BOOK REVIEWS


Paths to Justice presents the results of the largest survey yet conducted of attitudes to the legal system in England and Wales. Conducted over a five-year period, the survey made headlines last year with the finding that only a bare majority of the public were confident of a fair hearing in court. Other results were no more encouraging. The survey found that most people are reluctant to go to court to enforce or defend their rights and that among the reasons were: fears about costs; a lack of confidence in the outcome; and a belief that judges serve the interests of the wealthy. For some, it gave credence to George Bernard Shaw’s observation that “all professions are conspiracies against the laity”.

Yet that is only part of the picture. Of the smaller number of respondents who had actual experience of attending a court or tribunal, 85% of respondents said they would definitely or probably go to court again if they found themselves in the same position. The vast majority of this group also said that they believed the outcome was fair and it did not seem to matter whether the dispute was resolved by adjudication or by agreement. Moreover, a third reported that the experience had given them a sense of empowerment; proof, perhaps, that not only lawyers can experience the Joy of Law.

An initial random sample of over 4,000 people was probed to discover whether they had experienced a “justiciable problem” (a problem that had a legal remedy) during the previous five years. Face-to-face interviews were then conducted with over 1,000 of these individuals, as well as in-depth qualitative interviews with a small sub-group. Cost unfortunately precluded comparing the experience of respondents from different ethnic backgrounds. It is hoped that future research will transcend this limitation, in view of the evidence of racial bias in other parts of the judicial system. With 40% of the sample experiencing a “justiciable problem” (typically faulty goods, money, rented accommodation and home ownership), Genn estimates that about 41 and a half million problems were experienced by nearly 16 million adults in England and Wales. In less capable hands, processing this data might betoken pages of dull statistics, but fortunately Genn succeeds in giving it a personal touch. The reader follows the fortunes of three types of respondent: the “lumper” (who does nothing about the problem and “lumps it”); the “advised” (who gets outside advice) and the “self-helper”. The result is a window on the world of law through which few people, not least lawyers living at the centre of a pre-Copernican universe, have had a proper glimpse.

Surprisingly, and contrary to tales of the “litigation bug”, we learn that the overwhelming majority of respondents tried to resolve the problem directly themselves by contacting the other party. Only when direct action
failed did the majority go on to obtain advice about resolving the problem. A significant minority (one-third) continued to pursue a self-help strategy which often demanded considerable determination and creativity. Many of these self-helpers lack access to good quality legal advice, but they are also typified by a fear of legal bills; previous negative experiences of lawyers; a sense of powerlessness and, in some cases, a sense of alienation from the legal system.

Naturally, the popularity of self-help depends on the type of problem experienced. Whilst consumer problems are the most likely of all problem types to be handled directly by respondents, others such as employment, neighbour, divorce and property problems are more strongly associated with obtaining outside advice. The seriousness with which the problem is viewed by the parties and the relative intractability of the issues involved sets real limits to self-help strategies, especially in the case of employment and family issues where the parties may still be locked into a continuing relationship. Fewer than half of the self-helpers succeeded in achieving a resolution by agreement. Much depends on the nature of the problem, the abilities of the complainant and the intransigence of the other party. More “self-helpers” than the “advised” thought their outcome was unfair, suggesting that advisers may help to lower expectations.

The research confirms the danger of going to court. Respondents whose problem led to a court or tribunal adjudication were the most likely to say that the experience of sorting out the problem had been stressful. By contrast, those who resolved their problem by agreement were the least likely to say that they had found the experience stressful. Indeed, they were the most likely to say that the experience had made them feel in control of the situation. Moreover, the survey also found that agreements appear to bring disputes to an end more completely than do court decisions.

Genn’s research also sheds light on what people want from the law. Over half of all respondents said that their main objective was money or property related. Only about seven percent said that their primary aim was to achieve a change in the other party’s behaviour (e.g. noisy neighbours) and less than one percent of respondents wanted an apology. Only a tiny proportion was interested in preventing the problem from happening to others. These narrow objectives suitably reflect the limits of law. Fewer than half of all respondents said that they had achieved their main objective completely and about a third said that they had not achieved their main objective. In terms of successful outcomes, it is better to be an accident victim than to have a bad employer or a noisy neighbour.

Genn’s research is a benchmark by which to measure the success of recent reforms. Indeed, it is a measure of the speed of change that her research is already dated; notably, in the area of mediation and ADR. Still, the finding that half of all members of the public failed to achieve any resolution to their problems, whether or not they sought advice, bears on the demand for greater access to justice, whilst the discovery of widespread feelings of ignorance about legal rights across most social groups and a profound need for easily accessible free or low cost advice sharpens the challenge for the Community Legal Service (CLS). Only time will tell whether these demands will lead to less litigation, as parties develop a greater capacity for avoiding or effectively resolving disputes, or to more, as increased knowledge of one’s own rights leads to a greater willingness to take cases to court. Either way, Paths to Justice is a seminal text: a
cataract of revelation about the state of civil justice at the end of the twentieth-century.

J.P. BURNSIDE

Just Lawyers: Regulation and Access to Justice. By CHRISTINE PARKER.
[Oxford: Oxford University Press. 1999. vii, 228, (Appendices) 4,
(Bibliography) 31 and (Index) 3 pp. Hardback. £45.00 net. ISBN 0–
19–826841–6.]

In Just Lawyers Christine Parker sets out to describe a method of ensuring wider access to justice by integrating the discussion and determination of justice into all levels of the community in a form of “deliberative democracy”. She claims that we can establish a multi-layered system which will be both fairer than the current model and also self-policing. The system described is essentially a pyramid, with informal discursive community forums at the bottom level, informal ADR mechanisms above them, and the courts at the very top. The community will be empowered to achieve justice for itself, thus avoiding the exclusionary and the individualistic side-effects of reliance on courts, and will also be empowered to police the courts’ justice on those occasions when it is necessary to rely on them. Simultaneously, the top level of the justice pyramid, the courts, will oversee the justice being meted out at the lower levels and ensure that sufficient protection is given to individual and minority rights.

The first part of the book identifies the failings of the current legal system and lawyers as the sole forum for justice available to the community. Parker cites community concerns with the high cost of legal services together with the lower quality of legal services provided to the poor compared to those offered the rich, and lawyers’ perceived willingness to work substantive injustices in the name of client loyalty. Parker also criticises the lack of connection between the communities’ concerns and the chief preoccupations of the law profession’s governing bodies. Communities are concerned with quality of service whereas lawyers’ concerns revolve around maintaining their economic monopoly on service provision.

Next, Parker analyses previous attempts to increase access to justice, identifies four “waves of reform”: the legal aid movement, public service litigation, ADR and attacks on the non-competitiveness of the legal profession. She identifies a lack of co-ordination between them, coupled with the tendency to focus too much on lawyer-mediated justice and to allow lawyers to hijack even community-based schemes. Instead, Parker emphasises sociological views of justice as a community construct or shared value and argues that unless provision is made for more community-lawyer dialogue justice as a construct of the courts suffers, becoming at once unrealistic and unenforceable. Accordingly, she recommends a “fifth wave” of reform which she claims will build on and reinvigorate the previous efforts: the systematic creation of informal justice forums at multiple levels of society as described above. Parker isolates three levels at which there must be discussions of justice for a truly “deliberative democracy” capable of ensuring access to justice for all: “indigenous ordering” in everyday relationships of family and work; informal forums within institutions and finally as a last resort, the courts. Parker makes a series of variously detailed proposals for change at each level.
Parker’s strongest focus is on the reform of the legal profession. Despite lawyers’ shortcomings, she argues that the profession contains the potential for self-transformation through its ideology of service and justice. This is, however, not a book in the Kronman/Glendon vein. Parker has few illusions about the glories of a supposed golden past of public-service lawyering. Instead she accepts historians’ proposals that ethics were at least in part prompted by not-very ethical considerations of image-conscious marketing strategies. Nonetheless even such unpromising materials can be used to transform its proponents into better lawyers.

