveal one’s innocence or simple vulgarity. Legal theory, it seems, has no special relevance to the problems of doctrinal legal thought. As Joseph Raz observes in a recent essay, “There is no denying that questions about the nature of law can arise in courts, and can feature in judicial decisions. But so can just about any other issue, from astrophysics to biology, sociology, and the rest”.

This lemming-like rush by legal theorists to consign themselves to total irrelevance is a product of two closely linked factors. One is their sheer lack of concern for the history of theoretical reflection upon law, which has (until recently) always been closely bound up with the intellectual problems of systematising, expounding and applying a legal order. The other factor is their comfortable assumption that legal systems with settled criteria of recognition and shared background assumptions are the natural order of the day, so that situations where these happy conditions do not prevail can be confined to the margins of the subject as “pathological” cases.

When societies undergo the catastrophic horror of revolution or military defeat, or when rapid social change erodes familiar structures, lawyers may have to grapple with new laws and new constitutions; or they may have to fit the old law to dramatically changed circumstances. In such situations, background understandings are lost, eroded, or called into question; and at this point, the ordinary tasks of doctrinal legal thought come to be inseparable from the intractable disputes of legal theory. The dependence of legal thought upon contestable visions of the political community is, of course, not limited to such traumatic periods: the breakdown of normality does not represent the pathology of law, so much as reveal its continuing nature.

Jacobson and Schlink have provided the reader with a most useful collection of writings that illustrate this point. Translations of writings by Jellinek, Kelsen, Schmitt, Triepel, Heller and numerous others illustrate the intense and fascinating controversies about the foundations of the constitution and the nature of law that raged in the Weimar republic. Each set of extracts is helpfully introduced by a modern commentator, so that the complete novice (your reviewer) is rapidly given an insight into territory that is normally reserved for specialists. The fact that doctrinal and legal-theoretical disputes played a not inconsiderable part in Hitler’s rise to power lends a grim aspect to these debates from long ago, but should also serve to remind us of their importance.

One of the most fertile eras for legal theoretical reflection was the seventeenth century, for in that period Europeans confronted a dramatically changed political and religious landscape that forced upon them new models of legality and new conceptions of right. There have been other such periods: the Weimar republic offers us only one chilling example. Such periods have been followed by long spells of fine weather, when legal theory becomes a pleasant activity for the seminar room. Perhaps, however, the comfortable times of settled criteria and shared understandings are disappearing from the world. If that is so, lawyers will increasingly and continuously have to assimilate new conceptions and approaches, and will have to adapt familiar materials to a changed context of background assumptions. Ordinary legal thought may have to replace the taken-for-granted background with the permanent need for theoretical reflection. It will be a shame if, when the hour comes, legal theorists have
decided only to address each other, enjoying a harmless intellectual game while the world groans.

N.E. Simmonds


Arthur Ripstein has written quite an uneven book on the moral fundamentals of Anglo-American tort law and criminal law. He endeavours to delineate a justificatory framework of liberal principles underlying the chief doctrines of the aforementioned areas of law, and he seeks to show that those principles also structure contemporary philosophical debates about distributive justice. The second half of the book (from Chapter 5 onward)—which concentrates on criminal law and distributive justice—is generally more impressive and subtle than the first half, which concentrates on tort.

Ripstein sets forth his basic thesis at the outset of the book. He maintains that tort law and criminal law are aimed at holding people responsible for their conduct in ways that will ensure the fairness of the terms of their interaction. Such fairness consists in a principle of reciprocity, "the idea that one person may not unilaterally set the terms of his interactions with others" (p. 2). When reciprocity is achieved—through suitable institutions of tort law, criminal law, and distributive justice—everyone bears the costs of his own choices to an appropriate extent.

While Ripstein’s explorations of his basic idea of reciprocity in connection with criminal law and distributive justice are not free of shortcomings, they are interesting and illuminating on the whole. By contrast, his application of that idea to tort law in the first half of his book—though not devoid of virtues—is more jejune and contrived. One defect in that first half of the volume is the ponderousness of the prose and the argument. The prose suffers from verbosity (and also from a host of minor solecisms and misprints that could and should have been removed by a copy-editor), and the argument gets off to a slow start. Ripstein sets the stage for his own position by attacking two versions of libertarianism, one of which has never been espoused by anyone (as he himself acknowledges) and the other of which has been very heavily criticised by previous scholars. To those earlier criticisms he does not really add anything of importance. Hence, by the time he unfolds his own approach to tort law in his third and fourth chapters, readers can be excused for feeling slightly weary.

Sundry weaknesses, both general and specific, detract from Ripstein’s discussions in his third and fourth chapters. Only a few of those difficulties can be highlighted in a short review. One general source of dissatisfaction is Ripstein’s decision to frame his whole analysis by reference to a conflict between liberty and security: “Each [party] has a liberty interest in going about his or her own affairs, and a security interest in being free of injury . . . An unlimited interest in security would prevent others from acting, because virtually all action creates a risk of injury. Conversely, an unlimited interest in liberty would make the security of one person hostage
to the choices of others” (p. 49). Although North American theorists of private law are greatly enamoured of the liberty/security dichotomy, a little bit of reflection reveals just how unhelpful it is. Consider, for example, a traffic light. When it signals green for me and red for the motorists on a perpendicular street, is it thereby promoting my liberty to move through an intersection or my security against being hit by a car from the perpendicular street? In this humdrum scenario as in countless other ordinary scenarios, the liberty/security dichotomy is an obfuscatory distraction.

Ripstein’s tendency to resort to hyperbole when characterising the targets of his arguments is likewise something that impairs his analyses. For example, when endorsing the exclusion of liability in negligence for purely economic losses, Ripstein contends that “protecting all economic interests would place too great a burden on the liberty of others. If I could not act unless I was sure that your financial position would not be adversely affected, I could not act at all” (p. 50). Since the relevant protection of other people’s economic interests would be conferred by a negligence standard, it would patently not require anyone to be certain that no adverse impact on those interests might follow from his or her actions; rather, it would simply require reasonable care. Hence, although the exclusion of liability in negligence for purely economic losses may well be justified, Ripstein has not adduced any reason for the exclusion.

