BOOK REVIEWS


The first half of Raimo Siltala’s book (chapters 1–5) is an essay in “analytical legal positivism” that examines the doctrine and practice of precedent in a number of jurisdictions. Analytical positivism is, for Siltala, “a shorthand expression for a set or cluster of philosophical and jurisprudential tenets” (p. 17). These tenets include the sources and separation theses of contemporary legal positivism and, more generally, the commitments of “[a]nalytical philosophy” (p. 20) to “(rational) argument and clarity, along with the emphasis laid on linguistic analysis, seen as free from any effort towards metaphysical synthesis” (ibid.). Within this framework, Siltala develops an account of the nature of a legal norm (chapter 2) which serves as an entrée to the main course, namely, the construction, elucidation and defence of “a theory of precedent ideology” (chapters 3–5). The latter theory should not, however, detract from the utility of Siltala’s account of legal norms, helpfully combining the early Dworkin’s discussion of rules and principles with some analyses of legal formality to yield an account of “deontic formality” (pp. 53–54). This notion appears genuinely fruitful and it would be a pity were it overlooked because it only occasionally surfaces in the subsequent discussion of precedent ideologies.

Siltala’s theory of precedent ideology consists primarily of six models. They are the judicial reference, judicial legislation, judicial exegesis, judicial analogy, systemic construction and judicial evaluation models (pp. 76–105). Each model is helpfully unpacked by Siltala and each captures a possible and distinctive position that judges could take when working with precedents. One of the most vivid contrasts is between the first and the fifth models Siltala elucidates. The judicial reference model is marked by “total argumentative closure and semantic predetermination of the meaning-content of the ratio of a case, supported by an absolute ban on any later modifications made to it on the part of a subsequent court” (p. 78). In the Dworkinian version of the systemic construction model, “the underlying system-bound reasons for the prior case, prevalent “beneath” any manifest precedent-norm . . . are taken to be decisive in the allocation of binding force in that decision” (p. 99). While on the former model judges could not conceivably be more constrained by precedent, on the latter they could not have much more leeway in the construction and interpretation of precedents and yet still, in some presumably limited sense, “be bound” by prior decisions. Indeed, beyond the range of the six models lie two (the free law and judicial hunch models) that eschew any reference to precedent, denying that judges either can or ought to be meaningfully bound by prior decisions.

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The principal value of this part of the book is its appreciation of the complexities involved in understanding what judges might say and could do when working with precedents. Much legal philosophy overlooks or avoids complexity, at least in the domain which it purports to understand, if not in the structure or language of the theories that supposedly provide an understanding of that domain. Hence accounts of the nature of adjudication are offered which build upon a tiny sample of hard (usually constitutional) cases, ignoring the vast mass of sundry cases that occupy the courts. Alternatively, theories of the nature of law are developed that are blind to the awkward and messy details of, for example, common law systems. Siltala’s account of precedent ideologies could not be accused of being similarly reductive, since it is sensitive to a range of possible positions that could be instantiated in judicial thought and action. However, part of the complexity of Siltala’s account is a product of the complexity of the practice but of his occasional lapse into classification for the sake of classification. A relatively unproblematic instance of this is his occasional tendency to list categories or positions or reasons that are not, on their face, actually different from one another. Consider the discussion of the judge’s understanding of how to read precedents which Siltala says is framed by two factors: an account of legal sources and “the determinacy and tradition on precedents” (p. 113). But the latter is surely just a restatement of a judge’s understanding of how to read precedents and adds nothing do it, unless we suppose, implausibly, that a judge could have an understanding of how to read precedents entirely independent of a context which includes a tradition of understanding and using precedent. (Could one have an understanding of the rules of etiquette in a context in which no such a body of practices ever existed?)