Parker, in common with most ethics writers, identifies four main principles to which lawyers aspire: devoted client service, responsibility to advocate for all comers, a counter-balancing responsibility to justice and a principle of collegiality or mutual courtesy and self-regulation. She argues that these principles all offer the potential to support a general professional commitment to provide better access to justice. Parker targets collegiality as the principle most in need of renovation in order to realise this transformation, because self-regulation has come to mean self-protection, economically in its suppression of competition and morally in its suppression and denial of client complaints and bad practice. What is required is not a total government take-over of lawyers’ regulation but for the government to apply pressure to change but to involve lawyers in dialogue about those changes and leave them with substantial responsibility to implement the changes. Parker’s empirical study of Australian lawyers’ reactions to government actions to break lawyers’ monopoly over legal services suggests that such an approach increases cooperation. A mixture of self-regulation which recognises lawyers’ autonomy and external governmental pressure, monitored by the judiciary and by ombudsman-type groups are the best way to achieve higher standards.

Turning to the proposed informal justice systems, the new structures would be situated in the organisations and institutions in which we all spend the majority of our lives: in companies and corporations, in schools, hospitals and government departments. All these organisations would be required by government to have internal procedures for resolving disputes fairly, thus breaking law’s hold on justice in the community. Parker argues that companies will find economic advantages in this type of procedure in higher customer and employee satisfaction. However, the government should retain direct responsibility for protecting people in areas of society not amenable to this sort of regulation, in particular, the family. Parker’s view of what actions the government should take are, however, limited to funding crisis agencies for women. She also advocates education programmes in which students learn to debate and demand justice, but made no direct link between this training and any revolution in gender relationships. Her focus is apparently on students learning to demand greater justice in the marketplace rather than in the home. Parker’s vision is focused on the marketplace and on citizen’s “public” life. Despite her awareness of some minority concerns (especially of women, homosexuals and Aboriginal Australians) it is difficult to see how her proposals would change much of the basic structures and inequities of society or truly enable the dis-empowered to obtain better justice. It is not clear how justified Parker is in relying on the courts to make up for situations where the majority of the community is likely to be unsympathetic to the plight of a dis-empowered group. The courts, for all their “rights” focus, have not
always had the will to make up the shortfall, even where their concepts of the individual and of rights have been adequate to the situation. Sometimes it appears that minority groups are envisaged as serving a useful function provoking debate from the fringes of society, which tends to suggest that Parker does not envisage them as ever being brought into its centre.

Parker imagines a reform movement on a huge scale and requiring massive commitment by the government to legislate and then regulate, especially, the professions and companies or the marketplace and employment generally. Not only is this a vast project in its overall effect, it would require enormous delicacy in drafting the requisite regulations etc. and in the negotiations necessary to convince each body affected and to generate significant compliance. Parker uses a remarkably wide range of empirical examples of how various projects and initiatives have created some of the various individual changes which are necessary to her vision to defend herself from criticisms that her project is unrealistic. In some senses it might still be interesting to see one aspect of the scheme worked out in more detail, but individually her case studies are always interesting and pertinent.

This is a well-written book which combines a comprehensive vision of reform with immensely detailed empirical research, of interest to anyone concerned with methods of increasing access to justice.

EMILY HENDERSON


Until recently the doctrine of parliamentary sovereignty was regarded as the very foundation as well as a large part of the superstructure of the British Constitution. Vernon Bogdanor was able to write “there is a sense in which the British Constitution can be summed up in eight words: What the Queen in Parliament enacts is law” (Politics and the Constitution: Essays on British Government (1996), p. 5). For good or ill, there was no legal limit on what the Queen in Parliament could enact and no other element of the Constitution could challenge the will of Parliament. In particular the courts had no power to invalidate any statute no matter how foolish or oppressive that statute might be.

The doctrine of parliamentary sovereignty has the merits of simplicity and clarity. Moreover, since parliament, with all its flaws, speaks with the special legitimacy of a democratic legislature, it is not self-evident why some other body without that legitimacy should be able to invalidate what parliament has enacted. We all complain vigorously about our elected representatives, but we would not be governed by any one else—particularly if we were unable to throw them out at the next election. On the other hand, should our liberties and fundamental freedoms be at the mercy of a transient majority in a legislature dominated by the executive? Surely, our fundamental rights rest upon more secure ground than this? In recent years, especially since the rise of the doctrine of fundamental human rights at the national and international level critics of parliamentary sovereignty have been growing and have been taken more seriously.

In broad terms the critics have argued first that the doctrine is mistaken
as a matter of history. Far from being an ancient characteristic of the constitution, sovereignty is, it is said, in large part the creation of the academic lawyers (predominantly A.V. Dicey) in the late nineteenth century. In this view, prior to the nineteenth century, the common law limited legislative power. Secondly, critics have argued that the doctrine is based on a misunderstanding of the relationship between statute and common law. It is the common law that gives statute its predominance and thus the common law, as developed by the judges, and driven by the need to protect rights, may deny to parliamentary enactments predominance over common law fundamental rights in general or in particular.

This splendid book challenges both these streams of criticism of the doctrine. Working, as the author frankly admits, predominantly from secondary sources Professor Goldsworthy traces the doctrine from the thirteenth century to the present. He notes how the doctrine has not been the subject of a comprehensive historical study although it has been studied in depth by individual historians working in their own periods. Thus what he does is to integrate the work of historians from particular periods into that comprehensive study. This non-historian found this work immensely valuable, interesting and completely convincing. Professor Goldsworthy approaches his topic with obvious fairness and writes with clarity and understanding. He starts with Bracton and traces the tale through the reformation, the revolution and after finding throughout a consistent recognition of the special authority of Parliament. The challenge, when there was one, to the power and authority of Parliament was to be found in the monarch and his prerogative not in the common law.

The high point of this tale was for this reader the point (pp. 109–117) where he deals with the common law theories about the authority of Parliament. In assessing statements about the common law controlling Acts of Parliament it should be remembered that Parliament was itself a court with the supreme power of judgment of what the common law was. Thus a statement that the common law could control an Act did not mean (as it would today) that the courts, as the exclusive guardians of what the common law was, could strike down Acts. This is the light in which one should see Sir Edward Coke's opinion expressed in Dr Bonham's case ((1610) 8 Co. Rep 113b, 118; 77 ER 646, 652) that “the common law will controul [sic] Acts of Parliament and sometimes adjudge them to be utterly void: for when an Act of Parliament is against common right and reason, or repugnant or impossible to be performed, the common law will controul it, and adjudge such act to be void”. As Goldsworthy points out the view of most scholars that have looked closely at this issue is that Coke had in mind a power of statutory construction to avoid absurd and nonsensical results. But even if this is wrong and Coke's view at the time was the judiciary could strike down Acts of Parliament that offended against fundamental common law rights, it is crystal clear that Coke changed his mind. He was generally opposed to Parliament changing the common law because he believed that “the wisdom of a single Parliament is unlikely to surpass the wisdom embodied in the law shaped by the accumulated experience of many generations” (Goldsworthy, p. 112). But none the less he recognised that Parliament had the authority to do so and that the common law would have to give way. Thus, to give but one instance, in his Fourth Institute Coke says “the power and jurisdiction of the Parliament for the making of laws in proceeding by bill, is so transcendent and
absolute, as it cannot be confined either for causes or persons within any bounds" (cited p. 113).

There is always a danger that we will see the past through eyes half obscured by modern concerns. There is doubtless much that will be able to be added to Goldsworthy’s analysis. But this reader was left in little doubt that Goldsworthy’s conclusion that there never was “a golden age of constitutionalism, in which the judiciary enforced limits to the authority of Parliament imposed by common law or by natural law” (p. 235) is fully justified. The sovereignty of parliament is not a relatively recent creation of Dicey’s. For good or ill, it is the foundation of our constitutional order. And that is a fact with which the doctrine’s critics, as much as its supporters, must deal.

Of course, the critics do not rest their case on historical arguments alone. They argue that supremacy of statute is the result of a common law rule to that effect which the courts, if they judge it right to do so, may change and deny supremacy to statute. These arguments are subjected to Goldsworthy’s careful and thoughtful analysis. Even if there were agreement that the sovereignty of parliament should be dispensed with it has always seemed to me to be startling—to put it mildly—that the judges could by themselves decide to change such a fundamental aspect of the constitution. Goldsworthy shows why this is so. He adopts a Hartian analysis. The existence of a legal system depends upon the acceptance of the rule of recognition—conferring supreme authority upon parliament—by the senior officials across all three branches of government. That is where the source of sovereignty is ultimately located beyond the power of the courts, by themselves, to alter it. He concludes that “to give judges … authority [to invalidate statutes inconsistent with fundamental rights] would require a fundamental constitutional change … which should be brought about by consensus, rather than judicial fiat. That is surely a requirement of democracy itself … it is also a requirement of law” (p. 279).