Nor is he any more effective when he derides the famous test broached by Learned Hand for ascertaining whether someone has acted with reasonable care. Hand’s test specifies that a defendant who has not taken some accident-averting precaution(s) is to be deemed negligent if and only if the cost of the precaution(s) would have been lower than the expected cost of the accident multiplied by the probability of the accident’s occurrence. A few of the remarks by Ripstein on the Hand Test are correct (though entirely unoriginal), but some of his further criticisms are dubious in at least two respects. First, he contrasts his own approach with that of the Hand Test by maintaining that his standard of reasonable care “is defined in terms of fair terms of interaction in general. If a security interest is protected against a certain type of risk, that protection is not lost because precautions would be more expensive than compensation on a particular occasion” (p. 60, emphasis in original). The ostensible contrast with the Hand Test is spurious, since that test can be focused—and usually is focused—on general types of mishaps rather than on particular occurrences. Second, Ripstein poses a standard complaint against Hand’s criterion when he asserts that “[t]here is much that is puzzling about such a picture, notably its readiness to leave costs where they lie in just those cases where it would have been more expensive for the injurer to take precautions than for the victim to bear them” (p. 60, emphasises in original). This objection ignores the reverse Hand Test favoured by numerous law-and-economics theorists, whereby a defendant whose actions have injured someone else is to be deemed liable unless the cost to the victim of avoiding the accident would have been lower than the expected cost of the accident multiplied by the probability of its occurrence. In other words, although the original version of the Hand Test is susceptible to Ripstein’s censure, his query can be addressed without an abandonment of the categories and techniques that are at the centre of the law-and-economics movement.
Although many other inadequacies and some strengths in the first half of Ripstein’s book could be mentioned, this review will close with a quick look at his treatment of cases—often known as “mass-tort cases”—in which manufacturers of harmful pharmaceutical products are held severally liable to the victims of those products in proportion to the manufacturers’ shares of the relevant markets. (In each such case, the product that caused any particular victim’s injury cannot be traced to any particular manufacturer.) Richard Wright has persuasively argued that the manufacturers in such cases are held liable for having tortiously exposed people to certain types of risk, rather than for having caused the actual injuries which those people undergo. Ripstein takes a contrary view: “Where it is clear that one of the defendants caused the injury, and the undisputed negligence of multiple defendants makes it impossible to show which one caused it, the defendants are not entitled to the benefit of the ordinary [burden of proof concerning causation]. The point is not that they are being punished for creating the risk. It is rather that they must forego [sic] the procedural benefit that results from their carelessness” (p. 79). The problem with this line of argument is that it does not square with the actual holdings in the cases under consideration. If Ripstein were correct, the courts in the mass-tort cases would be holding each defendant severally liable for the entire amount of each victim’s losses. In fact, however, each manufacturer’s liability for those losses is only for the proportion which corresponds to that manufacturer’s market share in relation to the market shares of the other defendants. (In precisely this respect, the mass-tort cases differ from cases such as Summers v. Tice.) That pattern of liability tallies with Wright’s analysis of the holdings, and is at odds with Ripstein’s account.

In short, Ripstein’s attempt to unearth the moral foundations of Anglo-American tort law is marred by a number of dubious arguments (and also by his propensity to beg various questions, which has not been highlighted in this review). Still, the discussions of criminal law and distributive justice in the second half of the volume deserve the attention of any readers interested in legal and political philosophy.

Matthew H. Kramer


Peter Skegg’s Law, Ethics and Medicine (Clarendon Press, 1984) set the standard for medical law monographs published in the UK. Since the publication of that classic work there have been few monographs published by British medical lawyers, and even fewer of comparable quality. How does Legal and Ethical Aspects of Organ Transplantation, whose subject-matter, coincidentally, overlaps considerably with Skegg’s book, compare? Its author is David Price, Professor of Medical Law at De Montfort University. He is certainly well qualified to write about organ transplantation, not least because he was Chair of the EUROTOLD project, a European Commission-funded research project into the practice
and legal and ethical aspects of living donor organ transplantation in Europe. He writes in the Introduction that the major aim of his book “is to assess the legal and ethical character of existing transplantation practices and legal regimes and proposals mooted to increase the supply of organs” (p. 17).

The book is divided into three parts. Part I deals with dead donors, Part II with living donors, and Part III with “general issues”. Part I comprises an introduction and five chapters: “Why and when is a potential donor a cadaver?”; “Organ procurement systems”; “Interests in the corpse”; “The maintenance and preservation of the cadaver”; and “The treatment of potential donors prior to death”. Part II consists of an introduction and three chapters: “The rationale and limits of living donor transplantation”; “Informed consent to living organ donation”, and “Contentious classes of donors”. Part III contains two chapters: “Commerce” and “Recipients”. There is also a concluding chapter.

First, the book’s strengths. It is an impressively-researched volume, a cornucopia of relevant data and interesting material, and deserves to become a standard work of reference. It will be a valuable resource for those involved in the clinical, ethical, legal, and public policy aspects of transplantation. The author marshals his material well and weaves it together with ethical and legal discussion so that it transcends dull description. The discussion spans the fascinating range of critical questions in this area, including the definition of death and proposals to increase the supply of organs by enacting legislation to presume consent to donation after death or to allow the selling of organs. Price’s consideration of these questions is often thoughtful, balanced and challenging.

Now for the book’s main weakness. While the author’s handling of the clinical data is impressively competent, and his legal analysis fluently confident, his discussion of matters ethical is less sure-footed. This is not to say that his ethical conclusions are wrong. On the contrary, many of them, such as his support for the “dead donor” rule, his opposition to using anencephalics as a source for organs, and his criticism of organ trading, are ones which many will with good reason endorse. Further, his analysis of certain issues, such as transplantation from minors, and the arguments for and against organ selling, are impressive. The problem is that his ethical conclusions do not always consistently seem to follow from his premises, and that those premises sometimes appear inconsistent. For example, discussing cadaveric donation, he supports the “dead donor rule” which permits the removal of organs provided the donor is dead. He writes that the rule should be retained without exception for any class of individuals, such as anencephalics. (p. 181). However, commenting on proposals that, once a decision to allow a patient in persistent vegetative state to die has been made, the patient should be given a lethal injection so that their organs can then be used for transplantation, he comments that, assuming the two decisions could be kept separate, the proposals, “have much to commend them” (p. 184). However, as Price points out, death in such a situation “might be viewed as having been caused for organ retrieval” (p. 175, original emphasis.) Moreover, Price appears to hold that there is nothing wrong with intentionally killing patients in pvs, at least if death is thought to be in their best interests. It is not clear why he should object to killing patients in pvs (or, indeed, anencephalics) by removing their organs.
Again, he states at one point (p. 201) that in the absence of consent incoherent patients should not be used wholly as a means to satisfy the needs of others, but at another point (p. 212) seems to endorse the Law Commission’s proposal that the Secretary of State should be allowed to authorise non-therapeutic use of incompetent patients for the benefit of others, provided it causes “no significant harm” to those patients. Of course, there are those who would argue that patients in conditions such as PVS are beyond “harm”.