A more problematic instance of categorisation is Siltala’s list of 11 fragments of judicial ideology, which are supposedly part of the six models which themselves are further subdivided into at least 11 possible constitutive positions (pp. 76–77). The specific problem with the 11 fragments is that there is no obvious sense in which they could be spoken of as “models” of judicial thought and practice. This is because the fragments are drawn almost entirely from the works of, inter alios, Oliphant, Pound, Kelsen, Wroblewski and MacCormick. Few, if any of these august scholars were or are judges and it is therefore odd to assume that their thoughts on precedent constitute “[f]ragments of a judge’s precedent ideology” (p. 67; emphasis added), unless we are thinking of a notional “every judge”. These fragments could be part of judges’ precedent ideologies, but we require evidence of judges saying or doing as this sample of jurists say in order to be convinced. Since is no obvious a priori reason to think either that judges’ precedent ideologies are exactly co-extensive with, or partly or completely divergent from, the positions conceived by jurists, some argument must be provided. The question of the relation between the jurists’ sayings and judges’ doings is open and it does not advance our understanding to assume it is not. This point hints at a deeper, doubled-edged difficulty in the first half of the book. It consists of slippage in what it is that Siltala is providing models of (judicial thought and action, as evidenced in judgments, or conceivable possible positions about precedent as represented in the writings of legal scholars?) and the more general problems of social-scientific model construction.
Siltala sometimes regards his models of precedent ideology as Weberian ideal types (pp. 30–31). In some hands this notion is so fluid as to amount to little more than a statement of aspiration, accepting that the model proffered is not rooted in messy empirical reality yet hoping it is not completely off the wall. While Max Weber often cautioned against mistaking ideal types for the empirical world, he was nonetheless clear that such models were both rooted in and abstractions from reality, highlighting either the most rationally pure or impure or most developed or debased form of some action, institution or structure of beliefs. Two crucial (closely related) questions about ideal types concern the criteria used in their construction and their empirical referent. Siltala’s answers to these questions are not persuasive. On the first he is content simply to repeat Weber’s remarks that, in general, ideal types in the social sciences are neither averages nor a scientific hypotheses. This is of only limited help since, once these generalities are accepted, the question still arises of the criteria used in constructing particular ideal types, be they of feudalism, gift-giving or precedent-following. As to the second question, Siltala equivocates (as we have already noted) between modelling judicial behaviour and describing a range of conceivable positions on precedent offered by jurists.

In the second half of the book, “the down-reaching edifice of the ideological, discourse-theoretical and infrastructural level prerequisites of precedent-identification and precedent-following [is] ... unfolded” (p. 21). Chapters 6 and 7 are the most accessible in this part and have the most in common with the argument of part 1. They unpack what Siltala calls a rule of law ideology for precedents and some of its principal underpinning assumptions. While Siltala undoubtedly thinks his models of judicial precedent ideology inform (and reflect?) judicial practice at the “surface-structure” level of law, “the exact content of a judge’s precedent ideology need not be very self-reflected or openly articulated even by the judiciary itself” (p. 151). These ideologies therefore exist at the deep-structure level of law, along with a rule of law ideology for precedents; this level also includes the “axiomatic postulates of analytical positivism and the felicity conditions of legal adjudication” (p. 261). At a supposedly even deeper or more fundamental level—that of the infrastructures of law—are found the “prelogical and preconceptual preconditions of legal norm constitution and signification” (ibid.).

Siltala’s rule of law ideology for precedents has six facets: appositeness and adequacy of information; fair predictability; systemic balance; ideological commitments and argumentative skills; respect for justice and fairness; integrity in argumentation (pp. 168–175). Each of these facets is well elucidated and, despite the occasionally off-putting terminology, plausible. Any gripe that could be made about Siltala’s treatment of this issue would simply repeat one already noted: that the author’s respect for complexity sometimes gets the better of him, leading to lists containing entries that are not always obviously distinguishable. Take, for example, the fourth facet, ideological commitments and argumentative skills. This component of the rule of law ideology for precedents includes, at least, “a consistent and self-reflected conception of the constituents of precedent ideology on the part of judges”, “a common and widely shared understanding of the role and function of precedents as a sources of legal argumentation” and, perhaps, “a more profound understanding of the
inherent premises of precedent-based ... adjudication .... [including] detailed knowledge of the individual ideological fragments involved in precedent following” (p. 173). Now at least some of the latter fragments concern arguments about the value of precedent following (see p. 74) that overlap with, or are actually the same as, those included in facet five of the rule of law ideology for precedents, namely, respect for some conception of justice and fairness. Indeed, it is difficult to see how facets four and five could be meaningfully separated, since many (perhaps all) arguments aimed at demonstrating the value of precedent as a system of regulation must have recourse to some or other conception of justice or fairness (treating like cases alike and so on).

