BOOK REVIEWS


This collection of essays is part of the valuable series on topics of comparative legal history sponsored by the Gerda Henkel Stiftung. It deals with the various legal mechanisms devised to cover situations where one person holds property for the benefit of another or for a particular purpose and compares the English trust with the analogous institutions in civil law countries. It consists of nineteen studies, fourteen in English and five in German.

The editors contribute the opening piece and see the issue of the origin of the trust as part of the debate on whether certain typically English legal institutions are alien to the civilian experience or are part of a common medieval core. Until the end of the nineteenth century most scholars accepted Francis Bacon's assertion, in his Reading on the Statute of Uses, that the trust was derived from Roman law, and Blackstone suggested the fideicommissum as its ancestor. O.W. Holmes and F.W. Maitland, under the influence of the nineteenth century Germanist school of legal history, denied a Roman origin and held that the English trust was derived from the German Treuhand, and this view quickly became the new orthodoxy. The welcome given to the 1985 Hague Convention on the Law Applicable to Trusts and on their Recognition shows that practical considerations have led most civilian systems to recognise the English trust in some form.

The remaining studies are roughly in chronological order. David Johnston succinctly reviews trust-like devices in Roman law, such as fiducia, fideicommissum, tutor. Harald Siems considers the late Roman and Carolingian provision for piae causae and the xenodochia or hostels for foreigners, which could be endowed with property. Shael Herman discusses the canonical conception of a “trust”, particularly as a means of reconciling the Franciscans’ vow of poverty with their enjoyment of the property their order received. The pope was their dispensator.

We then turn to England. Joseph Biancalana deals with the origins of medieval uses and Richard Helmholz reviews the evidence for the recognition, from the fourteenth century, of uses and trusts in the probate jurisdiction of the English ecclesiastical courts. Neil Jones discusses trusts in the sixteenth century in the light of the Statute of Uses and Michael Macnair carries on the story into the seventeenth and early eighteenth century, by recounting the various analogies that were used to explain the nature of trusts.

Now we move to Germany. Karl Otto Sehner gives a full account of the origins of the Treuhand in German customary law, a topic that appears to be as controversial as the origin of trusts. It could be used to protect
the interests of wives, minors, clerics and other groups. Under the heading heres fiduciarius, Reinhard Zimmermann gives an exhaustive account of the rise and fall of testamentary executors in continental countries. The Roman familiae emptor became a purely formal figure and gave way to the heir as the administrator of the deceased’s estate but surviving wills from antiquity sometimes appointed a minister or curator in preference to the heir. Medieval canon law had a place for the executor ultimae voluntatis, supervised by the bishop. In the usus modernus the heir regained his dominant role, sometimes under state supervision and sometimes not. Under the German BGB, the testator may still appoint a long term executor over the heir.

Robert Feenstra traces the history of foundations (Stiftungen), roughly equivalent to charitable trusts, in continental laws since the twelfth century, and in particular the rise of the notion of the legal person. Michele Graziadei discusses the development of the secret testamentary fiducia in the ius commune until the end of ancien régime. Where assets were vested in A who was bound to deal with them solely in the interests of B, the analysis was first in terms of titulus and commodum, then of fideicommissum and deposit. Klaus Luig concentrates on the fideicommissum familiae which performed the function of the English entail. In its application to the property of the nobility, it was the subject of an elaborate analysis in a treatise by the seventeenth century jurist Philipp Knipschildt, which is itself carefully analysed by Luig.

The next five studies concentrate on the nineteenth and twentieth centuries. Sybille Hofer surveys the various theories put forward in the nineteenth century to explain the Treuhand, both by those of the romanist persuasion, who regarded it as a fiduciary transaction, and by their opponents on the germanist side, who stressed the differences between fiducia and Treuhand. Joachim Ruckert continues the dissection of the nineteenth and twentieth century academic debates on Treuhand. Andreas Richter compares German and American law of charity in the early nineteenth century. In the former he highlights the dominant role of Savigny’s theory of legal personality, which classified charitable foundations as legal persons distinct from corporations, and in the latter the development of the charitable corporation as an unincorporated trust. Stefan Grundmann compares the evolution of trust and of Treuhand in the twentieth century. So far as protection of the beneficiary’s interests are concerned, trust and Treuhand produce virtually identical practical results; theoretically, however, continental law has tended to favour a contractual basis for the relationship of “trustee” and beneficiary, whereas the common law sees it in proprietary terms.

Maurizio Lupoi discusses the effects of the Hague Convention on trusts, which, he argues, only binds the ratifying states to give effect to the foreign law by which the trust is governed and so is one-sided. Citing recent Italian case-law, he points out how odd trusts still seem to the civil lawyer, largely on account of the difficulty of fitting them into basic civil law categories.

The final study is George Gretton’s account of the history of the trust in Scots law, “a semi-civilian system”. The institution, although not yet designated trust, is found already in substance in the fifteenth century; the full terminology arrives in the seventeenth. There is evidence of Roman influence in the eighteenth century but from the nineteenth English
influence, usually exercised through the House of Lords in Scottish cases, is stronger.

The topic is clearly a fruitful one for an exercise in comparative legal history and the volume provides a solid base for further work.

PETER STEIN


This is a collection of 13 essays which examine, from a variety of perspectives, the legal and political nature of the Crown. As the editors say in their introductory chapter, the purpose of the book “is to explore the constitutional heart of the British system of government”.

It is remarkable that this ancient, enduring, omnipresent “something” at the centre of our constitution remains so elusive and problematic. Is it the Queen, the Government, the State, a corporation sole or aggregate, a metaphor? A like uncertainty attaches to its attributes. What survives of its “immunity”? How are its “prerogatives” to be defined?

If we do arrive at an understanding of the meaning of the Crown we find that, so far from providing coherence and strength to the modern democratic constitution, it seems to generate doubts, flaws and anomalies. Is it, for instance, compatible with the rule of law? (“The law struggles”, says Adam Tomkins in his essay, “to keep the heart of British government (the Crown) within the rule of law.”) Have modern developments in the organisation and practice of government—such as the creation of executive agencies—so weakened “the chain by which the Crown is tethered to Parliament” (in particular through the doctrine of ministerial responsibility) that, as Mark Freedland suggests, a State may be emerging “in which the Crown no longer exists as hitherto understood”: if so, is legislation needed to re-invent the Crown or to replace it with a new central structure?

Attached to the Crown is a bundle of prerogative powers, these being exercised by the Queen herself (“embodying” the Crown), normally on ministerial advice, or by ministers directly (“representing” the Crown). Despite the reformatory efforts of parliamentarians and the work of the courts, many exercises of prerogative power remain beyond the reach of effective parliamentary or judicial scrutiny. The achievement of the courts in occupying the “dead ground in the constitution” by progressively extending judicial review to prerogative powers, as related in Brigid Hadfield’s essay, has been impressive. Nevertheless, wide-ranging prerogative powers remain at the disposal of ministers, and as Rodney Brazier observes, ministers “rely daily on those powers to do what otherwise would lack legal foundation, in circumstances which are very agreeable for ministers”, for “they do not have to pay heed to any safeguards for the citizen which Parliament might have included in any modern, statutory formulation of equivalent powers”. Brazier accordingly proposes legislative reform of these prerogatives to achieve “an appropriate balance between the state’s rights and citizens’ rights”, and the same remedy is urged by Adam Tomkins so as to define and limit the remaining
privileges and immunities of the Crown (and those of the Monarch herself, notably in respect of taxation).

The legal immunities of the Crown that have impinged most directly upon the citizen have been those associated with legal proceedings. Tom Cornford’s essay explores “the extent to which the Crown and its officers retain any immunity from legal process”. He gives a lucid and helpful account of the development of remedies against the Crown in both civil and Crown-side proceedings before the Crown Proceedings Act 1947 and in subsequent years, concluding with an analysis of *M v. Home Office* [1994] 1 A.C. 377. In Cornford’s view it has now become possible to claim that we have achieved a complete system of remedies against the Crown (albeit not the Monarch in person) and its officers, available in judicial review and in civil proceedings (with one exception in the denial of interim declarations).

The idea of the State has so far failed to gain more than an uncertain foothold in the British constitutional system. It is not easily accommodated with the idea of the Crown. But the Crown, says Martin Loughlin in his essay, “has, in practice, provided a poor substitute for the idea of the State”, and our failure to realise the latter idea is to be explained by our constitutional history, which has brought about “a gulf between substance and form in our institutions of government”. Deprived of a concept of the State as a political authority distinguished both from the people and from the person of the ruler, we have had to make do with the notion of the Crown. But in this we have failed, says Loughlin, “to unravel the King from the Crown”, and the Crown as a legal concept “has been strained to the point of incoherence”. In Loughlin’s view, while the courts have broken new ground in developing a system of public law, they have not yet succeeded in forging an “appropriate legal conception of government” or of the State.