As these examples illustrate, the author’s ethical position sometimes appears incoherent, opaque and seemingly inconsistent. The book would have largely avoided this criticism had it sought merely to review the ethical literature (which is what it largely in fact does) but by (rightly) seeking to assess ethical arguments, it promises more than it delivers. And although it is much more impressive as ethical review than ethical analysis, there is at least one surprising omission from that review: the concepts of anatomical and functional integrity, which have long played a central role in ethical analysis of transplantation.

Despite the fact that the book’s ethical analysis is not as strong as its legal analysis and its review of transplantation practice, the book is a valuable, useful and timely addition to the literature. It deserves to be widely read and to sit alongside Skegg’s.

**John Keown**


Connoisseurs of the *Encyclopaedia Britannica* treasure one edition of it above all others: the eleventh, produced in 1915 at the end of an era of (by and large) peace, prosperity and supreme confidence in the Anglo-Saxon way of doing things. Lord Bryce, lawyer and polymath, was chosen to write the introduction. Not surprisingly, he immediately saw what the problem was with a work conceived in such grand compass. Two or three hundred years earlier, he said, an enthusiast in a given subject could have assimilated “nearly all that was worth knowing, and perhaps a good deal of what was best worth knowing in several other fields also.” But he realised that, even in 1915, this no longer worked. No work could any longer pretend to universality: polymathy had of necessity become selective.

Professor Birks and the team behind the ambitious two-decker entitled *English Private Law* have, I suspect, faced much the same difficulty. It is openly admitted that the inspiration of Gaius’s *Institutes* or Justinian’s *Digest* looms large behind it. The new work aims to replicate them, or at least what was best in them. The whole of private law is to appear, from sources of law, through the law of persons, things and obligations, to the law of actions (what we, less elegantly, call remedies or civil procedure). A magnificent project indeed: but an awkward one. Times have changed. Catholicity is obviously impossible: *Chitty on Contracts* alone is as long as *English Private Law*, and for comprehensive coverage one will always have to look elsewhere. (Incidentally, that does make one wonder why the
publishers here envisage periodical supplements appearing, *Cui bono?*). It is equally clearly out of the question to provide an authoritative text in the old grand style, a first point of reference to which commentators attach—as civil lawyers once did to Justinian and Scotsmen still do (sometimes, at least) to Stair. There is just too much law, and that is too varied.

But what, then, should go into these would-be *Institutes of English Law*? A series of simplified summaries of the confused mass of statute and jurisprudence that go to make, say, contract or family law will not fit the bill. Collections of potted précis can have no pretension to be anything more than undistinguished sums of unimpressive parts. On the other hand, changing the discussion to a disquisition on generalities—the broad trends behind a given area of law, or the social interests protected by it, for example—carries its own problems. This is, after all, meant to be a book of English private law, not an account of the social or other background to it.

We are left, I would suggest, with something like this. As regards each division of the law, what we need is, first, a lucid account of the logic and legal principles behind it; second, a critical appreciation of why English lawyers think that way about it; and third, where necessary a sketch of other intellectual approaches which might be better. Put another way, we are talking about something which, if an educated French or German lawyer with no knowledge of England or its legal tradition read it, would enable him to hold intelligent converse with a common lawyer without suffering from vacuity or information overload.

How well does *English Private Law* fit this demanding bill? The answer, of course, varies across different chapters. Not all the authors can write as well as the others, and it would be unfair to deny that parts of it are disappointing. Nevertheless, these are very much in the minority. As regards the vast preponderance of the work, the job has been done quite impeccably. Look at random through the chapters on (say) property, intellectual property, security (real and personal), and judicial remedies, and you will get a consistent and overwhelming impression of sheer quality and erudition. In every case there is little surplusage; the exposition is logical and perspicuous; and you are never bogged down in the detail. A part I particularly liked was that on agency and representation. This is an awkward topic, where legal thinking varies largely between different European legal systems, and where in many ways the common law approach is comparatively idiosyncratic. But here the coverage was just right: pellucid as to principle without becoming Germanically abstract, aware of comparisons from other systems without detachment from its English roots.

Moreover, much of the praise for this must go to the direction emanating from Professor Birks (who also, incidentally, co-wrote the highly impressive chapter on unjust enrichment). Indeed, his passionate advocacy of right classification and logical structure, for the common as for the civil law, would be worth reading even if the rest of the book were not there. But it is this pervading theme, that the law must be seen in the light of the logic behind it and of the structure underlying the whole idea of private law, which lends coherence and rigour to the book as a whole. It is abundantly clear that each chapter has been written with one eye on where its subject-matter fits in to the scheme of things, and as to how the joints can be made as smooth as possible. It is this, indeed, which makes the
production a grand book of English law in the round, rather than a mere collection of essays on particular parts of it. This is educated writing in the best sense: if anyone were to read it from end to end, he would undoubtedly be able to claim a knowledge of English private law and the culture of thought behind it which is second to none. And what more could one ask than that?

ANDREW TETTENBORN


Comparison at the level of general principles runs the dangers of either superficiality or, worse still, distortion. It assumes that problems will present themselves in ways which the general principles can capture adequately.

Following the methodology of Schlesinger, the Trento project has taken as its core a focus on hypothetical case studies. Short fact situations are examined by experts from a number of legal systems. Their reports are presented under each case study, together with a summary and an editor’s commentary. The advantage of this approach is that each national reporter has space to explain the particularity of her system without the need to fit the solution into some grand theoretical framework, nor to align herself to the solutions of other members of its “legal family”. Each report is free-standing. Such a methodology proves its worth in relation to the enforceability of contracts because national systems have a wide diversity of rules on formalities, of conceptual frameworks into which particular promises might be fitted, and of overall policies.

The key to success in this method lies in the design of the case studies. They have to be chosen to bring out some of the distinctive features of a number of legal systems, especially where they diverge either in result or in the method of reaching it. But they also have to be well focused to ensure that the solutions are found overwhelmingly through the general principles of contract law, rather than in specific and idiosyncratic national rules. The editor thus needs to know the likely range of national approaches in advance, even if not the detail of all systems. The case studies are thus as much a pedagogic as a heuristic device. It is to the credit of the editor that the design of this selection of case studies produces focused and illuminating discussions. His essential ability is to know what are live issues.

Success also depends on the discipline shown by the writers of national reports. They need to write with an awareness of what features make their own system distinctive in relation to the rest of the national reports. It is clear that some authors, such as the Belgians and Portuguese, are well aware of neighbouring systems and those which have influenced their system. On the whole, the larger jurisdictions show this awareness less, and so there is often limited dialogue between the national reports. Some national reports are considerably longer than others, without this being justified by differences in the complexity of the law. For example, on Case 9, the Italian report is 8 lines long, while the French occupies 5 pages.
Some greater rigour in pruning away speculative comments and analyses is required, once the national reports have been compared with each other.