Chapters 8 and 9 concern the “final premises of law” and are, in one respect, the least satisfactory in the book. Siltala’s summary of these two chapters provides the clue: they concern “[t]he critical unfolding or radical questioning of the very ‘final’ or ‘ultimate’ premises of law [which] led to the discovery of the infrastructures of law” (p. 255). It would be folly to suggest that this task is inherently unworthy or uninteresting, but it is appropriate, since the focus of the main part of the book is the practice of precedent, to ask what effect, if any, the unearthing of these final premises has upon the practice itself. For, even if it were true that “the ontological, epistemological and methodological status of the ‘ultimate’ premises of law cannot be conclusively defined without committing a logico-conceptual fallacy, cancelling their infrastructure level function as the final criteria of law, or begging the question” (p. 259), might not the practice of adjudication and precedent usage continue regardless? Siltala is aware of the question (p. 262) but has no compelling response to it. The closest he comes to addressing it is the observation that “[u]nless the demands posited by the different levels of law are brought into balance ... systemic defects and malfunctioning is bound to emerge even at the operative surface-structure level of precedent following” (p. 264). The difficulty is with this “bound”, as things stand, that is just an assertion, no argument being provided as the nature or strength of the alleged connection between the different levels. Furthermore, it is unlikely that the puzzles of signification noted in chapter 9 help Siltala demonstrate a connection since, if true, they are true of all language, not just legal language. Since these puzzles do not inhibit actual communication in non-legal language, special reason would be needed to think that they must inhibit communication and the generation of meaning in legal language.

An argument showing a necessary link between infrastructural and surface levels would be significant, possibly illuminating an important, deeper issue. That issue concerns the power of theoretical or “philosophical” reflection over some of its objects, namely, the practices to which it is sometimes directed. Stanley Fish’s position as leading “theoretical” sceptic is not solely a result of him having many good lines (“theory has no consequences”), but also because he has some pretty powerful arguments on his side. These arguments call into question the aspirations behind and utility of Siltala’s “theoretical” or “philosophical” venture into the infrastructures of law. Had Siltala provided an argument showing how the difficulties he unearths at the infrastructural (theoretical) level of law are “bound” to destabilise the practice of precedent-following, then he might also have provided a reply to Fish. In the absence of such an argument, Fish’s scepticism throws a shadow over Siltala’s
infrastructural discoveries: if they make no impact at all on the practice they supposedly inform, in what sense can they be regarded as “radical” or “critical”?

This book is often illuminating and interesting yet sometimes exasperating. It is well written but occasionally (most often in chapters 8 and 9) suffers from complete syntactic collapse. It is undoubtedly stimulating and, on the whole, the stimulation provided is of the right (commendable) kind.

WILLIAM LUCY


ECONOMIC analysis has recently gained a high profile in English company law scholarship, not least through its employment by the Law Commissions and its resonance with the Company Law Review. This approach has taught us much about how company law functions in relation to the marketplace. Whincop’s book is, however, the first attempt to use economic methodology not only to explain how the law functions, but also to provide an evolutionary account of why the history of English company law followed the path it did. The result is a thesis that, whilst complex, has a powerful intuitive appeal for those familiar with Victorian company law judgments.

Although the market economies in England and America have many similarities, there are important differences between the institutions which generate corporate law. In the US, interstate competition for corporate charters has brought well-documented competitive pressures to bear on the law-making process. Historically, no such forces have acted in the UK. From this starting-point, Whincop offers a positive theory of the development of English (and Australian) corporate law. This review will focus on a central theme: that nineteenth-century judges produced company law that was well-adapted to its function in the marketplace, whereas twentieth-century legislatures did not.

Economists studying the production of law apply the rational actor model here as anywhere else. Thus lawmakers are viewed as maximising the satisfaction of their preferences subject to relevant constraints. The dominant constraint faced by judges is that of precedent. Yet when corporate law was young, direct precedents did not exist. Whincop argues that the judiciary of the time therefore had in fact considerable freedom. At the same time, their diffidence in making policy decisions ensured that there was no overt acknowledgement of the lack of constraints. Nevertheless, their laissez-faire ideology led them to select, by pragmatic reasoning, doctrines which tended to favour the facilitation of business. The “jurisprudential” part of Whincop’s genealogy of corporate law begins with a standard realist critique. He shows how the legal implications of the “corporate entity” were gradually worked out by analogies with its trust and partnership cousins, the selection of which, in formal terms, was never more than partially determined by precedent. In the process, he argues that the Victorian judiciary employed an intuitive form of consequentialist
reasoning, which was closely grounded in the doctrine under development, but nevertheless managed to produce principles that were remarkably well-adapted to their function. This claim is demonstrated through a wide survey of nineteenth-century doctrines in terms of their efficiency.