Our continuing attachment to the concept of the Crown and the absence of the idea of the State in our constitution are now qualified by the need to accommodate our legal system to the requirements of Community law. This matter is considered by Paul Craig. “Domestic definitions of the Crown”, he remarks, “are no longer decisive” in applying the Community law doctrines of direct effect and State liability: it has been necessary to “introduce the State as a juridical concept which has to be applied by our domestic courts”. He offers a warning here: the meaning of “the State” is not always the same. We need to be alert to the different purposes for which the legal concept of the State may be used, since the particular purpose may shape the definition of the State that is adopted for realising that purpose. Craig’s essay also provides thoughtful comment on the impact of Community law on Crown immunity, parliamentary sovereignty, and governance within the United Kingdom.

In regard to the nature of the Crown and the liability of its ministers and officers we naturally look for a contribution from Sir William Wade, and he does indeed present us with a short essay on the essentials of the matter, offered as “a small appetiser for the remainder of the feast”. Wade’s is an attractively lucid version of the meaning of the Crown: it is simply, the Queen, “though the term is usually confined to her in her political or constitutional capacity”; the Queen is both a natural person and a corporation sole; the Crown is immune from legal process at common law but so far as the immunity survives, the courts have been able to get round it; ministers do not share in the legal personality of the Crown or in its immunity.
Wade’s thesis is contested in Martin Loughlin’s stimulating essay. Their contrary views of the nature and utility of the concept of the Crown are highlighted in their analyses of Town Investments Ltd. v. Department of the Environment [1978] A.C. 359 and M v. Home Office [1994] 1 A.C. 377. For Wade the former case is heresy and he deprecates the “unsoundness of the House of Lords’ sweeping propositions”, while for Loughlin the Law Lords in that case laid the foundations for “a more appropriate legal conception of government”. Again, for Wade, M v. Home Office set the law on the right road, and showed that “the rule of law really works”, whereas for Loughlin the case is only “a faltering step in the modernisation process in public law”, while it “entirely fudged” the central question of the nature of the Crown. These two essays and the bracing conflict of their theses will provoke the student of constitutional law to some hard thinking at a fundamental level.

Several other essays in this book—as those by Craig, Cornford, Freedland and Tomkins—also engage with fundamental aspects of the Crown in a stimulating fashion, while the prerogative is elucidated in its history and definition (Payne), amenability to judicial review (Hadfield) and ripeness for reform (Brazier). The nature of the Crown is illuminated in crosslight in the studies of such collateral subjects as the law officers (Walker), the armed forces (Rowe) and Crown employment (Watt). All in all this is a refreshing book, which grapples with basic principles and presents a wide range of reflections about the nature of the Crown. It will not settle the arguments about this problematic concept but will help to clarify our understanding of the place of the Crown in the modern system of government.

COLIN TURPIN


IAN Carter’s book on freedom is a first-rate work of political and legal philosophy. It is extraordinarily well structured, technically sophisticated, consistently illuminating, and rigorously argumentative. For those theorists (including the present reviewer) who disagree with a number of its positions, it is a volume that will amply repay critical reflection. Indeed, of the myriad books published in the twentieth century on the philosophy of freedom, Carter’s is probably the best.

Carter focuses principally on the question whether political and social freedom is a measurable attribute. Many liberal theories of justice take for granted that freedom is indeed measurable, as they submit that individuals are entitled to enjoy maximal overall freedom or maximal equal freedom or simply equal freedom. Similarly, in everyday discourse we often presuppose the measurability of liberty as we contend that one society or nation is freer than another. Carter seeks to determine whether we can make sense of these liberal prescriptions and these quotidian comparisons. He adopts what he characterizes as an “empirical” conception of freedom—a conception on the basis of which he contends that the task of measuring freedom is strictly non-evaluative. He endeavors to show that such a conception will yield the measurability required by liberal theories of justice.
and will also generate specific conclusions that are in accordance with our common-sense comparisons.

The argumentation in *A Measure of Freedom* is as admirably bold as it is rigorous. Carter does not flinch from jousting with an array of prominent political and legal philosophers, and he generally fares very well indeed in the confrontations. Among the theorists of whom he decidedly gets the better are Ronald Dworkin, Will Kymlicka, Charles Taylor, Amartya Sen, Felix Oppenheim, Philip Pettit, and Quentin Skinner. Building on the extremely important work of Hillel Steiner and G.A. Cohen, Carter modifies their ideas in illuminating directions while adding many insights of his own.

*A Measure of Freedom* is divided into three chief parts. In the first of these, Carter argues persuasively that freedom is an attribute with content-independent value (i.e., value that transcends the desirableness of the particular things which one is free to do). He then proceeds to explore a number of principles for the appropriate distribution of freedom among people in a society. Those manifold principles are the chief elements in the competing theories of justice propounded by liberal political and legal philosophers. Carter investigates the extent to which the implementation of each set of those principles will require precision in our measurements of freedom. He submits that, when we plump for a conception of freedom, we should do so with an eye toward the degree of precision-in-measurement that is demanded of us by the distributive principle(s) which we favour. We should strive for a reflective equilibrium—a mutual adjustment and reconciliation—between any such principle(s) and our conception of freedom.

In the second main part of the book, comprising Chapters 5 and 6, Carter sets himself against “value-based” approaches to freedom. Proponents of such approaches maintain that the task of ascertaining the extent of freedom enjoyed by any person or group of people is a partly evaluative endeavour and is therefore not focused purely on physical dimensions. After criticizing value-based approaches generally, Carter devotes his sixth chapter to a sustained and devastating critique of one such approach: Charles Taylor’s theory of freedom as self-mastery. Notwithstanding that Carter aptly trounces Taylor, and notwithstanding that some of his general animadversions on value-based theories are fully pertinent, his fifth chapter’s attack on all such theories is perhaps the least impressive part of his book. A value-based approach that suitably distinguishes between the existence of freedom and the extent of freedom can withstand his censure. Though a rejoinder to Carter on this point cannot even be sketched (much less elaborated) within the compass of a short review, the matter has certainly not been settled by his arguments. (The present reviewer is currently working on a book that includes a lengthy riposte to those arguments.)

The third and final major section of Carter’s book exhibits great ingenuity and subtlety in demonstrating that his empirical conception of freedom can overcome most of the difficulties that might initially appear to undermine it. By focusing on the compatibility of various possible actions and inactions, Carter is able to take account of the freedom-constricting effects of situations where people are nonetheless free to behave in certain specific ways. He grasps that, if one’s commission (or omission) of some action *X* will subsequently leave one unfree to do very much else, then one’s freedom to do *X* (or one’s freedom to forbear from doing *X*) is
accompanied by the cabining of one’s overall freedom. Although such an insight may seem obvious when stated here so simply and abstractly, a neglect of it has underlain many of the objections that have recurrently been posed against quantitative conceptions of freedom, as Carter deftly and patiently shows. Having established that the view of freedom as a quantitative attribute can be squared with virtually all common-sense comparisons of people’s different amounts of freedom, he closes his book by moving from the purely conceptual plane to the practical plane on which measurements of freedom would actually be undertaken. He quite convincingly maintains that we can gauge people’s overall freedom reasonably well by focusing both on their levels of wealth and on their enjoyment or non-enjoyment of certain important types of freedom.

On the whole, the argumentation in *A Measure of Freedom* is commendably rigorous and thought-provoking. Although there are many claims in the book (not only in Chapter 5) with which the present reviewer disagrees, nearly all the points that elicit disagreement are genuine issues in political and legal philosophy rather than instances of outright confusion. Even when Carter is guilty of some minor logical lapses—for example, his repeated use of the phrase “do not-x” when he means “not do x”, and his occasional use of the phrase “both cannot win” when he means “it is not the case that both can win”—the stumbles do not affect the substance of his analyses and conclusions. As the Preface indicates, the writing and polishing of this book extended over a decade; the wait has proved to be worthwhile indeed for both the author and the reader.

MATTHEW H. KRAMER


ENCOURAGED by the reputation gained for him in Europe and Latin America by Etienne Dumont’s elegant three volume recension of his otherwise largely unpublished writings, *Traités de législation civile et pénale* (Paris 1802), Jeremy Bentham between 1811 (when he was sixty-three) and 1830 seized every opportunity that he perceived to be presented by the political and constitutional changes taking place in Europe and America (north and south) to badger those having authority, power or influence with offers to draft for their states legal codes, penal, civil and, if need be, constitutional, codes both general and particular, which would promote the greatest happiness of the greatest number of their citizens. These public figures were sent letters, detailed proposals, prospectuses (with testimonials) and parcels of books. The codes, it was argued, should be drafted by a single hand: committees would compromise and fudge and fail to achieve consistency, and there would be no one person to accept responsibility for them. The sole draftsman should not be remunerated, lest he be influenced by any considerations other than that of the maximisation of human
happiness (the ring sent by the Tsar as a token of his esteem was, therefore, returned), and preferably be foreign (so that he should not even stand to benefit by the laws he drafted). What, accordingly, legislators should do was to invite drafts from as many draftsmen so qualified and willing as they could find, choose the best of them, and then, working with its author, subject his draft to rigorous critical scrutiny, making whatever (but it was believed they would be few) alterations as local circumstances demanded. Offers of this sort were made to the President of the United States, and to the Governor or legislature of each of them (who would, Bentham assumed, be keen to replace the chaotic, barbarous and now alien law they had inherited), to the Emperor of Russia, to a putative Viceroy of Poland, to the Genevan Conseil d’Etat, to the Spanish and Portuguese Cortes, to the Greek provisional government, and to the newly independent ones in Buenos Aires and Guatemala. All these offers, save that to the Portuguese Cortes, were either declined or ignored. That to the Portuguese was accepted, but not acted on.