The introductory chapter provides a succinct and useful overview of the historical development of contract law in the civilian and common law systems. This provides the reader with the essential architecture of concepts and ideas that will be discussed in the case studies. But there is a recognition that national legal systems have their own distinctiveness. Even with broadly the same text to interpret, the Belgians and French diverge quite significantly on their approach to what should be enforceable. Indeed, one of the advantages of this book is that it takes the reader beyond the superficial similarity within legal families and confronts the differences between systems with a common pedigree, as well as the similarities between those of different origins.

The core idea of the work is that, in the area of the enforceability of promises, the different legal systems are engaged with similar underlying concerns (pp. 1–2 and 371). The case studies are grouped to reflect these issues. In relation to gifts and favours, most systems require some formality and are concerned to avoid imposing expense on the person undertaking the favour. By contrast, the law is more ready to enforce promises to pay for benefits already received, but in relation to which a pre-existing duty to pay is unenforceable. Different concerns attach to the issue of whether a promise to pay more or to pay less for an existing contractual right is enforceable. Finally, where long-standing and open-ended commitments exist, then the law is concerned often to ensure that it remains fair to enforce the promise. In each area of concern, there are competing considerations that often conflict and the different legal systems make the different choices, which the case studies bring out. Similarity lies essentially neither in the solutions nor in the legal concepts and doctrines, but in the issues with which legal systems grapple. In the “epilogue”, Gordley tries to suggest ways forward which involve the need to balance competing considerations in the circumstances of the individual case, rather than to adopt a new conceptual framework or grand theory. The conclusion is thus that comparative work can clarify the common issues, rather than suggest the “best solution”.

Inevitably, one could argue with the framing of the study. It focuses on the general principles of contract at a time when many of the key debates are about the enforceability of specific forms of contract: consumer sales, of public contracts, of contracts of employment, on cohabitation agreements, and so on. Such a diversity calls into question the focus on general principles of contract as the core of contemporary issues on enforceability. But one cannot cover everything at once, and the methodology of the book could be applied with profit to these areas as well.

The case study approach is a very helpful and accessible teaching tool. The book is clearly structured and generally well-written, though a bibliography would help in following references. The introductory and concluding chapters stand in their own right as succinct and readable works of scholarship. Scholars and students can then dip into a selection of the cases to see in depth how the different systems work at a concrete level. This is a book which will be used extensively as an aid to the greater understanding of contract laws in western Europe.

John Bell

This is another work in the valuable series Oxford Monographs in International Law. It examines the topical subject of the criminal liability of States in international law, a matter which has been for the moment overshadowed by the development of individual criminal responsibility culminating in the Rome Statute of 1998.

The book is divided into five parts. Part I consists of an historical introduction to the concept of State criminality starting with Article 227 of the Treaty of Versailles whereby the Kaiser was arraigned “for a supreme offence against international morality and the sanctity of treaties”, a measure which, though it proved futile, some regarded as an attempt to convict the State through its titular head. It is pointed out that after 1945 individual responsibility under international law for crimes became well established while the criminal responsibility of States, though not rejected, was regarded as an unworkable concept. Part I goes on to analyse subsequent development, particularly the work of the International Law Commission. In 1980, the Commission provisionally adopted draft Article 19 which stated that it is an international crime for a State to breach an international obligation so essential for the protection of fundamental interests of the international community that its breach is recognised as a crime by that community as a whole. Part II deals with the juridical status of the concept of State criminality, in particular the concept of criminal organisations as discussed in the Nuremberg trials and also the possibility of regarding it a “general principle of law” drawn from the analogy of the criminal responsibility of corporations in national laws.

Part III discusses the criteria for identifying State crimes and distinguishing them from delicts as well as the indicia pointing to the inclusion of particular acts in the category of State crimes. After a concise discussion of the concepts of *jus cogens* and obligations *erga omnes* (as mentioned in *Barcelona Traction*), the author then suggests criteria including international community recognition, seriousness, shocking the conscience of mankind, and violating “elementary considerations of humanity” (as stated in *Corfu Channel* and more recently in *Tadić*), and the peace and security of mankind. Furthermore, she considers that the development of individual criminal responsibility under international law since 1945 is relevant to the extension of criminality to the State itself. In Part IV, the author discusses the practical implications of ascribing criminal responsibility to States, in particular the problem of the availability of appropriate punishment, particularly punitive damages, as well as the institutional framework and procedures which would have to be in place. Part V, finally, deals with the status of the contemporary concept of State criminality. After discussion in particular of the Genocide Convention and the case in respect of it currently before the International Court of Justice, she concludes that State criminality is an “emergent” general principle of international law and an “emerging” category of customary international law.

No sooner was the book published in the latter half of 2000 than Article 19 was removed from the International Law Commission’s Draft
Articles, a step which has received some, although not unanimous, support from members of the General Assembly’s Sixth Committee. The author might well have been irritated by this but she would not have been surprised, because she foreshadowed (at p. 262) the possibility of such removal. The book is comprehensive, lucidly-written and stimulating. It deserves to serve as a handbook for those who will be called upon to shape the future of this important concept.

GEOFFREY MARSTON

International Organizations before National Courts. By AUGUST REINISCH.

ONE of the more obvious developments in international law since 1945 has been the proliferation of international organisations. There is probably no capital in Europe which does not host the headquarters of an international organisation. London has several, of which the International Maritime Organisation at Millbank is the largest in terms of its membership. While performing their international functions, these organisations have to live in symbiosis with the legal systems of their host countries, a relationship which from time to time falls to be examined in the local courts. In some jurisdictions, particularly in Italy and the United States, the scrutiny has been from time to time intense. In England, furthermore, the insolvency of the International Tin Council generated in the late 1980s one of most protracted pieces of litigation in recent decades.

This work, based on a doctoral dissertation of the University of Vienna, seeks to analyse the attitudes and techniques adopted by national courts in disputes concerning international organisations and to draw policy conclusions from them. The book starts with a methodological analysis of the proposed subject defining international organisations as “entities consisting predominantly of states, created by international agreements, having their own organs, and entrusted to fulfil some common (usually public) tasks”.