The strength of the Victorian judges lay in their understanding of the inherent limitations of their role. In the jargon of economic analysis, it is often impossible to verify to a court all the information that is relevant to a business decision. Strongly influenced by Alan Schwartz's contributions to contract theory, Whincop suggests that the judiciary therefore favoured rules which needed only “passive” enforcement. One strategy was to encourage parties wherever possible to resolve disputes through extra-legal governance mechanisms. This was done by denying standing, as through the “majority rule” limb of the rule in Foss v. Harbottle (1843) 2 Hare 461, and limiting substantive rights to review, as with the “bona fide in the interests of the company” test applied to exercises of corporate powers. A concurrent technique was to employ rules which economised on the information needed to make a decision, for example the subjective duty of care. Whincop's coverage includes a full range of Victorian company law—including promoters’ duties, the remedy of rescission, the subjective duty of care, and the doctrine of maintenance of capital. In not all cases did the judges' pragmatism lead them to efficient rules—the doctrine of ultra vires and the rules relating to pre-incorporation contracts being the most egregious examples.

The accumulation of precedents meant that the freedom of the judiciary to develop corporate law decreased over time. In due course, the primary mechanism of change became legislative intervention. The book's account of legislative activity draws on public choice theory. When unconstrained by competitive forces, legislators seek to win populist votes or (where the result is less visible) respond to the demands of powerful lobbying groups. In either case, they are unlikely to produce rules which are efficient. Whincop analyses the mandatory rules regulating directors’ conduct introduced from 1928 onwards; the trend (beginning with the introduction of wrongful trading liability) towards a more objective duty of care for directors; and statutory remedies for unfair prejudice to minorities. Each, he argues, is inefficient. The analyses contain some very thoughtful insights, such as the suggestion that put options be used as remedies for unfair prejudice (pp. 152–154). A common weakness with economic analyses of law rules is a lack of empirical testing. Anticipating this objection, Whincop has supported his thesis with an original study of corporate charters during the laissez-faire period before mandatory rules of disclosure were introduced, showing fairly unambiguously that legislative intervention was welfare-reducing.

As is invariably the case with a project of such ambition, there are considerable gaps. In terms of scope, perhaps most tricky is the English/Australian split. Understandably, as an Australian Whincop is most confident about what is shared by the two jurisdictions (the nineteenth century) and least confident about the workings of the English legislature in the later twentieth century. In particular, the influence of European law is almost entirely absent from the thesis. This could usefully be integrated as a “third stage”, under which both judges and legislature have had less freedom to manoeuvre, the result being perhaps even greater inefficiency (witness in particular the Second Company Law Directive). Yet post-
Centros, this may be changing, and the rhetoric of the Company Law Review suggests lawmakers may see their role in a more competitive light.

Another gap is the “pre-history” of corporate law. Some of the examples Whincop gives of Victorian judicial development are actually direct applications of earlier equitable doctrines—such as the strict fiduciary “self-dealing” rule, and the remedy of rescission. To what extent were these applied because the nineteenth century judges thought they were well-adapted, or because they felt constrained to do so by precedent? And in either case, how had these concepts developed beforehand in the Courts of Chancery?

It is perhaps understandable, although not desirable, that given Whincop’s prodigious output rate (three monographs in 2001), the book should still have rough edges. To give an example, take the balance that must be struck between exposition of the theory and the assessment of evidence in its support. In this reviewer’s mind, the author has perhaps erred in favour of the latter. The analyses of legal rules in terms of efficiency are thoroughly-conducted and expansive. However, the effort devoted to them may have been at the expense of a more fully-developed account of the mechanisms of legal evolution which posit their (in)efficiency. This imbalance is probably because several of the chapters consist of reworked earlier articles, and the product would benefit from further synthesis. Another example is the text’s distracting habit of switching between English and Australian law without always making clear the differences.