This valuable book will be found challenging by the critics of parliamentary sovereignty. In its mild and persuasive way, it leaves their arguments in shreds. It will be interesting to see their response. With the advent of the Human Rights Act 1998 much of the steam has gone out of the debate over sovereignty in the UK, but it will doubtless continue in the journals if not in the courts. This book will prove impossible to ignore in that debate; indeed, its arguments will dominate it.

CHRISTOPHER FORSYTH


In this study of the executive in the United Kingdom the authors lead the way into constitutional territory which until now has been little explored by lawyers. In their pioneering enterprise they have gone beyond the formal structures of central government, illuminating its inner relationships and working arrangements, and in so doing have extended the boundaries of what, in our state, may be characterised as “constitutional”.

Constitutional lawyers have generally not had much to say about such
matters as the role of the Civil Service Commissioners, the powers of the Treasury, the Public Expenditure Survey (PES) system, the government legal services or the Citizen’s Charter (now “Service First”), and in their predominant interest in the laws enacted by Parliament and enforced by the courts, have neglected what these authors identify as “the executive’s own law”. The executive has not been given its due as “a distinct power within the constitution”, taking independent initiatives which have modified its relationship to individuals and to Parliament (less so, as yet, to the courts). Such initiatives and the transformation of the executive in recent times have largely escaped the notice of constitutional lawyers, who have averred their attention from the “flood of codes, handbooks, guidance, framework documents, charters, statements of principle, and other forms of normative material” which have issued from reforming governments in recent years. In the result an important dimension of the constitution has gone largely unrecognised, a neglect which has limited our understanding of the way in which the traditional constitutional controls, such as ministerial responsibility to Parliament and judicial review, are realised and accommodated by the executive through its internal mechanisms of control. Moreover what the authors discern as a preoccupation of constitutional lawyers with parliamentary and judicial controls has obscured “the activity and organisation of government which is the subject of control”. The authors’ own perspective derives from their view of the constitution as “a set of rules for obtaining, allocating, and deploying the resources” (of people, money and laws) that the state requires for its purposes: their project is to discover and analyse those stable rules (not formal legal rules alone) that provide for the control and management of the executive’s resources.

The executive, one is not surprised to find, does not conduct its affairs in arbitrary and unpredictable ways, but seeks to co-ordinate and control its activities through a variety of internal mechanisms and procedures. A recurring theme in the authors’ inquiry into these mechanisms is the plural nature of the executive. While the notion of the Crown provides an important symbol of unity in British government, the principle of unity is significantly qualified by the autonomy of the ministerial departments and may seem to be threatened by policies which promote decentralisation and the contracting out of public services. Differentiation and pluralism are features of a central executive which the authors characterise as “a loosely structured conglomerate”, presenting obstacles to effective democratic and legal control. From this arises the need for a centrally organised system of co-ordination and control within the executive, which meshes with the external controls applied by Parliament and the courts.

This necessary central co-ordination is supported by some long-standing features of the constitutional system, such as the principle of collective ministerial responsibility (as embodied, for instance, in the system of Cabinet committees), the tradition of a unitary civil service and the Treasury’s powers of financial control. Latterly the development of centrally-driven measures of co-ordination has been spurred by the demands of EU membership and the need to give effect to Community obligations, and also, although so far with more modest effect, by the expansion of judicial review. On the other hand a continuing departmental autonomy, together with a decentralisation of administrative operations and financial responsibilities, have presented a challenge to the public
service reform projects of recent years, which require concerted action by departments and agencies if the government’s goals are to be achieved. To bring this about, government has taken the way of co-operation and co-ordination rather than resorting to centralised powers of direction.

The authors have carried out a detailed and penetrating examination of the executive’s mechanisms of control or co-ordination, particularly as applied in the organisation of the civil service and in the management of the financial and legal resources of government. They show that the extensive organisational changes of recent years have been largely accomplished through a diversity of internal measures, with little recourse to legislation. We are led into an unfamiliar and complex world of codified standards, formal written guidance and inter-departmental agreements, an executive “law” which is produced or fostered by units established in the Cabinet Office, Treasury directorates or elsewhere in the central executive. The relevance of the materials and procedures analysed in this book to our constitutional understanding emerges clearly. One may take as an example the Public Expenditure Survey System which, while remaining “legally invisible and inaccessible to the law”, has transformed the methodology of expenditure planning and control within the executive, with significant consequences for the “visible” system of parliamentary control, or scrutiny, of government expenditure. Again, a constitutional study of the legislative process is partial and unbalanced if account is not taken of the internal checks and controls applied in the preparation of both primary and secondary legislation.

Daintith and Page have presented us with a masterly and illuminating account of the various and significant ways in which the executive plays its part in the working of the constitution and in maintaining and implementing basic constitutional principles. Their book enriches our understanding of the modern constitution and of the place within it of an executive whose role should not any longer be undervalued.

COLIN TURPIN


This volume contains the thirty-three papers presented at an international conference on Administrative Justice held in Bristol in 1997. But what is “Administrative Justice”? And how is it different from “Administrative Law”? The editors, and most at the conference, took a wide view of Administrative Justice as embracing “the whole range of decision-taking”. It thus includes both issues concerning the initial decision all the way through to the ultimate appeal. This does not seem much different from Administrative Law but these issues are broadly defined concerning not only strictly legal issues but also standards of service delivery, i.e. including questions of whether good decisions being taken fairly and without delay or maladministration. The focus is thus not on the development of judicial review and the work of the courts which forms the central topic of discussion in Administrative Law. Instead most of the papers concern the actual operation and design of administrative systems and these are
assessed, discussed and criticised without particular regard to the legality of particular decisions. It is a good thing for administrative systems to be viewed in this way and for administrative lawyers to raise their eyes from the detail of the law and look what some would call “the bigger picture”.

It would be impossible within the compass of this review to attempt much more than a superficial account of the papers. But conveniently the editors isolate the themes and issues that arise in the papers and show how they “hang together” in their introduction (at pp. 4–17). This imposes a certain order on the mass of papers and is useful in making sense of the book even if this reviewer felt that they sometimes did not “hang together”.

Thus the first part supposedly contains papers raising “theoretical issues about the nature and scope of ‘administrative justice’” (at p. 5). There is an critical paper by Terence Ison arguing that the use of the concept “administrative justice” is not to be encouraged. To categorise a decision as “administrative”, says Ison, often means allocating it to “clerical grade personnel, often working under pressure and in physical conditions not conducive to penetrating thought. Decisions are made on the face of incoming documents, without personal contact with the parties, even in complex and sensitive cases, and conclusions are reached without first having sought all the relevant evidence” (at p. 22). But says Ison the same issues considered with such care and procedural fairness on appeal arise at the initial decision stage and deserve similar care then. There is a faintly unrealistic air to all this. It is true that initial decisions are often taken under difficult circumstances and this may often contribute to erroneous decisions. But the very existence of appeal proceedings, at which decisions may be reassessed with care, is the recognition of this. Doubtless there are many cases in which more resources should go into initial decisions but the number of initial decisions will always mean resources are thinly spread. This, not the use of the epithet “administrative”, is what brings about the state of affairs that worries Ison. Ison is also critical of overview agencies which impose homogeneity and thus would divert attention from the true problems of administrative agencies.

But this paper, as well as that of Michael Harris in the same part, rightly places the emphasis on initial decision making and internal administrative safeguards. Harris in particular argues that—contrary to the current trend as indicated by the Social Security Act 1998—internal administrative checks should be formalised, i.e. internal reconsideration should be a prerequisite for being able to appeal. In reaching this conclusion he differs sharply from those (such as Sainsbury) who consider that such formalisation leads to “appeal fatigue” and puts claimants off from seeking a full appeal when formal review fails. In this same part is a paper by Linda Mulcahy about complaints procedures arguing that they should be integrated into the system of administrative justice. Chiming with Ison’s paper she is critical of the “intellectual snobbery” (p. 81) that treats low level cases as unimportant.

Mention should also be made of Judge David Pearl’s paper on immigration and asylum appeals and administrative justice which also appears in this part. Judge Pearl talks, of course, with great authority about the present system and its defects. He stresses the need for better training of adjudicators and tribunal members as well as the need for better representation.