The materials, printed and manuscript, most closely related to all this activity form the latest (the 19th) volume in that fine work of scholarship, *The Collected Works of Jeremy Bentham*, which since 1970 has been emerging slowly but steadily from the Bentham Project at University College, London. The problems facing the editors in presenting this material must have been enormous. They have been met with great skill and learning, leaving all who are fascinated, exasperated, puzzled by, or just interested in, Bentham much in their debt. His prose style did not, it has to be said, improve with the years. And it may have been even more difficult for contemporaries than it is for us (take, first, a deep breath... since many words that are now familiar—including, indeed, the verb to ‘to codify’—were of his own coining. But at the fertility of his mind one can only marvel: precious little said since about the aims, methods, techniques and difficulties of legislative drafting and codification is not to be found here.

Bentham’s ideas came to pervade, when they did not dominate, the thinking of nearly everyone of whom K.J.M. Smith writes in his remarkable book, *Lawyers, Legislators and Theorists: Developments in English Criminal Jurisprudence 1800–1957*, which appears in the Oxford Monographs on Criminal Law and Justice series. Its subtitle would seem to be a piece of wishful thinking, as its final chapter appears to concede. Put aside some small growth in analytical and conceptual clarity, and there is next to nothing else during this century and a half that deserves to be called a jurisprudential development. The same ideas were being batted around and the same debates were going on (inconclusively) in the 1950s (and, indeed, the 1990s) as in the 1870s or the 1820s and 1830s. This may be why H.L.A. Hart decided to devote so much of his life to Bentham and the Bentham project.

The reader of this book cannot get far (not much beyond page 3) without uncomfortable forebodings of what is to come, and if, lured on by the General Editor’s promise of “a rich harvest of new insights and perspectives to [sic] the study of the criminal law”, he trudges on, as a reviewer feels himself in duty bound to do, through 378 pages to the end, he will have all his forebodings confirmed and reinforced. For behind a scholarly façade, and on footings provided by notes that are often inches deep, there is much banality, obtuseness, misunderstanding, repetition and verbosity—and the English language mistreated to a degree that ought to
attract criminal sanctions. Nor is there anything between the book’s two covers that will be unfamiliar to those who have dipped into Blackstone and Stephen and are conversant with the mainstream academic writing of recent decades.

With such a book it is difficult for a reviewer to know where, if at all, he should begin in particularising his complaints. Should he give examples of the pilings-up (and misuse) of words, the broken-backed sentences and the strange creatures who people its pages (such as the “non-professional layman”, the “eventual judge”, the “proto-legislator” and sometimes the “(proto-) legislator”)? Or should he cite the author’s repeated failures to read with sufficient care the judges and writers whom he ventres to criticise, or fully to grasp the critical importance at the start of his period of the distinction between felony and misdemeanour, that it is central to, for instance, the history of liability for inchoate offences? (That Sir Edward Hyde East chose to write on “The Pleas of the Crown” (1803), while his successor not only as a text book writer, but as Chief Justice of Bengal, Sir William Oldnall Russell, wrote a “Treatise of Crimes and Misdemeanours” (1819), does represent a significant change of perspective.) Or should the reviewer register his surprise that anyone should think of John Archbold’s pocket-sized (446 pages, foolscap 8vo) Summary of the Law Relating to Pleading and Evidence in Criminal Cases (1822) as a “comprehensive and discursive practitioners manual”, or find fault with Serjeant Hawkins for failing in his Pleas of the Crown (2 vols, 1716–1721) to take account of what Sir Matthew Hale had written in his History of the Pleas of the Crown, (which remained in only two manuscript copies, the author’s and a transcript, until 1736)? Or should he simply note that here is someone who sees the merely marginal modification of the felony-murder rule effected by the 1957 Homicide Act and the same statute’s introduction of the diminished responsibility defence as epoch-making, because “loaded with wider implications for criminal responsibility”, rather than as political stratagems for making the retention of capital punishment a little less indefensible, while ensuring that mentally abnormal killers should, although escaping hanging, not escape responsibility for their killings?

There is, however, a more important point needing to be made. Writing the history of law and legal ideas requires the exercise of historical imagination. The would-be historian must lay aside the preconceptions that come from his knowing about present day law, and try to understand how the law appeared to the lawyers of whom he writes. He has to try to get inside their minds, and to understand their trains of thought. What most deserves his attention is his subject’s starting point, not its destination. But there is no sign in this book that its author realises that this is what the task he set himself requires, and the book’s structure militates against it. Everything he reads he reads with the spectacles, the mind set, and the conceptual apparatus of an academic criminal lawyer of the last decade of the twentieth century, and as a result he never gets below the surface. Looking only to see how far from, or close to, a 1990s understanding of the structure of criminal liability earlier lawyers had come, he has engaged in an unrewarding and unenlightening enterprise.

P.R. GLAZEBROOK
In *The Dignity of Legislation* Jeremy Waldron raises the question of why it should be that, in jurisprudence, we have so little to say about legislation as compared with judge-made law. “Why is ... judge-made law ... our concept of law in jurisprudence, while statutes and legislation linger on the periphery of our philosophical concerns”? (p.11). “[A]lthough legal positivism”, for example, “has traditionally given pride of place to legislation as a basis for law, modern positivists are much less interested in this than they are in the processes whereby law is developed in courts” (p.15). The primary objective of this book is “to present legislation in a better light than it usually appears in legal and political philosophy” (p.128).

There are two ways in which Waldron pursues this objective. First, he offers analyses of various perspectives on legislation to be found within classical political thought. One would expect him to discuss a number of usual suspects: Bentham, Rousseau, possibly Hobbes. However, in order “to show that themes connected with legislation are a little more pervasive in the canon of political theory than a study confined to the usual suspects would reveal” (p.3), Waldron deliberately plays down the importance of these writers and focuses instead on Kant, Locke and Aristotle. Secondly, he uses his analyses of these philosophers “to bolster the claims that can be made on behalf of legislation by a popular assembly as a respectable source of law” (p.162). Kant, according to Waldron, is “one of the champions of the dignity of human legislation” (p.62) because, in his mature philosophy of law, he appears to be of the opinion that “the person who proposes to resist or disobey some piece of legislation is offering an affront to the very idea of right” (p.59). For Locke, “the function of the legislature is to pin down more precisely the rules and distributions that already exist in rough and ready form in the law and in the state of nature”—this being “a valuable function because it is precisely on these matters of detail that people are most likely to come to blows” (p.67). In Book III, Chapter 11 of *Politics*, Aristotle defends the collective deliberation of legislative assemblies by arguing that the multitude tends to be wiser, and more capable of making good decisions, than the individual (pp.92–93). Rather than quote from Kant, Locke and Aristotle “as if they were our oracles” (p.165), Waldron has produced some rather idiosyncratic interpretations: the Kant on show here is remarkably Hobbesian; the presentation of Locke “as a theorist or proto-theorist of deliberative democracy” (p.82) at times seems decidedly experimental (“I think what he wants to say is that ...”[p.86]); and the approach to Aristotle involves “heuristic exaggeration” (p.115), inflating the importance of a passage in *Politics* “in a way that may go far beyond the intentions of its author” (p.92).

In less assured hands, this could all prove disastrous. But Waldron knows what he is doing, a consequence of which is that his interpretations invariably remain on the right side of that vague and perilous border between highly imaginative and downright far-fetched. If there is a problem with the interpretations on offer, it is that they sometimes stray some distance away from the book’s central theme. Waldron ultimately concedes that many of the arguments which he considers are “not arguments about
legislation as such” but “arguments about the primal need to extrapolate some decision-procedure from the very notion of a political society” (p. 164). A considerable amount of the discussion is thus devoted to the defensibility of majoritarianism “as a principle for setting up a legislature, and for selecting the shape and character of subsequent rules for political decision-making” (pp. 163–164). “Our respect for legislation”, he suggests, “is in part the tribute we should pay to the achievement of concerted, co-operative, co-ordinated or collective action in the circumstances of modern life” (p. 156). By the end of the book, my feeling was that respect for this action was Waldron’s real concern: what impresses him, and what he wishes to impress upon us, is not so much the dignity of legislation as the dignity of the processes in which our representatives collectively engage in order to produce that legislation.