The book is divided into three parts: Part I, described as a descriptive analysis, Part II, policy issues, and Part III, future developments. In Part I, which is 134 pages in length, the author turns first to what he calls avoidance techniques used by courts in declining to determine disputes involving international organisations. The three main techniques perceived are absence of legal personality in the local law, non-justiciability, and immunity from jurisdiction. Part II discusses both the case for judicial abstention and, conversely and in double the space, the case for asserting jurisdiction. Part III considers in 75 pages the question whether national courts provide an appropriate forum for disputes involving international organisations and what should be done if they do not. The earlier discussion revealed that in some States it is not clear whether, in the absence of express local legislative provisions, international organisations have absolute immunity from the adjudicative and enforcement jurisdiction of the host State or something less called “functional” immunity or, as a third possibility, immunity restricted along the lines now accepted in
general customary international law for States or, as a final possibility, no immunity at all. The author sees the problem as a balancing of two conflicting interests: the need for international organisations to be able to fulfil their functions without undue influence and the need for private parties to have their rights and obligations settled in the local courts. The point is made that in respect of foreign States there has been a movement under customary international law away from immunity *ratione personae* towards immunity *ratione materiae*. Might a similar shift be appropriate for international organisations? He concludes that a relatively low level of functional immunity should be enough to protect a core of official activities or, as an alternative, he considers that courts might replace the ground of immunity with other reasons for abstention, such as act of State, in order to ensure the necessary subject-matter exemption for the core activities.

In Parts I and II, the author discusses a substantial quantity of case-law, distilled from 27 jurisdictions, as well as arbitral awards and the jurisprudence of several international judicial tribunals. This material alone makes the book worth reading and although it might not have suffered by a shorter presentation it is a timely and scholarly work.

**Geoffrey Marston**


The task of writing a book on EC Competition law has never been an easy one, but this difficulty has increased over the past two years, as a result of the important changes that have taken place in the law during this period. On the one hand, the Commission completed in 1999 and 2000 respectively, a comprehensive review of its policy to vertical and horizontal restraints, which culminated in the adoption of a new umbrella block exemption on vertical agreements and of two new block exemption regulations on specialisation and research and development agreements. On the other hand, the Commission suggested in the 1999 White Paper, the modernisation of the rules implementing Articles 81 and 82 EC. The Commission proposals advocated a fully decentralised system of enforcement where national courts and national competition authorities would be able to apply Article 81(3) EC, just as they have always applied Articles 81(1) and 82 EC. *EC Competition Law* deals not only with the recent Commission reforms but also provides an invaluable and comprehensive exposition of the traditional issues that arise in the framework of competition law.

The book begins with two introductory Chapters. The first one covers the objectives and essential tools of competition policy and the second sets out the competition provisions within the broader institutional and legislative context of the Community legal order.

Chapters three to nine cover the Treaty provisions that focus on the activities of undertakings and provide a structured discussion of the essential elements in Articles 81, 82 and 86 EC. Chapter nine is particularly
valuable, as it surveys the approaches followed by American courts and by the EC Commission and Community judicature in their treatment of vertical restraints as well as the criticisms levelled at the latter. It also includes a thorough examination of the provisions in the new block exemption regulation on vertical agreements (Regulation 2790/99).

The book then goes on to consider specific areas of competition law that are not expressly covered in the Treaty. Chapter ten is devoted to the study of the relationship between the competition rules, and intellectual property rights, an area originally developed by the case law of the European Court. Within this Chapter, the block exemption regulation on technology transfer agreements receives particular attention. Chapter eleven explores two thorny issues. First, it examines problems that surround the proof of the existence of a concerted practice between undertakings. Second, it uncovers the problems inherent in the application of Article 81 EC to oligopolistic markets and brings to the fore recent case law developments that have construed Article 82 EC as a mechanism to control the behaviour of participants in these markets. Chapter twelve is concerned with the study of the EC Merger Regulation. Chapter thirteen deals with joint ventures and other beneficial horizontal agreements and, although at the time the book was published, the Commission had not published its final version of the new block exemption regulations on horizontal agreements, the draft regulations (which are largely identical) are considered here in detail. The enforcement of Articles 81 and 82 EC at Community and national level is considered in Chapters fourteen and fifteen, while Chapter sixteen overviews the main principles underlying the 1999 modernisation proposals and the concerns that have been raised as a result of their publication. Finally, Chapter seventeen addresses the jurisdiction of the Commission to apply the competition provisions and also the increasingly international dimension that competition law enforcement is taking in order to respond to the challenges of a globalised economy.

It is not difficult to see that this book will become the standard textbook for postgraduate students of EC Competition Law. It will be a valuable resource both for those completely new to the subject and for those with some experience of it. It is comprehensive, clearly written and exceptionally well-structured. Moreover, from its very first page it banishes the perception that Competition law is an obscure and technical subject that cannot be put across in a comprehensible manner. The authors manage to tackle difficult concepts such as market definition, the economics of competition or the meaning of territorial and customer restrictions in vertical agreements, in an accessible way. The text is supported with relevant extracts from the main decisions of the Commission and of the Community judicature and with excerpts from leading academic articles, all supplemented with stimulating commentary. The result is not only a user-friendly and eminently readable book, but also the provision of an essential tool to give a clear focus to this vast area of Community law. This clarity of exposition, however, does not mean that the book avoids points of controversy, but rather the opposite. The book dwells on traditionally contentious issues such as discriminatory pricing (at pp. 349–366), or the debate on whether the Francovich principle should be extended to private actions for breach of the competition rules (at pp. 982–1002) and makes balanced judgments on them.
Although the book has been obviously written with students in mind, it is quite clear that practitioners will also draw on its many strengths, and in particular on its impressive review of the case law developments and main strands of the Commission’s competition policy. Teachers of competition law, too, will be grateful for the support that this work will lend to their courses.

Despite the wealth of excellent works on Competition Law in the market, there was a clear need for a book that would offer a wide-ranging, yet accessible insight on the foundations and evolution of EC Competition law. This book manages to do this and, moreover, to collate a formidable array of cases and materials.

**ALBERTINA ALBORS-LLORENS**


This is an impressive book which offers a valuable insight to the ever-expanding, increasingly complex world of discrimination law. The book begins with a useful reminder of just how far the law has come from the days of *Roberts v. Hopwood* [1925] A.C. 578 when the House of Lords struck down the practice of a public sector employer paying its male and female clerks the same pay. The Lords would not support “[t]he vanity of appearing as model employers of labour, ... and ardent feminists”. In a balanced way, the book examines the main discrimination statutes in the UK: the Sex Discrimination Act 1975, the Race Relations Act 1976, the Disability Discrimination Act 1995 and the Equal Pay Act 1970 with at least a chapter devoted to each. It also contains an important and interesting chapter on the Northern Irish Fair Employment legislation and a helpful chapter devoted to (and carefully analysing the meaning of) positive action.