The second part of the book deals with non-judicial ways of improving
administrative justice. Thus Alan Page considers “The Citizens Charter and Administrative Justice” (pp. 85–98). Of course, the Charter—to be renamed, he tells us, “Service First”—is concerned with raising the quality of service provided. But that is an important component of administrative justice. Several valuable papers follow. These include one concentrating of the management of complaints (Tom Williams and Tamara Goreily) as well as a discourse on open government comparing the United Kingdom with Canada (David Clark and Jane Pearson). Michael Harris follows on the “Ombudsman and Administrative Justice” and there is also an empirical study (by Christa Christensen, Suzanne Day and Jane Worthington) of complaints handling by solicitors. All this is termed “The New Administrative Law” but, while important, it seems unlikely to take the place of judicial review.

The focus in this part falls on the way individual grievances are handled. The next part, entitled “Collective Administrative Justice”, deals primarily with regulation, a topic of growing importance in administrative law. Aileen McHarg writes about dispute resolution in privatised utilities. She is critical of the practice of vesting both rule-making and rule-enforcing functions in utilities regulators. And in her paper Julia Black develops her views on regulation concentrating on the “conversations” between the regulated and the regulator.

The next part, entitled “Recent Research” takes an empirical look at Child Support Appeal Tribunals (Richard Young, Nick Wikeley and Gwynn Davies), the Education Appeal System (Neville Harris) and the Parking Adjudicator (Caroline Sheppard and John Raine) concentrating on new technology.

The next part, supposedly on the influence of Human Rights on Administrative Justice, is the most comparative part of the book. The first paper by Margaret Allars concentrates on the Teoh case ((1995) 183 CLR 273) in which the Australian High Court, very controversially, held that the ratification of an international convention which had not been incorporated into law could find a legitimate expectation that its terms would be followed. Since there is no Bill of Rights in the Australian Constitution, but Australia has ratified many international human rights treaties, this offered the prospect judicial protection of human rights. (Although Teoh was approved obiter in R. v. Home Secretary ex p. Ahmed [1999] COD 69 by Lord Woolf M.R., this bold principle is against the grain of R. v. D.P.P. ex p. Kebilene [1999] 3 WLR 972 (HL) which rejected the proposition that a discretion to prosecute need be exercised in accordance with the European Convention prior to the coming into force of the Human Rights Act 1998.) This is a stimulating paper—although there is much in it with which the traditional administrative lawyer would disagree. Rosemary Lyster’s paper on the right to just administrative action under the South African Constitution is also of value and addresses the proper role of judges in striking a balance between the decision maker’s freedom of action and the protection of fundamental rights. Both these papers concentrate inevitably on the judicial role and judicial review and as such fit ill with the concept of “administrative justice” developed earlier. But even if these papers do not “hang together” with the others, I would not see them excluded. They are amongst the best in the book.

The next part concerns management and training with accounts of the independent tribunal service (maintaining judicial standards, Godfrey Cole)
and (selection and training of lay members) (Michael Adler) and a similar paper on the Planning Inspectorate (Chris Shipley).

The semi-final part looks to the future. There is a paper by Roy Sainsbury on reform of Social Security Adjudication which is, alas, rather dated since the Social Security Act 1998 establishing the unified appeal tribunals was but a Bill at the time the paper was written. Brian Thompson looks “Towards the Millennium” in seeking an integrated system for administrative justice. This idea rests on a distinction between “service claims” and “rights claims”. The latter are to be dealt with by way of appeals from the primary decision maker to an appellate tribunal and thereafter to an administrative appeals tribunal on law and merits while the former are to be dealt with by complaint procedures which may move on to consideration by an Ombudman. The Ombudman would be the hinge between the complaints system and the courts.

The final part contains an account of the role of the Council on Tribunals by Lord Archer of Sandwell (Chairman of the Council) and on the Role of the Australian Administrative Review Council as a monitoring body by Alan Robertson. The two final papers are intriguing: Douglas Lewis calls for a Standing Administrative Conference (SAC). This would be extra-parliamentary but would have “the power and authority and scope to encourage government to adopt [a] holistic approach to administrative justice” (p. 17). The volume ends with a concluding paper by Martin Partington outlining many of the issues raised by the diverse papers and articulating the call by a steering committee of the delegates for the idea of a Standing Conference on the Resolution of Citizens’ Grievances (SCROCG). The idea is that this should be a partnership between private bodies, individuals and government departments. Its work would be of practical benefit to both policy makers and to service deliverers. It would use IT to create a “map” of the administrative justice system, it would organise seminars and conferences, provide a forum in which new ideas could be floated before both policy makers and service deliverers, it would develop clear criteria for assessing the costs and benefits of the administrative justice system and it would do many other similarly worthy things. (Since it seems clear that it will have no power to do anything about individual citizens’ grievances, the first thing it should do must be to change its name. Otherwise, citizens with grievances are bound to approach it looking for help—as they regularly approach the Council on Tribunals with grievances about tribunals.)

How to sum up this long and diverse book? Our society and our government are very complicated. The ways that government takes decisions are also very complicated and diverse. It is right and useful that the systems whereby these decisions are taken should be studied and understood and, where necessary, criticised. Many of the papers in this book are valuable contributions towards that process; and I find myself much better informed for having read this book. But as I read I found myself struggling to decide whether there were coherent principles of administrative justice that could be applied to all the diverse aspects of the governmental machine or whether the diversity was such that the recognition of such coherent principles was an intellectual task beyond me. Notwithstanding the admirable efforts of the editors to find integrating themes I am afraid that this book left me undecided. The system of administrative justice is certainly ramshackle and there is much room for
improvement. Would the situation be better if, as a result of the conference, a SAC or a SCROCG or perhaps both were established?

CHRISTOPHER FORSYTH


The two books reviewed here, each by an author of immense distinction and experience, and purporting to be about the same subject—the constitutional order of the European Community/Union—could not be more different in their tone, style and focus. Weiler’s whole concern is with system: the unique structure and dynamics of the Community order (what makes them so, and how they got to be so); and with the pathology of, and the prognosis for, the order in the post-Maastricht era. He writes as a lawyer, of course, but one who is at home with the techniques and insights of modern American political science—for whom, indeed, “the very dichotomy of law and politics is questionable”. His cultural references range from the Talmud to post-modernism, and his style has the exasperated passion of an Old Testament prophet wrestling with his God. Hartley is cooler, didactic rather than prophetic, narrowly lawyerlike. His “problems” are the (alleged) lack of objectivity of the Court of Justice, the uncertainty of Community law, the principles that (ought to) govern the division of powers within the system, the variable enforcement record of the Member States and, most importantly, sovereignty. The mood of the book is unrelentingly critical. Oddly, it seems that the author of The Foundations of European Community Law has fallen out of love with his subject.

I begin with the bigger of the two books. The Weiler volume is a collection of essays, all of which, except for the Introduction, have seen the light of day before and which, for the most part, are here only lightly re-edited and supplemented. The essays are ranged on either side of what Weiler considers “the most important constitutional moment in the history of the European construct”, namely the crisis surrounding the ratification of the Maastricht Treaty—a moment both threatening (because a precious patrimony was called into question) and exhilarating “because the debate and questioning represent a popular and national empowerment which, incidentally, can bestow on the Union an altogether deeper order of legitimacy”. The logic underlying the arrangement of chapters is explained as being that of the passage in Exodus 24:7 where the people, after hearing Moses read from the book of the Covenant, declare: “All that the Eternal hath spoken we will do, and hearken”. The inversion in the act of acceptance (first doing, then harkening, i.e. seeking to understand) is, Weiler contends, reflected in the history of the Community; and so also in his text. Part I being about the nature and the making of the Community system, and Part II about its ideals, legitimacy and prospects of improvement.

Included in Part I are essays on “Fundamental rights and fundamental
boundaries” and on “The European Court and political integration”, which give a fresh twist to over-worked topics; and there is Weiler’s comparative analysis of the “mixed” agreement phenomenon (conclusion of an international agreement using both Community and Member State powers), entitled “External relations of non-unitary actors”, still required reading though it pre-dates the WTO Opinion of the Court of Justice by more than a decade. I shall, however, concentrate on the piece Weiler himself regards as the most important in Part I, “The transformation of Europe”, his account of the evolution of the Community order which was first published in the Yale Law Journal of 1991, and to which a brief “Afterword” has here been added.