It might be objected that this last point is rather pedantic. But I am not so sure. For if one reflects on the question of why it should be that, in jurisprudence, we have had so little to say about legislative procedure, it is not obvious that we have had very little to say. Perhaps everything depends on how far one casts one’s net. Were one to stray away from modern Anglo-American jurisprudence—something which Waldron does not do here—one might find considerably more philosophical attention being devoted to both the mechanisms behind, and effects of, legislation (cf., for example, Gunther Teubner, Law as an Autopoietic System [Oxford: Blackwell, 1993], pp. 64–99). Even within the Anglo-American tradition, “legisprudence” has a not inconsiderable history (see, e.g., [1950] 59 Yale L.J. 86–97); indeed, in the United States over the past decade or so, the jurisprudential study of legislative processes has seen significant developments. Perhaps the sort of works which I have in mind—outgrowths, in most instances, of the so-called “legal process school” of the 1950s—Waldron would not classify as jurisprudence. But there is the rub: his claim that “law must be seen eventually as the o/shoot of politics whatever the jurisprudes say” (p. 166) is likely to prove compelling only if one shares his understanding of who “the jurisprudes” are. In dealing with this matter, Waldron does round up the usual suspects (see pp. 9–16). Indeed, we might deduce from his recently-published companion volume to The Dignity of Legislation that when he refers to the inattentiveness of jurisprudence to statute law, he means the inattentiveness of analytical jurisprudence to statute law (see Law and Disagreement [Oxford University Press, 1999], pp. 9, 33–48).

None of this is intended to suggest that Waldron’s argument concerning the jurisprudential neglect of legislation must be wrongheaded. The argument—notwithstanding examples which may run counter to it—probably represents fairly accurately a general jurisprudential mindset (especially within the analytical tradition). The problem with The Dignity of Legislation, to my mind, is that it does not set out the argument convincingly. Indeed, it is probably only to be expected, given its origins in a series of lectures, that the book should contain a fair amount of speculation. Consider, for example, the following passage:

I suspect that the reason for this continuing fixation [with judge-made as opposed to statute law] in jurisprudence ... is ... a worry about compromising what is taken to be the appealing anonymity of law and—so long as that anonymity is sustained—it's apparent neutrality, or at any rate its distance from or independence of politics...[Â] large part of the authority, the legitimacy—if you like, the simple
appeal—of a legal system is that we may regard ourselves as subject to government by laws, not by men. The danger of focusing on legislation is that, as a source of law, it is all too human... (p. 24).

All of this may well be correct. But the chances are that one will feel uneasy reading it. If jurisprudence has remained fixated with judge-made law in order to maintain law’s distance from politics, why should we find proponents of critical legal studies—who are, as Waldron himself notes (p. 24), concerned with removing this distance—by and large preoccupied more with judicial reasoning than with legislation? Waldron’s observation here provides no clue as to why critical legal studies should be as court-centred as other branches of jurisprudence. As for the idea that legislation is all too human, one might expect many academic lawyers educated within those systems which produced *Law and the Modern Mind* and *The Politics of the Judiciary* to question why legislation should be considered any more “human” than adjudication. Again, the point is not that Waldron must be wrong, but that he has perhaps not done enough to convince his readers that he is right.

_The Dignity of Legislation_ is an erudite, engaging and provocative book which slants a fresh shaft of light on works by some of the great political philosophers. The main problem with the book rests, I believe, in Waldron’s claim that “legal scholars... tend to confine themselves philosophically to the hushed tones of jurisprudential discussions of the nature of judicial reasoning” (pp.165–166). If one reads _The Dignity of Legislation_ alongside _Law and Disagreement_—and if it is assumed that legal scholars are nearly always Anglo-American and that jurisprudential discussions are in most instances analytical—one is unlikely to be troubled by this claim. But without the companion volume—and, more importantly, in the absence of these assumptions—_The Dignity of Legislation_ seems underdeveloped.

NEIL DUXBURY


Despite the profusion of legislative creativity in the field of family law under successive governments at the end of the twentieth century, the beginning of the twenty-first reveals that much work remains to be done. Some of this involves reconsideration and reappraisal of reform initiatives which have failed to live up to their expectations—the child support system and the currently shelved divorce process are obvious candidates. In other cases, statutory regimes of greater longevity—the jurisdiction splitting matrimonial assets on divorce and the adoption legislation—are being carefully reviewed with comprehensive reform in mind. Then there are fields where the legislator has, for political reasons, refused to stray, but which cry out for statutory intervention and guidance; in particular, the Law Commission’s proposals on homesharers are eagerly awaited. Meanwhile, the Human Rights Act will transform, at least in its early years, the way in which many family law disputes, particularly regarding children, are argued. Family law, an ever-changing subject as it responds to
societal trends and reader acceptance of human diversity, will continue to move with the times.

Law, Law Reform and the Family is a collection of essays, all but one of which have been previously published, which have been revised and updated for the purposes of publication in the current form. It is in sum a study of legislative history. Dr. Cretney commences outside the family arena (but appropriately as a former Law Commissioner) with a consideration of the political pressures and an analysis of the inevitable political compromise which led to the birth of the English and Scottish Law Commissions in 1965. The rest of the book develops the theme of the processes and procedures of law reform in its various guises, as applied in the context of family law. The history of divorce is the ultimate fascination for the student of legislative development, or evolution, and it is particularly pertinent as the Lord Chancellor determines the fate of the enacted but stagnating Part II of the Family Law Act 1996. The one wholly new chapter considers the background to the enactment of the Divorce Reform Act 1969, with the benefit of records and papers only recently made available under the thirty years’ rule. Less well known (and little used) is the Judicial Proceedings (Regulation of Reports) Act 1926—“one of the rare examples of peace-time legislation specifically restricting the freedom of the press to publish material lawfully in a reporter’s possession”—passed in response to the widely publicised Russell divorce case (later to be exhumed by the House of Lords Committee of Privileges hearing the Amphill Peerage claim [1977] A.C. 547). Dr. Cretney’s assessment of the 1926 Act is followed by his examination of the Summary Procedure (Domestic Proceedings) Act 1937, possibly the first major statute to promote conciliation in family cases, and the further advancement of alternative dispute resolution by the 1947 Denning Committee on Procedure in Matrimonial Causes, which marked “a decisive step in the evolution of the divorce process” in propounding the heresy that the promulgation of a divorce decree should not remain the sole prerogative of the judges of the Family Division of the High Court, and pointing the way to the special procedure of bureaucratic divorce. That same special procedure tolled the death knell for the 1926 Act.

There are three essays on the law of children. The paper on the Guardianship of Infants Act 1925 is justly celebrated, illustrating the conflict consequential on parental rights analyses, and the ultimate effectiveness of the splendid, if flawed, legal compromise of parental responsibility. The inception of adoption by statute in 1926, and the difficulties in prescribing the legal consequences and dealing with the parent who refuses to consent, is given detailed and careful consideration, after which Dr. Cretney explains how child welfare services were rationalised by the Children Act 1948 following the lengthy examination of the issues by the Curtis Committee and the recognition of a public responsibility towards children in need. All of these statutes dealing with various aspects of children’s welfare have been superseded, but the surrounding debates, so lucidly summarised, provide vital illumination on the underlying policy issues. Two chapters concern family property, both in the context of devolution on death. Thus, the limitations of the scrutiny procedure for private member’s bills are highlighted in the chapter on the peculiar Forfeiture Act of 1982. The final chapter looks at the interrelated areas of intestacy and family provision. It bravely addresses the difficulties consequential on the rejection by the government of the Law Commission’s
1989 Report on Distribution on Intestacy (Law Com. No. 187) and makes ambitious proposals for future development.

The book maintains a coherent identity of its own, many of the chapters being inter-linked, and it does not seriously justify the author’s concern that it might as a collection lack a common or unifying theme. The ordering of chapters is a little strange, in that consideration of the Divorce Reform Act 1969 precedes the chapters dealing with aspects of the earlier history of divorce law and procedure, and the Forfeiture Act 1982 sits rather awkwardly between them. But this is a minor cavil. The book is, as one would expect, meticulously researched, lucidly written, elegantly presented, and a hugely enjoyable read. But it is much more than that. Tempting though it may be to file it under legislative history, it proves the old adage that history teaches us lessons for the future, and it cannot be ignored by those who have the unenviable but necessary task of furthering the work of family law reform. The promised sequel on Law, Lawmakers and the Family in 20th Century Britain cannot come soon enough.

STUART BRIDGE


If one issue has dominated medical law and ethics over the past decade it is voluntary euthanasia. Much of the debate concerns the morality of voluntary euthanasia in principle. Is it ever right for a doctor purposefully to kill his or her suffering patient at the patient’s request?

Proving to be of even greater significance in the debate about law and public policy is the question whether, even if voluntary euthanasia were justifiable in certain “hard cases” (typically as a last resort for patients who were suffering unbearably and who seriously requested it), it could be safely controlled in practice. Could it be confined to those “hard cases”? Or would allowing it involve an unacceptable risk of euthanasia being applied to patients whose suffering could be alleviated by palliative care, or who did not request euthanasia, either because they were incompetent to do so (“non-voluntary” euthanasia) or because they did not want it (“involuntary” euthanasia)?

Opponents of voluntary euthanasia argue that the slide down the “slippery slope” to non-voluntary euthanasia is inevitable, not only because safeguards against it simply cannot be made effective (the “empirical” slope argument) but also because the argument for voluntary euthanasia is equally an argument for non-voluntary euthanasia (the “logical” slope argument). If, this “logical” argument runs, a doctor can judge that death would be a benefit for a patient who asks for it, why cannot the doctor make the same judgement in relation to a patient in identical circumstances who cannot request it? Why should the doctor deny this benefit (if such it be) to the incompetent? Defenders of voluntary euthanasia deny there is a logical connection and claim that safeguards against the slide can be made effective.