The strengths of this book are many. First, it combines coverage of a wide range of material with detailed legal analysis. The author chooses her cases wisely (and includes some less familiar decisions as well as the old chestnuts) and she offers helpful commentary on the decisions selected. The quality of this analysis is improved by reference to case law from other parts of the common law world. Given the author’s own interest in comparative law (see her earlier excellent work *Just Wages for Women*, Oxford, OUP. 1997) the insights she offers to the approach adopted by the US, Canadian and Australian courts are particularly illuminating. Secondly, the author does not confine her coverage to judicial decisions: she draws on a wide range of material (government reports, parliamentary debates, newspaper articles, solicitors’ briefings) as well as placing her discussion at the heart of contemporary debate (e.g., the role of the MacPherson report at p. 240). She also situates her legal material firmly in the context of the broader social science literature. Thus, for example, the discussion on equal pay is preceded by useful statistical information about pay differentials between men and women and why this might be. Thirdly, the book is accessible and well presented. It is also well written. The author’s own stance is plain (e.g., p. 117 “The reasoning of the tribunal can only be
described as extraordinary”; p. 520 “The spurious nature of these theories should be apparent to the most untutored eye”) and this helps to make the book a lively read.

Inevitably, any author of a book on a subject as topical, diverse and changing as discrimination law has to make brutal decisions as to what to leave out as well as what to include. Nevertheless, I would have hoped that more reference would have been made to the vast theoretical literature on the meaning of the principle of equality, its relationship to the principle of non-discrimination, and the feminist approach to sex discrimination. It might also have been useful to situate the discussion not just in the context of the EC and ECHR jurisprudence but within the broader frame of the other international norms on equality. It is perhaps at the interface between these different norms that the author is least sure-footed. How precisely does the Equal Pay Act interrelate to the Article 141 jurisprudence, in particular in respect of the difficult area of indirect discrimination? These observations apart, this is an excellent book both for students and academics alike and a valuable addition to the field.

CATHERINE BARNARD


This study by Moynmayee Basu is an eye opener to any reader particularly to one who may happen to be a non-Indian. At the dawn of the twenty-first century one tends to take factors like an appropriate lawful age of marriage, the right of a woman to remarry on the death of a husband and divorce in circumstances where a marriage is untenable almost for granted. Moynmayee Basu in her book reminds us all too sharply that these only came about in India as a consequence of a long and bitter struggle. The preface tells us that her work sets out to examine some marital problems of Hindu women and how these were viewed upon by Hindu society in various stages of its evolution. What endeavours were made by Indian reformers to improve the status of Hindu women and whether these attempts succeeded. Lastly, she investigates attempts made by the legislature to solve these problems.

The background to the study is the condition of Hindu women in the mid-nineteenth century. Bengal has been taken as a case study and chapter one gives us the grim picture of the condition of the married woman and widowed women at the relevant time. The position of Indian women had reached the “lowest depth of degradation”. Child marriage was rampant and girls were given in marriage at the age of ten or even younger. The life of the young child bride was one of unimaginable horror. Burdened with all kinds of responsibilities that could not be performed by a child she lived in a state of fear and tension, at the beck and call of the older members of her husband’s family. Even more tragic was the lot of a child widow destined to live a miserable life. A non-child widow’s plight was not much better except perhaps that she perhaps was at least able to comprehend the injustice that society had wreaked upon her. Lack of
property rights and rights of succession made the Hindu women potentially vulnerable. A Hindu woman therefore became virtually a pauper on her husband’s death since she inherited nothing from either her family or her husband’s family. Across the Palk Straits in Ceylon, as it then was, the Kandyan widow stood in sharp contrast. She had property and contractual rights. On her husband’s death she acquired a share in her husband’s acquired property and where that was insufficient to sustain her she had even a right to be sustained out of her husband’s ancestral property. The unrelenting dowry system was another evil that prevailed in Hindu society at the time. Where the girl’s family could not provide what the groom’s family thought was an adequate dowry the position of the bride became untenable. She was ridiculed, humiliated and even tortured.

The work goes on to deal with the reforms. The movement against child marriage had gathered momentum throughout the 1860’s. Legislation followed in 1872 but was not a great success. A clear lesson to be learnt from the Indian experience is that legislation does not inevitably bring about the desired effects. The dissemination of knowledge as to the purpose behind the legislation, what ill-effects it is trying to ameliorate and the consequences of the retention of the status quo were also necessary. Reformers like Malabari eventually exposed the abuses of early marriage and made the changes more acceptable. The next set of reforms sought to deal with early marriage and forced sexual intercourse by amendments in the Penal code and the Criminal Procedure Code.

The reform movement culminated in the Marriage Restraint Act, which in turn formed the first part of the Hindu Code of 1955. The British at one time claimed that Indian opinion yielded to reformist pressure on the part of the government. However, the author demonstrates convincingly that the efforts to raise the age of marriage in India was due almost entirely to Indian initiative and persistence. A similar trend is seen in relation to widow remarriage. It was around the middle of the nineteenth century that the attention of the public was drawn to the plight of widows. Ishwar Chandra spearheaded the cause of widow remarriage, culminating in the Hindu Widows Remarriage Act of 1956. By and large the Act was not a success. It did not improve the economic position of the widow significantly and remarriage deprived her of any right or interest that she might have had in her late husband’s property. Yet the ultimate freedom for the widow lay in education and the resultant economic freedom which could not be achieved by legislation.

Dowry received the attention of social thinkers only in the middle of the nineteenth century provoked into action by the women’s organisations. The author points out that dowry in India like everything else took different forms in different regions and communities. The custom, however, was near universal and evil. Though often confused with Stridhan conceptually, it is quite different. Stridhan remains the woman’s property whilst dowry goes to the woman’s in-laws. Whilst one enhances the woman’s position, the other does not. Efforts to eradicate this ill took place initially at regional level and culminated in universal legislation. In the first stage the legislation did not prohibit but merely prescribed certain checks and restrictions. In its later form it prohibited dowry, making both the giver and the taker guilty of an offence. Once again the legislation was a failure. The author identifies the reasons. First, the legislation itself was flawed. Secondly, there was no social support for the reform and in the
author’s view “legislation is not enough to banish this hydra-headed monster”. Examples taken from a single year, 1983, are cited. Social rather than legislative reforms in the author’s opinion will eventually eradicate dowry.

One major area remained to be reformed, the law of divorce. Hindu marriage was viewed as a sacrament and indissoluble. Until the enactment of the Hindu Marriage Act, however unsatisfactory a marriage, it could not be repudiated. In bill form the legislation was the subject of discussion from 1938. Here Deshmukh fought for the cause of women who found themselves caught up in the shackles of an empty marriage. In Ceylon both the General law as well as the Special Laws (i.e. the customary laws) permitted divorce. Whilst the grounds of divorce under the General law were fault-based, both the Kandyan law and the Muslim law contained strands of fault-based divorce and breakdown grounds. The Hindu woman however, was only able to attain in 1955 what her counterpart, the Indian Christian woman attained in 1869. The 1955 law moreover was not an advanced piece of legislation. In the view of the author it was “a faltering attempt at reform a half-hearted endeavour to move with the times”. Nevertheless, it must not be forgotten that divorce became a possibility for the Hindu woman only after this piece of legislation and it furthermore paved the way for reform of this area of the law.