“Transformation” (Weiler’s own abbreviation) identifies three distinct phases in the constitutional history of the Community to 1992, each marked by a profound “mutation”. In the foundational phase, from 1958 to the mid-1970s, the constitutionalisation of the system (through the development by the Court of Justice of doctrines like direct effect and the supremacy of Community law) was balanced by the Member States’ conquest of the legislative process (though the practice of decision-making by consensus). The equilibrium thus achieved, between federal and confederal elements in the system, helps explain the progress of European integration in a distinctly unpromising political climate. The hallmark of the second phase, from the mid-1970s to the mid-1980s, was not, as many commentators have suggested, stagnation but the extension of Community activity into fields not specifically contemplated by the EC Treaty, notably by interpreting Article 308 (ex Article 235) as if it were a codification of the implied powers principle. Again, Weiler argues, it was the control of the political process by the Member States, each with an effective veto, that gave them confidence to accept this. The Europe of the third phase, somewhat anxiously presented for our inspection in “Transformation”, is that of the early 1990s, the period of the realisation of the internal market project and the negotiation of the Maastricht Treaty. The great mutation of this period is, for Weiler, the acceptance of qualified majority voting as the Council’s regular method of decision-making, more particularly under the new legal bases introduced by the Single European Act for the adoption of internal market legislation. That meant the disruption of the foundational equilibrium. Member States were faced not only with the fact that legislation, fully effective under an advanced constitutional order, could be enacted against their wishes, but also with the operation of the order over a vast area of public policy. There followed a crisis of legitimacy, at both government and popular levels, from which the Community is still seeking to extricate itself.

There is no hope of doing justice, in a brief summary, to the rich variety of Weiler’s argumentation, the explanatory power of his constitutional history of the Community. That being so, criticisms may appear cavilling, but I shall nevertheless venture a couple. A first criticism is that Weiler rather neglects financial matters. The separation between budgetary power and legislative power is one of the particularities of the Community order; and the control the Member States are given by the Treaty over the level of so-called Community “own resources”, acts as a significant brake on centralising ambition. To me, the growth of non-agricultural spending, more especially on regional aid to the less prosperous Member States which joined the Community in the 1980s, represents a
mutation of the system as “seismic” as any. I believe, secondly, that Weiler exaggerates the impact of the change to majority voting in the Council. Intransigence may no longer be an option for a Member State, but strenuous efforts are made by the Presidency and the Commission, when formulating legislative compromises, to accommodate the serious political concerns of all delegations: the spirit of Council decision-making remains consensual. A third, and more fundamental, criticism I shall reserve to the end, since it applies also to Hartley’s book.

The five rather shorter essays in Part II of *The Constitution of Europe* are mainly concerned with the exploration of anxieties already aired in the later part of “Transformation”. They are stronger on diagnosis than on prescription. The scene is set by an introductory chapter, entitled “The reformation of European Constitutionalism” which notes a list of “challenges” to the classic conception of the relationship between the Community and its Member States, while celebrating the flowering of new academic writing on the subject.

“Fin-de-sie`cle Europe: do the new clothes have an emperor?” is a bleak analysis of the Community’s loss of innocence, the tarnishing of the original ideals of peace, prosperity and supranationalism. Weiler is most interesting on the last of these. The Community’s unique form of supranationalism, which allows the Member States to survive as such, while accepting the discipline of belonging to a constitutional order, is seen as threatened by the alternative, unitarian vision of a European superstate (Europe thus becoming the very thing it was designed to transcend). The great betrayer was the Maastricht Treaty, which “appropriates the deepest symbols of statehood: European citizenship, defense, foreign policy”. The chapter needs to be read together with the last one in the book, “To be a European citizen: Eros and civilisation”, which is more upbeat in tone. Here Weiler contemplates the possibility of developing a parallel notion of citizenship, one that would “embrace the national in the in-reaching strong sense of organic-cultural identification and belongingness”, and the other that would “embrace the European in terms of European transnational affinities to shared values that transcend the ethno-national diversity”. He thus accepts, finally, that individuals may belong simultaneously to two *demoi* based on different subjective factors of identification, though he does not explain how in political/institutional terms this is to be achieved.

Of the remaining chapters in Part II, “The autonomy of the Community legal order” addresses an issue that also concerns Hartley, and to which I return below. The other piece, “European democracy and its critics: polity and system” is about the central dilemma of a mixed federal/confederal order like that of the Community: how to ensure an adequate level of political accountability by those wielding legislative and executive power. Weiler makes a real contribution to the elucidation of the problem by the distinction he draws between three modes of governance: the international, dependent on negotiation, intergovernmental bargaining and diplomacy; the supranational, which is more structured, formal and rule-bound; and the ‘infranational’, which involves rule-making by officials (‘comitology’ in the jargon of the EC). Each of those modes of governance requires a different technique of accountability. Thus the pathology of comitology lies in the fact that, other than in exceptional political circumstances, the top echelons of the Commission, the Council, the European Parliament and Member State governments inevitably exercise
scant effective control over the mid-level civil servants (Community and national) actually taking decisions. Weiler concludes that the problems of democracy in relation to infranationalism will not be solved by any of the structural changes in the institutional balances of Community organs. A far more radical approach to transparency is required. But what that might be, we are left to guess.

Hartley, too, notices the democratic deficit of the Community as a constitutional problem, though he only refers to it briefly in his “Background” chapter, and evidently sees no solution, nor even any palliative. Chapters 2 and 3 of his volume represent a further contribution to the dispute which flares up from time to time, about the “activism” of the Court of Justice. Revealing himself a strict constructionist, Hartley concludes that there have been cases where judgments have gone against the objective meaning of the EC Treaty, and that these “reveal a disquieting streak in the character of the Court that could have serious consequences in the future”. The first part of that conclusion is debatable (and Hartley, it should be said, debates it ably); the second part, however, reveals a tendency to overstatement, and to draw startling conclusions from meagre evidence, which is found elsewhere in the work. In Chapter 4, for instance, it is concluded, from the consideration of a small and selective group of texts, that “Community law has a particularly vague and open-textured character”. There follows, in Chapter 5, an interesting attempt to give substance to the notion of subsidiarity by formulating a set of concrete principles that may be thought to justify action at Community rather than member State level. In Chapter 6, on “Enforcing Community Law” the point is strongly made, with statistics from enforcement proceedings, that the law does not apply evenly in all the Member States. Here again, though, a sober conclusion is marred by the unproven assertion that “the countries where an effective remedy [in the form of State liability for non-compliance] is most needed, are likely to be those in which it is least likely to be found”.

Finally, in three closely reasoned chapters, Hartley argues the case for regarding Community law as “an essentially dependent system”, owing its validity to international law and the legal systems of the Member States, and posing no threat to the sovereignty of Parliament. I know of no clearer and more compelling statement of the “conservative” and hierarchical view of the relationship between the national orders and the Community order. These three chapters alone justify the publication of the volume, and will ensure that it continues to be read. For my part, though, I share Weiler’s preference, derived (with ample acknowledgment) from MacCormick, for the modern theory of a “constitutional conversation” between independent orders.

A last remark. There is one respect in which I find both books wanting. For the authors, it seems, the “Europe” of concern to constitutional theory and practice can still only be the Community. The nature and structure of the Union, its relationship with the Community, and the dynamics of the common set of institutions serving the three “Pillars”, receive no serious attention. Like it or not, a new constitutional reality was brought into being by Maastricht, and it has been reformed and consolidated by
Amsterdam. Books on the European constitution and its “problems” which ignore that reality, have an old-fashioned feel about them.

ALAN DASHWOOD


This collection of nine essays is the product of a one-day conference at the University of Birmingham in 1998. As has already come to be expected, it has been published with speed, accuracy and elegance by Richard Hart.