In deciding between these arguments, the experience of the Netherlands,
where voluntary euthanasia has been officially tolerated since a decision of the Supreme Court in 1984, is proving of profound and continuing importance. However, just as there is disagreement about voluntary euthanasia in principle, there is disagreement about Dutch euthanasia in practice. Critics claim it confirms, defenders that it confutes, the “slippery slope” argument.

*Asking to Die* is a substantial collection of essays and interviews about Dutch euthanasia and is, on the whole, staunchly defensive. This is not, perhaps, surprising: as the subtitle “inside the Dutch debate” suggests, the contributors are all in fact Dutch. (Although two of the Editors are American the other two are Dutch, and the editorial contribution is univocal.) The Editors claim that “Only the Dutch themselves” (p. 15) can provide an accurate assessment of the development of Dutch euthanasia. This is, of course, questionable. Can only the Chinese provide an accurate assessment of human rights in China? By omitting non-Dutch experts the book excludes some of the leading critics of Dutch euthanasia.

The book is divided into three parts. Part I contains perspectives from law, medicine, theology and ethics, and is divided into two sections. The first section comprises eight chapters which provide useful information about legal developments and medical practice, and reject allegations of a “slippery slope”. The second section comprises five chapters, two of which are strongly critical of Dutch euthanasia. In another chapter, Dr. Ben Zylic, one of Holland’s few hospice doctors, describes his practice.

Part II comprises two sections. Section one, containing fourteen chapters, recounts doctors’ experiences with euthanasia. Section two comprises eleven chapters devoted to the experiences of relatives of euthanized patients.

Part III, which is relatively short, comprises two chapters. The first considers issues which continue to fuel the debate, such as the “slippery slope”, and whether non-voluntary euthanasia should be permitted. Chapter two suggests improvements which could be made to current practice, such as providing counselling for those doctors who experience guilt after performing euthanasia.

This is a big book, but its contribution to the euthanasia debate is likely to be less substantial. First, betraying a tendency all too typical of Dutch defenders of Dutch euthanasia, the book tends either to ignore or to play down criticisms and counter-arguments. For example, it fails to answer the criticism that the Dutch underestimate the incidence of euthanasia. Again, the disturbing lack of control over euthanasia, evidenced by the fact that the majority of cases are not reported by doctors, is played down. The crucial issue of non-voluntary euthanasia, an issue at the heart of the “slippery slope”, receives scant consideration, even though it is widely practised and has received judicial approval in cases of disabled neonates. In short, the book fails to confront the argument that the slide has already occurred: that non-voluntary euthanasia is widely practised and condoned, and that euthanasia is not infrequently used as an alternative to palliative care. Not only does the book tend to avoid such counter-arguments, it even tends to avoid argument. The moral case for voluntary euthanasia seems simply to be assumed. Is it not striking that in a book of forty chapters, not one advances the philosophical case for voluntary euthanasia which has persuaded the Dutch?

Secondly, while there is relatively little reasoned argument and analysis, there is much emotional anecdote. About half the book is taken up with
personal stories. The stories are typically of conscientious doctors who resort to euthanasia sparingly; of suffering patients who find relief in euthanasia; and of their grateful relatives. But do these vignettes not come perilously close to tabloid tear-jerking? And why no, equally moving, stories from conscientious doctors who offered palliative care not euthanasia; of patients who were thereby relieved; and of their grateful relatives? And why so few cases of doctors breaching the guidelines, as by terminating patients without request? Perhaps they would be less willing to be interviewed. But then how representative are those who were? And, if the Editors think that the stories reflect well on Dutch euthanasia, they need to think again. For example, in story after story no mention is made of the doctor consulting with either an expert in palliative care to explore alternatives, or with a psychiatrist to ensure that the patient’s request is competent and free. Given the inadequacies of palliative care in the Netherlands (Dr. Zylic writes that “Palliative care is virtually unknown in Holland” p. 196), and given that many if not most patients requesting euthanasia are psychiatrically ill, the anecdotes tend to heighten, rather than assuage, concerns about the “slippery slope”. It would have been interesting to have the views of a palliative care expert and a psychiatrist on each case.

Thirdly, many of the academic chapters have already been published elsewhere, particularly in the Cambridge Quarterly of Healthcare Ethics. To this extent, the book has little new to offer those reflecting on the ethical, legal and public policy aspects of the debate. It will, however, make those essays more accessible to the general reader who is sufficiently interested to spend £126. There are, however, better books on Dutch euthanasia at a fraction of the price.

In sum, an interesting but selective contribution to the growing literature about Dutch euthanasia. Predominantly pro-euthanasia it does at least air, if not always answer, some of the counter-arguments. The book accurately reflects the confusion and complacency in the debate in the Netherlands. It paints a relatively rosy picture of the Dutch euthanasia garden which largely ignores its deadly weeds.

JOHN KEOWN


This short but ambitious volume represents the fruits of a year’s research by the author at the European University Institute in Florence. The author’s aim is to connect a number of different areas of the developing European Community doctrine on judicial review of administrative action and to reveal how certain principles derived from them may form a coherent basis for a quasi-constitutional code of good administrative conduct.

Nehl takes the reader sequentially through the administrative law requirements that the courts have developed in the major areas of Community competence: the right of access to information, the right to be heard, the duty to give reasons and the principle of care. The canvass is thus a broad one and includes discussion of cases arising under the
Community laws on competition, State aids, anti-dumping, customs matters and the European Social Fund. The author’s method is to identify the birth of a particular procedural obligation in a specific area of Community activity and then to trace its development by the Court of First Instance (C.F.I.) and the European Court of Justice (E.C.J.) into a generalisable norm of administrative behaviour. An example would be the right of access to information which the author locates initially in the field of competition law as an aspect of the right to be heard. As the principle grew, it ceased to be justified as an instrumental part of another right and emerged as a free-standing principle which was no longer confined to the field of competition. Paralleling the growth of the procedural rule, the Community judiciary re-orientated its justification from one based on individual rights towards one based more on transparency and notions of democracy.

The author thus provides a succinct and up-to-date account of the development and current state of EC administrative law. Given the number of distinct areas covered, it is perhaps unsurprising that the majority of the work is descriptive but the author does permit himself some interstitial criticism of, for example, the unwillingness of the C.F.I. to address matters of principle rather than simply resolving the concrete dispute before it. Nehl also refers to influences beyond strict legal doctrine such as institutional reform and changing perceptions of the usefulness of litigation in explaining the growth of general principles of good administration. The author identifies the establishment of the C.F.I. and the increasing willingness of commercial entities to use litigation for the pursuit of their economic interests as crucial to the rapid development which he describes in these pages.

No administrative lawyer can afford to marginalise the direct and indirect influence of EC law on the development of domestic doctrine, but this work also serves to reveal how universal are the tensions which underlie all systems of judicial review. Indeed, in the course of his inquiry Nehl raises a number of issues which are of perennial concern to administrative lawyers in all jurisdictions. One is whether it is possible to have general norms which can be applied to diverse areas of administrative action or to what in his chosen context Nehl describes as “the extraordinarily heterogenic nature of the EC administrative ‘system’” (p. 1). The familiar fear is that differences between the substantive fields covered undermine the extent to which they may cross-fertilise each other and to which it is possible to generalise without moving to a level of abstraction which robs statements of principle of much of their normative value. The author acknowledges this in his discussion of the principle of good administration which he accepts has not emerged as a general principle of EC law partly because of its vagueness and partly because its actual content cannot be determined independently of its constituent elements, such as the right to a hearing. Nevertheless, the author remains optimistic about the prospects for the codification of principles of European administrative law.

Another common battleground in administrative law is the distinction between procedural and substantive grounds of judicial review. Nehl provides an instructive example in this field too in his description of the conflict between the C.F.I. and the E.C.J. in the Sytraval case (C–367/95 P, Commission v. Sytraval and Brink’s France) which he discusses in his extended section dealing with the principle of care. Of all the concepts analysed by the author this is likely to be the least familiar to
administrative lawyers in the United Kingdom. Nehl defines it as “the duty of the administration impartially and carefully to collect and examine the information needed for its decision-making” (p. 5). The E.C.J.’s criticism of the C.F.I. was principally that the latter failed to draw the necessary distinction between the substantive legality of a decision and the duty to give reasons for it, but the dispute was as much about competing models of the proper limits of the judicial role as it was about the procedural duties of the European Commission in the context of State aids.

It is in relation Nehl’s account of these recurring concerns in all administrative law systems that one could advance the criticism that his focus is too much on a description of the substantive law and contains insufficient discussion of the broader issues of principle which underlie the notion of judicial review. This difficulty is partly mitigated by extensive footnoting and a helpful bibliography, but it would have been interesting to hear more of the author’s view on who has the better of these disputes and why that should be so. This would be especially instructive since one can detect something of the judicial uncertainty over the scope of the principle of care in the author’s own ambivalence towards the prospect of separating it from other procedural standards (compare pp. 104, 120 and 148). It would also have been useful to have a clearer indication of how these norms might be integrated into the corpus of EC administrative law.