True emancipation of women is not possible without property rights. That is in fact the last area that the author touches on in this book. In early Hindu society women had no legal status. As a result, their economic security was wholly dependent on others. The one exception to this rule was the woman’s rights to Stridhan. The earliest attempt to ameliorate this situation was by a piece of legislation of very limited application. More far reaching was the Married Women’s Property Bill of 1874. Like in similar Bills introduced in other British colonies, the Married Women’s Property Acts in England inspired the bill. The underlying objective was that of protecting the separate property of the married woman. The Act, though radical, did not impact on Hindu society since it applied only to Christian women. It was not extended to Hindu women until 1923. The author sees this piece of legislation as the first move to ensure the safeguarding of the economic interests of women. She does not point out, however, that separate property regimes do not adequately safeguard the rights of married women who often give up or are compelled to give up, an economic role for the role of a homemaker.

The next stage in improving the property rights of women was legislation aimed at ensuring inheritance rights, denied to women under Hindu Law. A law of 1929 aimed at giving preference to some nearer female heirs to remoter male heirs. Once again the scope of the Act was limited. Neither widows nor daughters were given rights of inheritance. All that the Act did was to give nearer degrees of female heirs preference over remoter male heirs. A spate of abortive legislation followed. It was only in 1956 that the Hindu Succession Act ranked widows, daughters and a son’s widow with sons. The number of female heirs recognised was far more than previously. A woman’s entitlement did not depend on whether a woman had issue or not and a mother now succeeded her son in preference to the son’s father.

Running through this whole work is the theme that legislation by itself does not ameliorate the position of women. A limited minority of urban
women benefited whilst the lives of rural Hindu women continued in much the same way as it always was. The women’s movement in India (now under the leadership of women rather than men) now took on the struggle. Their cry has been for equality especially in the sphere of economic opportunities and education.

This work is well documented and examines the position of Hindu women for a period of one hundred years it reiterates the limited value of legislative reforms unless these reforms are backed up by societal reforms. The author adopts a fairly non-technical approach when dealing with legislation, which makes it more readable and will therefore reach a wider audience.

SHARYA SCHARENGUIVEL


Dr. Bruce McPherson (as he then was) published the first version of this book in Australia in 1968—a relatively slim volume, which I had the pleasure of reviewing in another journal ((1969) 85 LQR 562). He has since served for many years on the Queensland Bench, and is currently the senior judge of the Queensland Court of Appeal. In the Preface to the fourth Australian edition, Justice Peter Young described him as being “without doubt one of the most erudite lawyers of our generation”. The second edition came from the same hand; but in 1987 when the third edition was published responsibility was passed to Professor Jim O’Donovan, then the foremost among Australian academics specialising in Australian insolvency law. A decade later, Professor Andrew Keay, who could fairly claim to have attained comparable eminence, took charge of the fourth edition. At about the same time, he moved his base from Australia to England, and has now rewritten McPherson as a textbook of English law. Practitioners and students of insolvency law in this country thus have the benefit of a publication which, uniquely, has as its source a work which has been the standard text in a sister jurisdiction for over three decades and which embodies the combined scholarship of this succession of outstanding insolvency lawyers.

When the first edition was published, there were no differences of any great significance between Australian and English law, and the author made extensive reference to the English cases. Since there was at that time no comparable English textbook, it found a place on many an English lawyer’s bookshelves. In the years between then and now, however, the legislation in the two countries has developed along separate lines, and substantial numbers of cases—many reflecting this divergence—have been reported in each jurisdiction. In consequence, the later Australian editions, although remaining invaluable as a source of reference for researchers, could no longer be altogether relied on in a question of English law. The basic principles may have remained the same, but on almost every point of detail the two systems had grown apart. We may take just a few examples. Australia uses exclusively a “cash-flow” definition of insolvency; England sometimes uses a “balance-sheet” test instead, and sometimes allows
recourse to either. In Australia, one “files” (or “lodges”) an “application” for a winding-up order; in England, one “presents” a “petition”. In Australia there is a procedure to challenge a statutory demand, the use of which is virtually mandatory: England has no counterpart procedure, and the issue is not determined until the application for winding up is heard. On the law of preferences the mental state of the insolvent is irrelevant in Australia, but English law requires proof of a desire to prefer. “Insolvent trading” in Australia is based on the incurring of a debt; but the English “wrongful trading” has no similar requirement—and, indeed, such definition as there is is concerned with what the company’s directors have omitted to do rather than anything they have done.

Professor Keay in this new book has tackled the subject afresh and written it entirely from the standpoint of an English lawyer and for an English readership. It is not a case of setting out the Australian material supplemented by annotations. In many places, of course, it has been possible to reproduce the Australian text with little alteration, for instance in the introductory section, “Nature of the Winding-up Process”. In others, everything is new. Great care appears to have been taken to take into account the differences in legal terminology and nuances of expression which have developed in the two systems. So while the structure of the book follows the same pattern as Dr. McPherson’s original model and the sequence of chapters is very much the same as that in the Australian editions (except that a chapter on Private International Law has been omitted, largely for reasons of space), this is, and deserves to be seen as, a wholly English text in its own right. But it has an extra dimension, in regard to which all too few English law books would claim to match it. This is in the wealth of comparative material that it contains. Naturally enough, Professor Keay has had at his disposal reported Australian cases running into the thousands, and he has been careful to retain references to any that may be helpful to an English lawyer—almost as many Australian cases as English ones are cited in the footnotes. But, over and above this, a feature of Dr. McPherson’s first edition which I commended in my review at the time was the inclusion of material from many other Commonwealth jurisdictions, and Professor Keay has continued to adopt this approach.

In my various visits to Australia I have had occasion to use successive editions of McPherson and to rely on it unquestioningly as authoritative. I have also regularly included it as a valuable comparative and research resource in the reading list for my students in the Cambridge LL.M. Now that a fully-fledged English version is available, it can be recommended without hesitation to all who practise or teach in the field of insolvency law in this country. There can be no doubt whatever that it will take its place among the classics.