Stylistically, Whincop’s fireworks dazzle the reader, meaning perhaps that less is seen of the terrain he means to illuminate. Heavy use of jargon and virtuoso renditions of highly technical material are apt to deter the non-specialist. These very features will, however, make it essential reading for researchers wanting an advanced survey of the literature. Furthermore, the author’s talent for innovation will make the book a rich source of ideas for future work. To conclude, the foregoing criticisms should not be allowed to detract from the importance of Whincop’s contribution. The author is to be commended for having shown the way towards a truly evolutionary account of English company law.

JOHN ARMOUR


Under the auspices of the 1808 Asylums Act, twelve county asylums for the institutionalised care of “dangerous idiots and lunatics” were created from 1808 through 1834. The advent of the New Poor Law in that latter year, with its emphasis on economising costs through “relieving” the poor in Union workhouses, resulted in a drastic increase in the number of mentally disabled people under the care of the Poor Law Overseers. Subsequently (and partially in consequence) the Lunatics Act of 1845 directed that all “lunatics, idiots, or persons of unsound mind” be institutionalised in county asylums. The Earlswood Asylum (formerly the National Asylum for Idiots) was the premier establishment for the care of
people with mental disabilities throughout the Victorian era, and the institution upon which a national network would be modelled. This book chronicles and examines the history of the Earlswood Asylum from 1847–1901.

The ten chapters of *Mental Disability in Victorian England* are framed by an introduction and conclusion. The introduction situates the author’s study within the growing history of psychiatry. Wright aims to augment the lacunae of existing research on mental disability to “reveal the diversity” of those typified as “insane” during the period. Chapter 1 (“The State and Mental Disability”) contextualises the rise of institutions for the mentally disabled within the broader changes in laws governing the treatment of the poor. Of special significance was concentration by parish officers on controlling paupers with dangerous tendencies and treating those who were deemed curable, rather than managing innocuous and incurable individuals with mental disabilities. Chapter 2 (“An Asylum for Idiots”) describes how the mid-Victorian perspective on mental impairments influenced the development of the Earlswood Asylum. Complex notions of charity, morality, and professional interests intersected with statutory developments in the Poor Law and the passage of the Lunatics Act, resulting in the erection of an institution that commanded “attention and admiration.” In chapter 3 (“Care in the Community”) Wright utilises information drawn from Certificates of Insanity, Reception Orders, and census returns to explore the pre-asylum histories of “idiot” children. He concludes that most had previously been looked after in their own homes, and that their care-givers were usually women. Chapter 4 (“Institutionalizing Households”) reports on the origins of these institutionalised children. Families who were able to pay for treatment tended to do so on a trial basis, experimenting with the asylum as a substitute for existing household care; poor families whose children were admitted as charitable cases were more likely to have done so out of an inability to care for them at home.

In chapters 5 and 6, respectively, Wright engages two fields of medical historians. Chapter 5 (“Idiots by Election”) challenges scholars claiming that the growth of asylums was motivated by self-interested individuals who sought to control socially marginalised individuals. He argues instead that short institutionalisation periods demonstrate an opposite conclusion. An examination of the Earlswood Asylum staff in chapter 6 (“To Know No Weariness”) reveals that their work was relatively well-remunerated and frequently led to social advancement: women who came from domestic service returned to advanced positions, men who had worked in the armed services moved into constabulary positions. This finding disputes the traditionally received wisdom that asylum workers were underpaid, unskilful, and uncaring.

Chapter 7 (“The Golden Chain of Charity”) profiles the subscribers essential to maintaining the Earlswood Asylum. Many were drawn to the institution’s national, educational, and recuperative aspirations. Chapter 8 (“The Educable Idiot”) offers a rare view into the daily workings of a Victorian asylum. Piecing together evidence from Earlswood’s records and visitors’ accounts, Wright describes the vocational training undertaken by the asylum patients. Chapter 9 (“Down’s Syndrome”) is an account of the work performed at Earlswood by Dr. John Langdon Down, the researcher after whom the syndrome is named. Without being judgmental of observations which fall harshly on contemporary ears, Wright demonstrates
how many of Down’s conclusions were harmonious with the growing belief that mental disability was an hereditary, and incurable, defect. Chapter 10 (“The Danger of the Feeble-minded”) traces the subsequent history of this belief through the early twentieth century. Consequently, the population of “innocent idiot children” were transformed into “the social danger of the feeble-minded.” The conclusion smartly ties together many of the themes presented in the preceding chapters, emphasising that “far from operating on the fringes of Victorian welfare provision, idiots represented an important constituency for Poor Law Overseers in the early modern period.”