As to form, as one has already come to expect from Hart Publishing, the work is presented with very few typographical errors and in a clear and attractive way. As to substance, there is no question that the author has provided a highly useful and readable account of the present state of EC administrative law which will prove of interest to all public lawyers whether or not their principal focus is on Community law.

IVAN HARE


On 6 December 1999, Spain celebrated the twenty-first anniversary of her constitution. The country’s peaceful emergence from authoritarian rule has often served as a model for Latin American nations undergoing a similar process throughout the last two decades. Surprisingly, though, Spain’s legal system has drawn little attention from non-hispanophone countries making the transition to democracy in recent years, such as South Africa and those in Eastern Europe. In the English-speaking world, even comparative lawyers have exhibited little interest, preferring to study the systems of France and Germany as examples of civil jurisdictions. While the reason for this may be that the languages of those countries are more widely studied in Britain, it is still regrettable that, until the publication of Charlotte Villiers’ volume in Ashgate’s Law of the Nations series, there has only been one introductory monograph in English on the Spanish legal system. Whether the paucity of information on Spanish law in English is a
result or cause of this blind spot among jurists, one cannot say; nevertheless, Villiers has provided welcome relief.

The importance of the constitution to Spain’s success as a modern democratic nation cannot be overstated. The Constitution of 1978 stands supreme in the hierarchy of Spanish sources of law, and the history of its creation is one of the great examples of a people peacefully forging a new nation through the application of law. The text of the constitution is not without its serious flaws, but it remains a remarkable achievement of political consensus. Therefore it is fitting that Villiers has made study of the constitution the centrepiece of her monograph.

Most importantly, the author has highlighted the constitution’s solution to the question of regional autonomy. Perhaps the most interesting facet of the Spanish legal system for the British reader is the extent to which it has accommodated a multitude of sub-systems pertaining to each of the autonomous regions. Spain has always had difficulty holding its distinct regions together as a nation. National unity and the supposed threat to it from the historic regions were among the most significant causes of the Civil War. Under the Second Republic, the Catalans and Basques had been granted an unprecedented amount of autonomy, provoking the Nationalists, led by Franco, to rebel against the government. Violent repression during the dictator’s regime barely kept the lid on simmering tensions until 1973 when Basque terrorist group ETA exploded a car-bomb, killing Franco’s prime minister and intended successor. So deciding the limits of regional autonomy was the most difficult task facing the Consensus Coalition, the congressional subcommittee appointed in 1977 to produce a draft constitution. The result was Article 2, which recognises and guarantees the right to self-government of the regions, but which also reaffirms the indissoluble unity of the Spanish Nation. The constitution is silent, however, on the extent of autonomy, and this has been the cause of some political discontent. It is difficult to provide a guide to the law of autonomy in Spain without crossing the line from law into pure politics. Such a discussion would be beyond the scope of this book, which is (and is intended to be) a descriptive account. Villiers successfully avoids this, but it is regrettable that she does not give more historical background on the way in which foral laws (which in some cases have ancient origins) have been accommodated under the modern legal system. Nevertheless, she has achieved two aims: to offer a general introduction to the legal system of Spain and to focus the work so as to be of interest to the British jurist.

One weakness of Villiers’ book is not directly attributable to the author; rather it is a flaw arising, perhaps unavoidably, from the nature of the series itself. Villiers’ work does not contain any exegesis of general civil law principles, and this may prove frustrating for the reader who is new to continental systems. The series editor Thomas Glyn Watkin has provided the first volume, and his study of the Italian legal tradition is quite different in style and structure from Villiers’. Watkin devotes a significant amount of space to describing those philosophical and methodological features of the civil law system so novel to the common lawyer. Many of the principles Watkin elucidates are common to other civil law systems, so it is quite sensible that Villiers’ volume does not treat the same material, thus avoiding repetition across the series as a whole. On the other hand, such an omission does prove a handicap for the reader who comes only to a single work in the series.

Not all foreign jurisdictions will be of interest to the English-speaking
lawyer. It may be argued that the French system holds the greatest interest for the comparativist because of the influence that France’s Civil Code has had beyond her borders. Nevertheless, the Spanish legal system’s emphasis on constitution, its entrenchment of fundamental rights and its accommodation of autonomous regions make it a rewarding object of study for the British jurist.

LESLIE TURANO


Out of kindness to those who may shrink before the combination of “Chicago” and “economic approach”, the authors begin with an assurance that “the world is composed of three [sic] types of people—those who can count and those who can’t—and [that the authors] have written this book with the last group in mind” (p. xii). Readers may count on their assurance. This is a lively and lucid introduction to Japanese law. As the book’s sub-title rightly claims, however, it does much more than merely offering a sketch of the modern laws of Japan. For those who are not familiar with economic analysis of law, this book could well be an eye-opener. Those who regard Japanese law or any law of a foreign country too outlandish may, with this book, discover the fascination of comparative law. The book, in short, is an introduction not only to Japanese law, but to law and economics as well as to comparative law. Readers may see for themselves how economic approach could provide an extraordinarily powerful framework of analysis for comparative law.

Professor Ramseyer of Harvard Law School is already well-known for his leading works in various areas of Japanese law and legal system. As far as the present reviewer is aware, this book is his second joint-venture with Professor Nakazato of Tokyo University. The book does contain a number of bold claims provocatively stated—inevitable in an introductory work. But Professor Ramseyer’s disarmingly frank style makes them both charming and interesting. Those who nevertheless find some of their bolder assertions too rough to swallow will want to refer to more scholarly works of these same authors as well as their colleagues and opponents. Such scholarly works are well indicated throughout the book and in the useful bibliography provided by the authors. If many readers feel compelled to do so, that will no doubt be the greatest praise for any author of an introductory work.

The first chapter contains a section on the mechanisms of recruitment and promotion of judges and a section on lawyers and lawyer-substitutes in Japan. The chapter provides valuable information which is indispensable to any serious attempt at comparative study of legal services industry between Japan and Western countries. The fact that judges and public prosecutors in Japan are recruited from the same stock at about the same age does receive a brief mention. But the point could have been given more weight as it is an important institutional feature which is crucial to an understanding of Japanese criminal justice system. Chapter 2 gives a sketch of Japanese law of property. The legal relationship between landlord and
tenant, which Japanese lawyers would regard as a question of obligations rather than property law, is also explained in this chapter revealing the authors’ economic angle of analysis. The authors give a vivid and almost poignant account of how the Japanese court’s repeated decisions have radically curtailed the owner’s (lessor’s) contractual freedom to terminate or refuse the renewal of a lease. The result is that owners of a house and/ or land in Japan (these can be owned separately) will think twice before letting or leasing the property. Once they do let their property, the court will insist that there be a “justifiable ground” for discontinuing the arrangement. Everyone, including Japanese themselves, knows that such a régime is not conducive to an efficient use of land and housing resources. For the authors who consistently argue that “classic Chicago-school economic intuition” can explain much law-related behaviour in Japan, the Japanese law of tenancy is indeed a “disastrous exception” (p. 22). An historical approach—briefly hinted at by John Haley in his Authority Without Power—could perhaps be a more satisfactory alternative for explaining this area of Japanese law.

Chapters 3 and 4 deal with the law of contracts and torts. Readers will find illuminating discussions about why Japanese are bringing so few medical malpractice claims compared to their US counterparts; why Japanese in general appear to shun the court (the topic is discussed using the example of traffic accident); how the Japanese had, even before the enactment of their Products Liability Act in 1995, a self-imposed regime of strict liability voluntarily instituted by certain manufacturers, and how such an arrangement can challenge a number of fundamental assumptions habitually invoked to justify the products liability law in the US and, incidentally, why this voluntary regime of products liability in Japan is handling so few claims. The central theme running through these brilliant analyses is an antithesis to the well-known myth/mystery of the alleged reluctance of the Japanese to resort to the formal legal mechanisms of dispute resolution. The undoubted orthodoxy used to be to explain the low volume of litigation in Japan by referring to the cultural uniqueness of Japanese society where non-legal, ethical code stressing harmony and consensus dictated people to ignore or to by-pass formal legal arrangements. The explanation, if it is an explanation, is elusive and has attracted a great following precisely because its elusiveness confirms and reinforces an image of Japanese society widely held in the West. Undermining this orthodoxy is not an easy task. But the authors demonstrate that economic approach buttressed by a proper understanding of the differences of institutional arrangements between Japan and the US (absence of jury trials in Japan, in particular) can provide a convincing alternative. Their arguments are iconoclastic, lucid and compelling.