After many years during which a devoted band of administrative law scholars and practitioners advocated the incorporation of proportionality into domestic law, the concept is now firmly on the agenda as a result of judicial and legislative action. Although it is only three years since the last book-length treatment of this topic, this volume has a great deal of new material to analyse and is much more than a re-heating of existing arguments. Most of the contributions are new, except for those by Professor Tridimas and Lord Hoffmann, and come from present members of Bar and Bench as well as academe. The range of expertise covers European Community Law, the European Convention on Human Rights (ECHR) and domestic constitutional and administrative law. Of the chapters focusing on EC law, Francis Jacobs discusses recent developments, while Walter van Gerven examines the impact of proportionality on the actions of member states. In addition, Takis Tridimas analyses the factors which lead the European Court of Justice to apply differential levels of scrutiny when enforcing proportionality and the editor provides an account of proportionality in the context of Community sex discrimination law. Jeremy McBride’s discussion of proportionality under the ECHR is a good prelude to David Feldman’s chapter on the likely impact of the principle once the Human Rights Act 1998 is in force. Paul Craig and Lord Hoffmann compare proportionality to the administrative law principle of Wednesbury unreasonableness and Nicholas Green places the debate in the context of the changing conceptions of sovereignty consequent upon membership of the Community.

A number of important themes emerges in the course of the book. One is an acknowledgement of the protean nature of the concept of proportionality, even within one of the legal orders under discussion. In EC law this is to some extent explicable by the fact that proportionality is one of the general principles of Community law. As such, proportionality has to be applied to all those areas of activity which have an impact on interests protected by EC law whether at the level of Community or member state action. Similarly, McBride’s paper makes clear the variations in the intensity with which the principle is applied by the European Court of Human Rights which appear to be a function of which right is implicated, how the violation is sought to be justified and the complex relationship between proportionality and the margin of appreciation. McBride’s paper also demonstrates that the application of the principle is subject to significant re-formulation over time.

These variations require that great care should be taken to identify the context in which a decision was made before lessons about the operation of
the principle can be drawn. This explains one of the interesting divisions of opinion within the collection. Most of the contributors accept that proportionality requires a closer degree of judicial scrutiny of impugned executive or legislative action than is habitual in English administrative law. In contrast, Lord Hoffmann’s contribution is a manifestation of the view that there is very little to choose between proportionality and Wednesbury unreasonableness since both are applied flexibly to a range of contexts and neither should require the judge to substitute his or her judgment for that of the decision-maker whose determination is subject to review. Perhaps the most striking manifestation of this tendency appears in the judgments of the House of Lords in R. v. Chief Constable of Sussex, ex p. International Trader’s Ferry Ltd. [1999] 1 All E.R. 129 which appeared too late for extensive treatment in the text. Perversely, this view may have arisen partly as a result of the efforts of early champions of the adoption of proportionality to stress the similarities between the two concepts. Of course, in many cases, review on Wednesbury grounds and proportionality will yield the same result, but this does not alter the fact that it is a fundamentally distinct judicial activity which is being undertaken as is revealed by the decision of the ECHR in Smith and Grady v. U.K. (Applications 33985/96 and 33986/96), 27 September 1999, The Times, 11 October 1999 (noted at (2000) 59 C.L.J. 6). As Francis Jacobs notes, those who attempt to undermine the distinction between Wednesbury unreasonableness and proportionality frequently seek to do so by reference to decisions of the ECJ in which a general legislative act of the Community was in issue. Such cases provide very limited guidance on the intensity of proportionality review in relation to, say, an administrative decision of a Member State. This collection, if widely read, should prevent the recurrence of the type of analysis seen in ex p. International Trader’s Ferry.

The volume also provokes reflection on the current judicial review procedure. If it is accepted that proportionality requires a closer level of scrutiny than the traditional grounds of judicial review, it is important to assess whether existing judicial training and procedures are adequate to do the job. Access to discovery and cross-examination in judicial review proceedings is extremely limited and this may compromise the extent to which English judges can measure the necessity of a particular form of administrative intervention. As Green points out, the contrast in this respect between judicial review in the UK and proceedings before the ECJ is striking. It is to be hoped that this volume will also act as a spur to those who are presently considering what procedural changes may need to be made to the judicial review procedure to equip it for the expanded role it will undoubtedly be expected to fulfil over the coming years.

IVAN HARE


Any practitioner will know the feeling. You have made a well-crafted, tightly-argued submission whose chief merit is its patent and irresistible common sense. The tribunal then puts you back in your place by saying: “Now, just remind us: what precisely is the authority which you say
supports your Proposition 2(b)(i)? ... none at all, you say? ... I see.” And, feeling rather like a balloonist falling rapidly to earth after his machine has been air-gunned, you retire red-faced.

If ever there was an antidote to problems of this sort, it is Wilken & Villiers, a massive tome of over 500 pages aiming at comprehensive coverage of a large and intricate subject. Virtually every decision in England on waiver and estoppel (together with a good deal of the case-law in other jurisdictions) has been trawled, analysed and dissected. The result, as might be expected, is encyclopaedic. Variation of contracts; election; waiver of terms entirely to the benefit of the waiving party; the three classic estoppels; proprietary estoppel; equitable estoppel (rechristened, a little confusingly, “equitable forbearance”)—all have their detailed coverage. Moreover, this is detailed coverage of a decidedly old-fashioned sort. Every topic is preceded by a detailed—one might even say dogmatic—account of what its essential elements are and are not, and how it differs from doctrines superficially similar: no attempts to blur distinctions or muddy waters here. Wherever there is a point of controversy, one is virtually guaranteed a statement of both sides of the argument, reference to all the authorities supporting either, and then a magisterial suggestion as to which side has the balance of authority on its side.

Lastly, as if the theoretical coverage was not enough, the final eight chapters deal with particular applications of waiver, etc., in shipping, insurance, and so on. They inevitably repeat a good deal of what has gone earlier; but that is not necessarily any bad thing, and is also undoubtedly useful.

What are we to make of all this? Sober, meticulous and comprehensive it most certainly is; for that reason alone, it is likely to sit on a reasonably accessible part of your reviewer’s shelves. Containing references to all the standard authorities and a great deal more, it is equally likely to figure large in any lawyer’s research into this highly significant topic. And yet ... one is left with a nagging feeling that all is not well.

It is not simply a matter of style, though sometimes one has the impression of listening to a muscular and rigorous sermon and being repeatedly and mercilessly jerked awake by the preacher (“First ... secondly ... thirdly ... fourthly ... ”; “three points fall to be made here”; “there appear to be four possibilities ... the first ... ” and so on). A more serious difficulty is that the authors’ passion for taxonomy sometimes makes them lose the wood for the trees. Try this passage for size (it comes on p. 401):

“... the courts have made it clear that an agency by estoppel is not agency. By way of contrast, ostensible authority and agency are axiomatically one and the same. Four results flow. First, agency by estoppel and ostensible authority cannot be one and the same doctrine. If they were, agency by estoppel would be agency. Secondly, there must therefore be some distinction between agency by estoppel and ostensible authority. Thirdly, agency by estoppel must therefore be, as the name implies, a form of estoppel. Fourthly, estoppel must therefore be distinguished from ostensible authority.”

There is also what appears to be the occasional obsession with particular words, and with dealing with every authority that has anything to do with them. This can yield slightly odd results. Thus the contractual golden oldie of White & Carter v. McGregor gets surprisingly extensive
coverage, no doubt because there was technically an “election” there (to keep the contract alive); but what that case has to do with waiver, variation and estoppel is by no means clear.

But the real problem is, it is suggested, that too often the vision is lacking to make necessary connections and speculations. In writers of law books, especially academics, the most valuable characteristic is very often the ability to stand back and look at the subject from a distance: to see the contradictions, and the parallels, between its different parts, and to suggest how they can be resolved. This feature is not always there in this work. What, for example, should we be doing about marrying up the law of duress and the decision in Williams v. Roffey Bros? Why do we (or should we) continue to distinguish between different sorts of estoppel? Should our view about representations of law and their legal (non)-effect (stated without qualification at § 8.035) be qualified by what is happening elsewhere on mistake of law? And so on. These are important matters: they affect where our law is going: and, incidentally, they also affect the practitioners who use it and the judges who manipulate it. If there is a second edition, no doubt this omission can be put right.

The authors state in their Preface that they hope the work will be read not as an exhaustive, jurisprudential analysis, but as an essay, in the true sense of the word. That is a laudable aim: but in view of the comments your reviewer has just made, whether they have entirely achieved it must be open to some doubt.