L.S. Sealy


In 1995, when Butterworths published the first edition of Mark Hill’s Ecclesiastical Law, there was no other up to date text book on the law of
the Church of England. The 14th volume of Halsbury’s Laws of England, although fairly thorough, was last updated in 1975. Briden and Hanson’s third edition of Moore’s Introduction to English Canon Law (1992) could only be described as an introductory work. Newsom and Newsom’s second edition of Faculty Jurisdiction of the Church of England (1993), although an excellent work, is very narrow in scope. There was nothing else. So although Hill’s work was expensive (Butterworths had priced it at £98), those with more than a passing interest in the subject had no real alternative but to obtain a copy. What they got was a work of 497 pages (plus tables and index) divided into eight chapters on the nature and sources of ecclesiastical law; the constitution of the Church of England; the parish; clergy; services and worship; church courts; faculty jurisdiction; and cathedrals. Each chapter contained both text and materials, with some chapters heavily weighted towards the latter. It would have required a certain meanness of spirit to describe it as a mere source book, and it certainly filled an obvious lacuna in the law’s bibliography, but the sheer weight of materials inevitably meant that the author could not afford to include too much academic discussion in his text. For much of the work, the prose style was that of Halsbury’s Laws: bold assertions of principle, with terse references to the supporting material, but no real academic discussion.

Since 1995, the canon lawyer has welcomed the publication of four major works of reference. Chancellor Bursell has given us Liturgy, Order and the Law (1996); Professor Doe has given us The Legal Framework of the Church of England (1996) and Canon Law in the Anglican Communion (1998); and Lynne Leeder has given us her Ecclesiastical Law Handbook (1998). The second edition of Hill must, therefore, fight for its place in a very much more crowded market than the first. But does it pack the necessary punch?

The arrangement of the second edition is at once familiar. Chancellor Hill has retained the same eight chapter headings as in the first edition. However, the materials have now been separated from the text, and appear together at the back of the book. Or rather, they appear in the middle and at the back of the book, for this arrangement cruelly exposes the true balance (or imbalance) of this work: there are a mere 246 pages of text, compared with 493 pages of materials. Breaking the materials down further, we are offered the complete text of the canons (58 pages); 228 pages of selected statutes and measures; 56 pages of selected statutory instruments; the complete text of the Church Representation Rules (40 pages); and 108 pages of selected cases. This balance is infelicitous, both as between text and materials, and as between the different materials which Chancellor Hill has chosen to include.

Why are the canons there at all? At paragraph 1.18, on page 8, we read “An entirely new code of Canons came into force in 1964 and 1969. These have been amended with some regularity and, indicative of the ephemeral nature of its canon law today, the Canons of the Church of England are now published in looseleaf form subject to periodic updates.” What, then, is the point of devoting nearly 89% of the work to a version of the canons which we cannot rely upon as being up to date for very long, when a current version of the canons will always be readily obtainable elsewhere? It might have made sense if the author had given us some detailed analysis in addition to the raw text, but he has not. At paragraph 1.27 on page 13
we read “some Canons promulgated prior to the 1969 Measure coming into force were arguably not made under primary legislation and, if so, the Human Rights Act 1998 will not apply to them”; and at footnote 86 on the same page we read “The piecemeal amendment of the Canons … since 1969 will pose a number of problems of interpretation in that certain parts of certain Canons may be subject to scrutiny under the Act whilst others are not”. Yet we search in vain for some indication as to which Canons and parts of Canons the author considered to be affected by each of these propositions. Nor is there so much as a mention of the respectable academic argument—advanced by Boulton at 5 EccLJ 366—that canons made since the establishment of the General Synod, which includes lay representation, can be binding on the laity notwithstanding Middleton v. Crofts (1736) 2 Atk. 650. Inevitably, therefore, we are also left to our own devices in trying to discover which of the canons might be binding on the laity, and which not.

In the statutory materials, Chancellor Hill has omitted Appendix C of the Faculty Jurisdiction Rules 2000 and Appendix 1 of the Church Representation Rules in order to save space, on the grounds that they consist mostly of prescribed forms. This must reduce the value of this book as a practitioner’s reference work: the busy practitioner who finds himself involved, unusually, in ecclesiastical litigation will have little use for an edition of the rules which tells him that there is a prescribed form which he must use, but does not tell him what it looks like. Similarly, this omission will surely disappoint those charged with the administration of church elections.

By far the biggest question mark, however, hangs over Chancellor Hill’s choice of cases. Extracts of 20 cases are included. No fewer than 11 of these are fully reported in the Family, Appeal Cases or Weekly Law Reports series, which must be readily accessible to the majority of the book’s potential readers. Yet of the 10 unreported cases referred to in the text, only three are printed in the materials. In addition, the Table of Cases contains 49 entries for cases where the only report cited is in the Ecclesiastical Law Journal, and a further seven are only reported in the Times or in both the Times and the Ecclesiastical Law Journal. These must surely have provided some better candidates for inclusion in the materials than those 11 which can readily be consulted in any law library. Perhaps Chancellor Hill has assumed that many of his readers will be church administrators who are unable to access a law library. In that case, however, one may be forgiven for wondering what such readers will make of footnote 312 on page 77: after referring to Cheesman v. Church Commissioners [2000] 1 A.C. 19, this continues “Note, however, the dissenting opinion of Lord Lloyd of Berwick at 33–44. The majority opinion, but not the dissenting opinion, is reproduced in the Materials.”

There are also, inevitably, a number of minor irritants. Many of these are matters of style and fancy, reflecting the reviewer’s personal preferences. Others, however, are not. For instance, when there is a reference to a discussion “above” or “below” it would cost little, but help the reader immeasurably, if the place in the text where this discussion is to be found were identified. But it seldom or never is.

Finally—and this is an occupational hazard for the writers of legal text books—the timing of the edition was most unfortunate in that it predates by a matter of weeks the decision of the Court of Appeal in Wallbank v.
Aston Cantlow and Wilmcote with Billesley PCC [2001] 3 W.L.R. 1323. Whilst Chancellor Hill can derive some satisfaction from seeing this work described by a strong Court of Appeal as “the leading textbook” (judgment paragraph 14), he would undoubtedly have preferred it if this important Human Rights case had been reported before he went to press, thus affording him an opportunity to comment upon it and include a discussion of its implications in his text.

If, despite this reviewer’s reservations, the reader is nevertheless prepared to pay £68 for Chancellor Hill’s text and selection of materials (for OUP, which published the second edition, has managed to shave £30 off Butterworths’ price) he will find that he gets a well-written and lucid, if unadventurous, work which manages to cover all of the major areas of concern to the modern ecclesiastical lawyer or administrator. The author has thoroughly updated this work, drawing on 67 new cases decided since the first edition, and 23 recent Measures, Statutes and Statutory Instruments (including two proposed Measures which had yet to be passed at the date of publication). The tables have been improved, so that there is now a separate Table of Canons and (a notable omission from the first edition) a Table of Rules and Regulations. He has also devoted much thought to the implications for the canonist of the Human Rights Act 1998. This may be sufficient to ensure that it retains its place on many canonists’ bookshelves; but times have moved on since 1995 and this new edition has not really kept pace with the competition. Ultimately, there can be no escaping the fact that, taken in the round, Chancellor Hill’s work is no longer the preferred work of reference for this particular reviewer.

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