Economic approaches, however, can be overused. In discussing criminal trials in Japan (chapter 7), the authors suggest that conviction rate is extraordinarily high in Japan “because prosecutors are freeing guilty defendants”. They do this, according to the authors, because they have too few resources to prosecute any but the strongest cases (p. 182). However, in any criminal justice system where prosecutors decide whether to prosecute or not (Germany being an exception to some degree), it must be regarded as a legitimate and necessary task of prosecutors to drop the case where they lack adequate suspicion against the person arrested. To describe it as “freeing guilty defendants” is somewhat inelegant. Also, there may be a significant difference in the way the exercise of such prosecutorial discretion
is viewed by the members of the legal profession themselves or by the
general public in Japan and in a country like US. Considering that
prosecutors and judges are recruited from the same stock and that they
both are regarded in some important sense as “public servants”, Japanese
prosecutor’s decision to drop the case is clearly regarded as quasi-judicial
and appealable. More importantly, the authors appear to suggest that
Japanese prosecutors drop vast number of cases in order to save resources
which will be needed to conduct trials. This may sound “intuitively”
sensible to US prosecuting attorneys who will treat trials as requiring most
of their available resources. But an American prosecutor’s “intuition” may
appear “counter-intuitive” to a Japanese prosecutor. For Japanese
prosecutors, trials require only a fraction of resources which they and their
staff devote to the investigation and pre-trial assessment of cases. Japanese
prosecutors must not only conduct trials but also investigate cases, of
which the vast majority will not after all go to full-blown trials. Too many
cases per prosecutor, as the authors point out. But dropping cases is not
something Japanese prosecutors can do to save resources. It is a decision
which they can make only after spending the greater part of their
resources.

The authors’ claim that plea bargaining is widely practised in Japan—
perhaps not in form but surely in substance—may similarly be regarded as
suffering from too much economics and too little comparative law. As the
mechanism of Japanese criminal trial, so goes their argument, provides a
great incentive to settle, the defendants and prosecutors will, and they
actually do, arrive at a negotiated deal. This is an argument which in effect
challenges the revered works of John Langbein who has taught us how
Germans do without plea bargaining (both Germany and France
contributed to the shaping of modern Japanese criminal procedure). In
ignoring an authority as great as Langbein’s, the authors seem to offer
little more than a few anecdotal accounts and their own strong economic
intuition. However, whether or not Japanese criminal justice system
provides sufficient incentive for prosecutors and defendants to strike a deal
and, if there is incentive to settle, whether or not the institutional and
procedural arrangement will allow the parties to settle are questions which
cannot adequately be dealt with by assertions based on economic intuition
alone. Afer all, there is room for arguing that our intuition (including
economic intuition) is itself determined by the institutional arrangement
under which we live. Careful attention to institutional and procedural
differences is an essential ingredient to a proper understanding of a foreign
law and law-related behaviour of its people. As the authors most
convincingly demonstrate frequently in this book, economic approach will
greatly complement it. But economic approach will not replace it.

The remaining chapters contain fascinating discussions about the
Japanese law of corporation and tax law. The authors have many
interesting and insightful things to say about the unique features of
corporate governance in Japan and about mergers and takeovers. It is not
by any means an easy task to convey the results of leading-edge
scholarship in a language which is both pleasant to read and easy to
understand. The authors, however, have done so with a great deal of taste
and skill. The choice selection of Japanese cases, abundant and invariably
entertaining, make reading this book an irresistible pleasure. “It is
fascinating and lucid, expert and scholarly—never dry.” These are the
words of Judge Richard Posner, who is no doubt well-placed to make an authoritative pronouncement in this matter.

Keechang Kim


At 1,138 pages of text this second edition of Craig and de Burca is, like its predecessor, a weighty volume in every sense. It seeks to analyse and explain the Union’s institutions and the development of its law in the context of the broader process of European integration. Thus the authors assert that “[t]o study and evaluate European Union…law without considering something of the historical, political and economic forces shaping its evolution would be to gain a very limited understanding of the subject”. Their hope therefore is to “make clear the interconnectedness of political forces, institutional structures, processes, and substantive policy in the formation of EU law”. As with the first edition they have attempted to achieve this goal across a wide range of subject matter. Nonetheless, although the book covers the topics traditionally included in Community law courses, it does, perhaps inevitably, exclude some topics in order to keep within its already very ample extent. One can, in particular, imagine that in future editions Community consumer law and environmental law will feature in their own right since they relate so directly to the interests of Europe’s citizens and have been the subject of much scholarly interest in the last few years. The authors’ decision as to what to include and what to exclude must, however, have been very difficult. All the more so since second editions are substantially judged by the extent to which important new developments are covered whilst “stale” text is excised. In this reviewer’s opinion the authors have been substantially successful in striking the balance in this regard. Indeed this second edition is, despite the inclusion of much new material, somewhat shorter than the first (which ran to 1,160 pages of text). This has been achieved by a judicious slimming down of the text throughout and has allowed, in particular, sufficient space for a new section on the Treaty of Amsterdam, for a much expanded treatment of state liability (to take full account of the post-Brasserie du Pecheur/Factorintam III case law), and for a new chapter on Capital and Economic and Monetary Union. Generally, therefore, revision of the text has been successful. For this reviewer, however, the continued location of the chapter on “Completion of the Single Market” at the very end of the book seems rather anomalous. At the time when the Single Market Programme was novel and its implementation and impact were being newly investigated it was understandable that such a chapter might be found at the end of, and rather outside the general structure of, a Community law text. With the passing of the years, however, it seems odd that the treatment of the subject has not been more fully integrated into the earlier text rather than being left as a discrete, terminal chapter. This is particularly so because earlier chapters (e.g., those on “The Development of European Integration”, “The Institutions” and “The Legislative Process
and Policy-Making”) cover subject matter into which a treatment of the completion of the single market would seem to fit.

Of course in commenting upon questions of selection and emphasis reviewers often enjoy the luxury of hindsight, especially where the pace of important events has been hectic. This has certainly been the case with recent European developments. Thus, although the major task facing the authors of this second edition was to accommodate the changes wrought by the Treaty of Amsterdam (no small task in itself) other significant events, no doubt occurring after the present edition went to press, will cast new light on some of the subject matter covered in the book and will no doubt affect the choice of topics to be included in any subsequent edition. The forced resignation of the Santer Commission, for example, will require the authors to expand and revise their treatment of the Court of Auditors (to which a little less than two pages of the current edition is dedicated) and, more importantly, to give a rather more extended treatment to the power-relation between the Commission and the Parliament. Indeed the affair, by focusing debate upon standards of governance at the European level, seems likely to develop a whole new topic that may need to be included. Similarly, the involvement of Member States in the armed conflict in Kosovo, albeit under the NATO banner, and the lessons that will no doubt be drawn as to the effectiveness of European co-operation in foreign policy and defence matters may well require the inclusion of a discrete new chapter on foreign and defence policy (as opposed to the more limited new section on external competence which is included in the present edition).

So far as presentation is concerned the second edition broadly follows the style of its predecessor but the authors very helpfully include references to the Treaty of Amsterdam re-numbering of the Treaty provisions, giving both the old and new numbers both in the footnotes and in conjunction with extract headings, (this being in addition to the inclusion in the Tables of the table of equivalences given in the Treaty of Amsterdam). In addition, the headings attached to extracts from judgments or scholarly writings are printed more boldly than in the first edition. This apparently small stylistic improvement makes it easier to pick out the extracts from the surrounding text and makes the page look less crowded and more attractive, at least to this reviewer’s eye. Somewhat less satisfactory is the fact that, although the title of the book has been changed to “EU Law” rather than “EC Law” (as it was in the first edition), this has not been reflected consistently throughout the text, in particular in the contents pages and in chapter headings several of which continue to refer to “EC Law”. This may be a small inconsistency but may nonetheless confuse the intended reader especially since, as the authors point out in their preface, the book’s title has been changed “partly because the EC is in fact contained within the EU, but more specifically because … it is becoming increasingly difficult and unhelpful…to assert such a clear distinction between the law of the Community and the law of the Union more generally”

For this reviewer the authors have largely achieved their goal—analysis of the law in the context of the integrative process—but that unifying theme is more cogently pursued in some parts of the book than in others. This is, perhaps, to be expected. Some chapters (e.g., those on the institutions, Community legislation and policy-making, the nature of Community law, the application of Community law in the national courts, supremacy of Community law, general principles of Community law,
enforcement actions against members states, the jurisdiction of the Community courts and on the fundamental Community freedoms) perhaps lend themselves more to this approach than do others (particularly those on competition law, merger control and state aids). This is not to say that the authors do not develop their theme in these areas but rather that the need to set forth and explain the relevant detailed technical rules does, almost inevitably, tend to obscure the contextual aspect. This should not really be regarded as a criticism of this book but as a limitation inherent in this type of work generally (as to which more below). Indeed, of its type, this edition (like its predecessor) has great virtue. The directness and clarity of the authors’ writing makes for a stimulating read. So does the fact that the authors, although properly critical and stimulatingly opinionated, do fairly present opposing viewpoints in a well-balanced way. Indeed, their careful selection and inclusion of extracts from the writings of other scholars, or from judicial pronouncements, works particularly well in illuminating issues by presenting the reader with succinct statements of opposing views. Thus (to take only two examples) the differing views of Toth and Steiner as to the meaning of the Community’s “exclusive competence” in the context of subsidiarity (pp. 125 and 126); and the differing conclusions drawn by Reich and Everling as to the implications for the Community of the Banana Litigation in Germany (pp. 275 and 276) help both to define the issues in question and to offer the reader alternative perspectives upon them.