ANDREW TETTENBORN


Users (and it is a compliment to say that this is a more appropriate term than “readers”) and potential purchasers of this book will wish to weigh the relative advantages of on-line and hard copy information, for the claim that the book has on our attention and our budgets is not that it says anything new but rather that it assembles basic information in a convenient form. For each of the twenty-eight tribunals covered by the text, short descriptions of the main procedural matters are presented. The matters include the identification of the governing legal texts and of the substantive law(s) applied by the tribunal; the composition and organization of the tribunal; the elements of the procedures for instituting and intervening in proceedings; and a short list of some of the recent writing concerning the tribunal and its work. The tribunals covered include (and retinas should be braced for a barrage of acronyms): the ICJ, PCA, ITLOS, OSCE, WTO, ICSID, ECJ, HRC, CERD, CAT, ECHR, ICTY, and the ICTR; both ICCs (the International Chamber of Commerce and, in a coincidence which even Brecht might have hesitated to construct, the International Criminal Court); the tribunals of EFTA, COMESA, NAFTA, ILO, IBRD, IADB, and the ADB; the Central American and Andean Community courts; African and American human rights bodies; and the Montreal (Ozone Protocol) non-compliance procedure. The odd tribunal may have escaped the net (see, for example, the excellent symposium on international
tribunals in the 1999 New York University Journal of International Law and Politics, itself another of the fruits of the Project on International Courts and Tribunals, from which the present study sprang; but for most readers the range of tribunals covered is more than adequate.

The amount of attention paid to each tribunal is varied, sometimes in a puzzling way. Major tribunals properly and predictably get extensive treatment. The ICJ gets a solid nineteen pages, the PCA sixteen, and ICSID twenty-one. Some may wonder whether the International Tribunal on the Law of the Sea (ITLOS; twenty-three pages) really merited more than those major tribunals; and others may wonder how many users of this handbook are more likely to need guidance on the Rwanda and Yugoslav tribunals (fourteen pages each) than on the wide range of NAFTA tribunals (eight pages). For each of the tribunals, however, there is enough detail to give a helpful picture of what it is and what it does.

This is not a work of reference. It does not set out primary materials; and the details that it does give are liable to change. No-one is likely to act on the basis of the information in the book without checking its currency. The easiest way to do this is by checking on the relevant web-site; and if that is done, the information set out in the book will, in most cases, be found set out there in a user-friendly way. Does that make this text redundant? Not at all. While on-line access may be the best route to finding up-to-date (and in the case of official web-sites, authoritative) answers to questions posed by the searcher, it is very much less useful as a means of surveying the legal horizon. Web surfers, like their marine counterparts, spend a great deal of time wallowing aimlessly and treading water, not knowing quite which route to take. The volume of international litigation is increasing; and it is increasingly common for disputes to be pushed into a particular framework in order to match the jurisdiction and procedures of what appears to be the best available tribunal, rather than to search for the tribunal most appropriate to the “true” nature of the dispute. That requires an ability to consider and compare the merits of all the available tribunals; and it is in this context that the great value of the present manual is most evident. There is, quite simply, no better guide to the landscape of legal tribunals; though I suspect that other publishers could have made just as good a job of publishing it at a significantly lower price.

VAUGHAN LOWE


This book argues that the sentencing process is wrong to seek both the punishment and the rehabilitation of the offender. The author takes the view that a straight choice has to be made and advocates a system based entirely upon rehabilitation. (The author is a former probation service volunteer, since you ask). It is a radical argument but one that is, unfortunately, poorly made.

The author begins with an overview of the “causes of crime” under the seemingly random headings of “wickedness”; “soft sentencing”; “alcohol and drugs” and so on. The reader is given no sense of their relative
importance because there is no attempt to relate these disparate factors to meta-analytic or longitudinal studies. The result is a highly-subjective series of impressions: for some reason “screen violence” and “Marxist theory” are both given more space than “emotional deprivation”. Gratuitous claims such as: “In public life, prime minister David Lloyd George was a notorious philanderer and womaniser, yet this did not seem to cause serious moral problems for society” (p. 15) do little to advance her argument.

It is apparent from the outset that the author has only a limited grasp of the relevant literature. A particular weakness is the author’s reliance on newspaper cuttings, news bulletins and television documentaries for her source material. Even her use of media sources lacks acuity. For example, the author relays the news from a Guardian cutting that “Victim Support... is not in favour of victims having a direct role in sentencing and neither are most victims” (p. 121) but does not consider why this might be so. On p. 124 the author substantiates a claim by referring to “private research carried out by the author in 1993”. Without more, she might as well be referring to a chat in the post office.

All of this might be less objectionable in a book with more modest ambitions. But since the author is aiming at nothing less than a radical and full-scale revision of criminal justice and criminal law, one is regretfully bound to observe that the author wholly fails to marshal the kind of argument needed to get her ideas off the starting-block, let alone to overcome the many obstacles that lie in her path.

Chapter Two (“Sentencing Theory and Practice”) is a roundup of arguments for and against retribution, deterrence, incapacitation and rehabilitation. Hilariously, the author pens a section about purging the offender’s guilt under the heading “Expatiation” instead of “Expiation”. The author rejoices in the claim that: “Expiation can be realistically achieved without the threat of punishment” (p. 124) which ushers in a whole new era for sufferers of writer’s block.

Chapter Three (“Pressures on Sentencing”) looks at various influences on sentencing policy. It lists, again without any evaluation of their relative significance, “parliamentary law makers”, sentencers, the public, the media, “officials within the penal process”, penal reformers, and offenders. Everyone, in fact. The author, who is a former prison visitor, informs us that “the judiciary have neither the knowledge nor the confidence to think independently about sentencing policy” (p. 108). One might think that this is rather like a chanteuse criticising Dame Kiri te Kawana for wobbling on the high notes.

Chapter 4 (“A New Approach”) raises the curtain on the grand idea of “Censure Without Sanctions” (or “Sanction”—the author is frequently unsure as to the title), which may be a dig at von Hirsch’s Censure and Sanctions. “Censure Without Sanctions” turns out to be a no-holds barred version of the rehabilitative ideal. The author’s extremism is manifest in a six-point schema presented as “A new brand of rehabilitation” (pp. 125–126). The main elements of this approach are as follows: no-one should be punished for anything (though dangerous offenders should be locked up); the job of the state is to give every assistance to offenders to sort their lives out; society should take some of the responsibility for crime and whilst the offender is supposed to make amends, they will not generally face sanctions for failing to comply with their moral obligations. The author bluntly
asserts: “There is no certainty that such a scheme would be successful but it must be worth trying” (p. 126). Sadly, the author provides no convincing grounds for her optimism. Concerning her scheme she writes: “It assumes the best rather than the worst, appealing to the offender’s better nature. Offenders decide, preferably in negotiation with the victim, how best to put things right” (p. 124). This is Pollyanna under the influence of Class A drugs.

The closing chapter (“Theory Into Practice”) unsurprisingly magnifies all the weaknesses of her approach. The author abolishes the offence of involuntary manslaughter in four lines, noting, “There is no sense in trying to rehabilitate someone who did not intend to commit an offence in the first place” (p. 131) ignoring here and elsewhere the question of harm. Other proposals compete in their eccentricity, not least a new version of imprisonment that accords “as many rights and as few restrictions as possible” (p. 132); the need to merely “offer” and not “enforce” rehabilitative services (p. 133) and the cheerful abolition of the distinction between offenders who are sane and those who are mentally ill “because they are all being helped and none are being punished” (p. 134).

At the end of the book the author concedes that: “A 100 per cent success rate is unlikely, though it is asserted that Censure Without Sanctions would be much better at preventing reoffending than current or past policies” (p. 160; my italics). This sums up the tone of the book which is little more than an assertion without an argument. It is further undermined by some careless spelling errors, including a reference to a man “sewing wild oats” (p. 15).

The author’s extremism negates her good points. For this reviewer, she is right to press for fewer prisoners, more humane prison regimes and evidence-led rehabilitative strategies. Unfortunately, the author assumes that punishment is always opposed to assisting the offender and fails to consider that there may be benefits in constructive retribution. Fatally, she fails to recognise that the criminal justice process is a social institution that, like any other, must serve, or appear to serve, more than one purpose. Censure Without Sanction testifies to the folly of trying to subordinate criminal justice to a single ideology and as such stands as an indirect tribute to the value of eclecticism.