For all of the above reasons this edition well deserves its place upon the Community law bookshelf. It does however prompt one further thought concerning the different uses and virtues of contextual as opposed to systematic treatments of the law from the point of view of intended readers. This book is clearly aimed at the undergraduate reader and there can be no doubt that a contextual approach is necessary, to some extent at least, if European law is to come alive for such a reader. On the other hand, undergraduates need books that prepare them for the examinations or other assessments with which they will be faced. “Problem” rather than “essay” questions tend to predominate in these. By its contextual description of the development of European law this edition (like its predecessor) will, in general, help to make the subject accessible. It will also, in particular, be valuable for students intending to answer essay questions. This reviewer, however, retains some qualms as to whether the book lends itself quite so well to serving the needs of the student faced with “problem” questions. Indeed, the sort of concise structure of authority and commentary that such a student needs to carry in his/her head into the examination hall in order to be able to answer such questions may be better presented by a more systematic, perhaps less discursive, treatment. Although this is not a criticism of the excellent quality of scholarship in this book it would certainly affect one’s decision whether or not to recommend it as a principal undergraduate text.

PETER KUNZLIK

Not long ago professional rules of conduct prohibited barristers and solicitors from advertising their services. There has been a considerable relaxation in these restrictions in recent years. Now the airwaves crackle with adverts proclaiming Bloggs and Co.’s ability to recover substantial damages (with heavy emphasis on a quick interim payment) should you suffer an injury at work or as a result of a road traffic accident. Sets of Chambers now have their own brochures and websites. One can imagine the hours of agonising that goes into the production of these documents and cyber-pages. Should members of Chambers smile when their picture is taken, thereby showing themselves to be approachable, client friendly and, dare I say it, human, or should the camera be greeted with an stony, emotionless visage, emphasising the tough, hard, no nonsense approach of the legal gladiator?

How times have changed, or have they? Lawyers, particularly those starting out, have always been keen to get their wares before a wider audience and have written or contributed to legal textbooks to do so. There is a long and distinguished line of barristers and solicitors who have done this (see, e.g., Lord Denning, The Family Story (1981), p.94). These are serious books which have often made a real contribution to the area of law taken as their subject. A modern example of this genre is the “Chambers’ book” written by a group of barristers from the same Chambers who practise in the same field. The collaborative nature of such a work ensures the relatively speedy production of manuscript, thereby keeping the publishers happy, without placing an undue burden on any one busy practitioner. Above all, it highlights the spirit of teamwork within Chambers, something which can be heavily marketed by the new breed of practice managers who play such a prominent role in many sets of Chambers.

Banking Litigation is a Chambers’ book with a twist. Teamwork and co-operation has been taken one step further to include a leading firm of solicitors within the enterprise. The result of this joint venture is a book which focuses on recent developments in banking law and practice written by an “all star” team of lawyers from 3 Verulam Buildings and Richards Butler, some of the very people responsible for conducting the litigation which brought about these developments in the first place. It may not be surprising, therefore, if the various chapters within the book represent a somewhat eclectic collection of different topics, for the life of the banking litigator is varied and a book of this nature must ensure that its main audience, the bankers themselves, are made fully aware of the breadth of skill and experience offered by its authors.

Chapter 1 explores the risks of liability of a bank at common law, in equity and under statute when receiving a deposit of funds from its customer, be he a money launderer, commercial fraudster or the like. Common law claims for money had and received, and in negligence, are well covered, but the chapter would have benefited from a broader discussion of the availability of other common law remedies in cases of commercial fraud (e.g., the tort of knowing interference with another’s rights), as well as some discussion of the possible assimilation of equity and the common law in this area. The authors of this chapter would do
well in any future edition to take on board Michael Tugendhat’s excellent treatment of these topics in chapter 9 of F.D. Rose (ed.) *Restitution and Banking Law* (1998).

Chapter 2 concentrates on those aspects of a bank’s relationship with its customer most likely to lead to friction or difficulties and which could ultimately give rise to disputes between them. Here the emphasis is on topical issues. For example, the extent to which a bank may be under a duty to advise its customer, its fiduciary duties (if any), possible conflicts of interest and the techniques available to manage such conflicts (especially Chinese Walls). At all times the text is directed to the bank (not the customer) giving sensible practical advice, especially on what the bank should do when served with notice of a Mareva injunction obtained against one of its customers.

Chapter 3 highlights three topical issues relevant to the security taken by banks as lenders: the *O’Ririen* defence; charge-backs; the insurance of credit risks. *O’Ririen* is probably the fastest developing of these areas and the treatment of the subject in this chapter is clear and up to date. However, the difficult theoretical issues which lie behind the *O’Ririen* defence, particularly the novel use of the doctrine of notice, are largely ignored. Janet O’Sullivan’s chapter in *Restitution and Banking Law* provides the best example of how these issues should be dealt with.

Chapter 4 covers syndicated lending. It is particularly good on the problems faced by lenders who seek to recover from their professional advisers, especially property valuers, when there is default in repayment of such loans. Here difficult issues of responsibility for loss, the quantum of damages and the impact of contributory negligence are analysed in some depth.

Other chapters cover a range of different topics: custodianship of stocks and shares (chapter 5), letters of credit and performance bonds (chapter 6) and the impact of new technologies on banking services (chapter 7). Sometimes the sheer number of issues covered in these chapters and the speed at which they are dealt with can be a little bewildering. On the whole, however, they are all competently written. The odd one out, as the Preface to the book admits, is the chapter on letters of credit and performance bonds, hardly an area bristling with recent major developments. However, remember, this is a “Chambers’ book”. It could hardly leave out an area which generates significant amounts of litigation and in which the authors are experts.

The final chapter (chapter 8) on disclosure is a *tour de force*. Here the authors are on home ground as they grapple with the delicate balance between the bank’s obligations of disclosure in the context of litigation and the duty of confidence owed to its customers. Clear practical advice is given to banks, advice which testifies to the hands on experience of the various authors who must have dealt with these issues many times in practice.

The title of this book could mislead. It is not a manual setting out the rules and procedures for the conduct of litigation in the banking arena. Rather, it focuses on those areas of banking law which in the last ten years or so have led to litigation or have the potential to generate litigation. The clear, sound practical advice offered to bankers by the authors on how to reduce the risk of their exposure to such litigation is one of the hallmarks of the text. Not all this advice will be heeded, and the mischievous reviewer is left wondering whether the authors hope that it is not. After all, thanks
to this book, we now know what these lawyers can do and where to find them, so it would be a shame if we had less reason to use their services in future!

Richard Hooley


This book is based on a thesis which the author submitted for a doctoral degree from the University of Sydney in 1996. Its principal focus is on the law of England and Wales, but its coverage embraces also the laws of Australia, Canada, Ireland and New Zealand, with some comparative references to the United States and Scotland. The subject has been thoroughly researched: the Table of Cases lists some 500 decisions and the Bibliography over 400 books and articles, and on many pages the space devoted to footnotes exceeds that of the text.

The equitable doctrine of marshalling of securities applies where one creditor holds first-ranking security over several assets of a debtor and another creditor has lower-ranking security over some only of those assets. Should the senior creditor recoup its secured debt by enforcing its security against the latter assets, equity allows the junior creditor to have recourse to the debtor’s other assets which were subject only to the former’s security, to the extent that its own security is insufficient to satisfy its debt. In this way, the priority position of the junior creditor is preserved vis-a-vis the debtor’s unsecured creditors.

The doctrine can be traced back for over three centuries, and can be regarded today as being reasonably well settled and as having few controversial features. The conditions for its application are not the subject of any great dispute. Indeed, on p. 32 Dr. Ali refers to the doctrine as “static”, and states that the dozen or so textbooks on equity and securities law which deal with the topic are content merely to describe its requirements and operation. It might have been thought on this account that the author would have found it difficult to extend his treatment of the subject to a discussion of over 200 pages. This he has done, however, to a considerable degree by considering and rejecting theoretical bases for the doctrine which have been put forward by others (e.g., that marshalling is a sub-category of subrogation, or related to other equitable doctrines and remedies such as consolidation, contribution or specific performance). A reasonable conclusion is that although the doctrine may have something in common with these other instances of equity’s discretionary jurisdiction, it is best regarded as a separate doctrine in its own right. More relevantly for the reader concerned with the application of the doctrine in practice, the author examines two conflicting analyses of its operation: (i) that where it applies the court will coerce the senior creditor to have recourse first against those assets which are not subject to the junior security; or, alternatively, (ii) that it is purely a “post-realisation” remedy, under which the senior creditor is free to recover its secured debt as and how it sees fit, leaving the court to intervene subsequently only if the junior creditor’s priority-ranking has been adversely affected by what the senior creditor has done. The characterisation of marshalling as a coercive remedy was
favoured for much of last century, but it has now generally given way to the “post-realisation” approach—not, however, without occasional hints in recent cases that there may be some scope to revive it. (These suggestions are surely misplaced, for it would be totally out of keeping with the general run of current decisions to require secured creditors to have any particular regard to the interests of subordinate security-holders when exercising their enforcement powers.)

This is a well-researched monograph, which covers its subject comprehensively and which is written in a style which is both scholarly and readable. It also illustrates admirably the kind of topic which postgraduate students should be encouraged to choose for a doctoral thesis: clearly defined and manageable in scope, and yet at the same time one which throws up issues which can be explored in depth, whether by way of conceptual analysis or by historical or comparative study or for its implications in practice.

L.S. Sealy