J.P. BURNSIDE


MEDICAL law is the new kid on the legal block. Unlike senior citizens such as equity and real property, medical law was conceived only in the latter half of the 20th century. The stimulus in this country was Glanville Williams’ controversial The Sanctity of Life and the Criminal Law (1958). Suckled academically by Peter Skegg’s excellent Law, Ethics and Medicine (1984), supplemented by Ian Kennedy’s engaging articles collected in Treat Me Right (1988), the body of medical law has grown apace. Scarcely a week passes without a medico-legal dilemma, novel in either substance or form, demanding judicial or legislative attention, not least dilemmas generated by new drugs and technologies.
Now in its adolescence, medical law needs sage and prudent advice; in particular, rigorous reflection about principles. For the growing corpus of medical law is showing signs of intellectual malnutrition and a rickety frame. For example, it grants patients an absolute right to refuse treatment but denies them a right to be informed of significant risks involved in treatment. It prohibits doctors from giving any patient a lethal injection at their request, but allows doctors to withhold tube-feeding from certain incompetent patients precisely with intent to kill them. Its test for whether a procedure, even non-therapeutic sterilisation, is in an incompetent adult’s best interests is simply whether a “responsible body” of doctors thinks it is.

As these examples illustrate, medical law betrays a disturbing and distorting deference to medical opinion, even on matters of ethical principle. Medical law clearly needs to start doing some critical thinking if it is to grow up into a mature member of the legal neighbourhood. Adolescent medical law, and the judges and practitioners who are faced with the ethically complex issues it involves, are clearly in need of a good book, a book which takes principles seriously.

There are several useful textbooks and casebooks which describe the current state of medical law, some of which make some attempt to engage with issues of principle, including Kennedy and Grubb’s own Medical Law: Text with Materials (2nd edn., 1994) (though, as was noted in [1995] 54 CLJ 190 the book lacks any coherent ethical framework). But the need for something corresponding to Andrew Ashworth’s Principles of Criminal Law has long been apparent. Indeed, it is arguable that the absence of such a book helps to explain the courts’ deference to medical opinion, with the result that medico-legal jurisprudence is not only the new kid on the block, but also the mixed-up kid on the block. It is therefore with anticipation that we turn to Principles of Medical Law, edited by Kennedy and Grubb.

Written by leading legal academics and practitioners, the book comprises seventeen chapters, divided into four parts. Part One, on the health care system, contains chapters by Christopher Newdick on the organisation of health care and Diana Kloss on the health care professions. In Part Two, on consent to treatment, Ian Kennedy and Andrew Grubb address consent by the competent, and James Munby Q.C. consent by the incompetent. Part Three contains four chapters on medical negligence written by Ian Kennedy, Andrew Grubb and Michael Jones. Part Four comprises nine chapters devoted to “specific issues”: Kristina Stern writes on “confidentiality and medical records”, Michael Freeman on “medically assisted reproduction”, Andrew Grubb on “abortion”, Adrian Whitfield Q.C. on “actions arising from birth”, Ian Kennedy on “research and experimentation”, Harvey Teff on “products liability”, Sandy McCall Smith on “ending life”, and Bernard Dickens on “donation and transplantation of organs and tissues” and on “death”. Annual supplements will update the volume until the next edition.

The editors claim that the book “seeks to expound the principles of law that govern medical practice and which form the corpus of medical law” (p. vii) and to “provide the courts, legal practitioners, academic lawyers and others with as comprehensive and, it is hoped, as authoritative an account as possible of the developing law in England and Wales” (p. viii).

The book succeeds in its second aim, but fails in its first. For, despite its title, Principles of Medical Law is another black letter textbook, not an analysis of principles. Take, for example, two fundamental ethical
principles: respect for autonomy, and the sanctity of human life. Remarkably, neither is explored. Indeed, neither is even mentioned in the index. This lack of principled analysis will not only disappoint academics but will also detract from its value to courts and practitioners who are the main market for the (£125) volume. For it is they who are confronted by new dilemmas whose coherent resolution requires a principled understanding of the subject. The practitioner’s need for principled analysis is only heightened by the imminent impact of the European Convention on Human Rights. The editors indicate that future editions will address the Convention. That the first edition has not done so is particularly surprising in view of the fact that in 1994 the editors claimed in their materials book: “medical law is a subset of human rights law. This is what provides its intellectual coherence” (p. 4).

Though the book fails in its first aim, it succeeds in its second. It is a quite comprehensive and authoritative guide to the present law, though there is a certain degree of overlap between chapters. Any practising or academic medical lawyer would benefit from access to a copy.

In sum, a valuable additional textbook on medical law, but a missed opportunity to go beyond existing texts, including their materials book, and move the subject forward. In their materials book, the editors accurately observed that until the ethical principles underlying medical law were recognised and reflected in legal thinking and analysis a coherent approach to the emerging problems in medical law would be difficult (p. 4). Unfortunately, neither that book, nor this one, meets that challenge. It is to be hoped that future editions of this book will do so, lest the medical law kid grow up even more confused.

JOHN KEOWN


One can almost hear the layman’s hollow laugh on seeing a bunch of successful lawyers spend 600-odd pages waxing lyrical about money. So be it. Put together by Fountain Court Chambers and now in its second edition, Bank Payments is quite simply a splendid set of essays on the mechanics of money and money obligations in all their manifold modes; real, virtual, plastic, electronic and so on. You do not only get a crisp and workmanlike account of golden oldies such as the law relating to bills of exchange, cheques and documentary credits. Much more importantly, there are practical and (surprisingly) readable details of the mechanics involved. Thus Mr Hooley’s trip through the mysteries of ADDACS, BACS, CHAPS, CHIPS, SWIFT and TARGET may conjure up disconcerting images of a spy-ring satire by the late Compton Mackenzie rather than serious legal writing: nevertheless, the reader prepared to negotiate this road of many acronyms will end up extremely well-informed and remarkably clear-headed.

In addition, the authors review with both readability and relish a large number of the crucial, if abstract, issues necessary to a proper understanding of the law of money. Just what does it mean, for example,
to pay money (real money, that is, not the notes and coins you hand over in Sainsbury’s)? Does it make any difference if the money you are paying with is plastic? Come to that, what is a debt anyway? Is a debt in dollars (or euros) the same kind of entity as a debt in sterling, and if not what is it? If you set a bank payment in motion, when do you lose the right to change your mind? If someone else goes through the motions of making a transfer to you and then goes bust, can you keep the credit? If your bank’s computer credits your account, or the manager decides to do so, what legal rights or duties do you obtain, against whom, and when?

This new edition has obviously involved a good deal of updating. Since the last one there have risen to importance Mondex and other smart cards, e-commerce generally, a new Code of Banking Practice, and the demise of venerable institutions such as town clearing of cheques, not to mention new systems for shifting electronic Euros. All seem to have found their way into the relevant parts. Two new chapters are specifically noteworthy. Chapter 2, on Money, was clearly inspired by the fall-out from the Bank of Zambia débâcle in 1996, and the birth closer to (but not yet at) home of the Euro Wundergeld on 1 January 1999. As regards the former, the authors are rightly sceptical about the Court of Appeal’s blanket characterisation of obligations under currency exchange transactions as debts (see Camdex No. 3 [1997] 6 Bank.L.R. 43). On the Euro, the analysis is brief but to the point, but salutary lessons still come of it. If (say) the Italian lira collapses and falls out of the Euro scheme, how many realise that arguably those who have borrowed it will, in the absence of contrary agreement, remain liable to repay the debt in Euros rather than devalued lira?

Chapter 5 is a more predictable addition, though none the worse for that. Nothing is complete these days without a reference to the Internet, and there undoubtedly was a need for Patricia Robertson’s long account of Internet payment and its legal implications. With the Government’s e-commerce Bill only now just available, a lot of what is said is necessarily speculative concerning (for example) encryption. But most of the legal suggestions made seem sound, and there is a welcome acceptance of the view that—at least as regards English credit cards—the protection of s. 75 of the Consumer Credit Act 1974 is available in the case of a transaction with an overseas website. Only one caveat suggests itself. Though it is rightly stated that the advantage of using a credit card is that in English law it amounts to absolute payment, it should be remembered that contracts concluded with websites abroad are very likely not to be governed by English law. If the law of the country where the website was situated applied a different rule, it is surely arguable that if, for any reason, the credit card company failed to pay the consumer would himself be liable to suit.

One could go on about the merits of this work, but there is no need. It is very well-written, very useful, and repays reading by anyone interested in the law of money—academic or practitioner. Its price, as usual, is steep: something like half-an-hour’s chat with a not very senior partner in a London law firm. But then the book is undoubtedly more entertaining, and may well be a great deal more informative.

Andrew Tettenborn