_Mental Disability in Victorian England_ is an important contribution to the growing socio-legal and socio-medical literature examining the phenomenon of mental disability in the Victorian period. Of particular value is the original and thorough research. Utilising often overlooked documentary materials, Wright’s analysis is rigorous from both a quantitative and qualitative perspective. Well written and presented, it is hoped that the author will continue his efforts to illuminate this developing area of enquiry.

M.A. STEIN


During the past decade entrepreneurs have emerged as key figures in national wealth creation. This book serves as a reminder that they were not always so highly regarded and records the intense struggles by which the medieval public purpose corporation was adapted to the structural challenges wrought by the industrial revolution. These were not merely the technical challenges of developing appropriate legal mechanisms to balance the needs of management and investors but entailed the readjustment of a whole range of vested interests and conflicting ideologies.

Following an introduction in which the author locates his ideas within the context of existing scholarship, the text explores the initial legal vehicles available to the entrepreneur. Although the most appropriate was the joint stock corporation, this necessitated a petition to the crown, or latterly parliament. As such it required significant political support and engaged heavy financial costs. Without a grant commercial ventures remained mere partnerships and were subject to a range of problems. Not least of these was joint and several liability which could see investors subject to ex parte applications that could place them in debtors prison at their own cost pending trial. The possibility of developing another option, the trust, was constrained by complex administrative requirements, and ultimately restricted to government stock in the wake of speculation by chancery clerks during the South Sea Bubble.

The struggle to emancipate the corporation for commercial use is traced in three parts. The first opens with the crown’s exploitation of the public benefit corporation by adapting it to the needs of international trading and settlement ventures thereby generating non-parliamentary revenue to meet
rising military costs. The second sees parliament taking over the corporate prerogative, the increasing power of the large monopoly companies, and ends in 1720 with the South Sea Bubble. The final part chronicles the painful erosion of parliamentary and judicial resistance to reform as a new breed of entrepreneur emerged during the first quarter of the nineteenth century. Supported by significant city backing and a growing reservoir of educated middle class professionals, they presented their projects as essential to the public interest, offered a better return than government stock, and attacked existing monopolies for manipulating markets and stock prices, paying extravagant salaries, and securing their influence by corruption. At the same time, ports such as Bristol and Liverpool, which had opened up as alternatives to London during Napoleon's continental system, increased the pressure for regional development. In opposition the traditional monopolies were joined by recently recognised vested interests and supported by a landowning establishment which required investments that preserved rather than increased capital. They argued that competitive investments would undermine the ability of government stock to guarantee defence needs and render the nations savings vulnerable to speculative diversion by exposing those of limited income to the moral hazards of gambling.

Pressures came to a head in 1825. By this time parliament had 624 companies awaiting approval and was under the constant lobbying of several hundred promoters and their advisors. The free trade ethos adopted by the Tories in the early 1820s seemed to hold the potential of reform but was frustrated by the changes in personnel and policy which followed the Latin American debt crisis of 1826. It finally fell to Gladstone at the Board of Trade to commence legislative reform as a consequence of his own conversion to free trade. By 1844 companies could be formed by registration and by 1855 they started to acquire the traits of legal personality and limited liability by which they are recognised today.

The role of the judiciary, and Lord Eldon in particular, comes in for considerable criticism. With the necessity for parliamentary approval creating a bottleneck to large commercial ventures, significant pressures existed to develop ways of interim trading. These were unrelentingly kept at bay by a judiciary dominated by landed interests. Intent on containing the evils of speculation the judiciary drew considerable support from Blackstone's interpretation of the Bubble Act as an anti-speculation measure responding to the market crash of 1720. The author counters this view by pointing out that in the calendar reorganisation of 1751 the start of the calendar year was moved back from 25 March to 1 January. In this context, the Bubble Act of June 1720 preceded the final market meltdown by some 16 months. Indeed, rather than reacting to the inequities of speculation, the relevant provision was tacked on to a general bill during the last day of its final reading and was intended to squeeze out competition to the activities of the South Sea Company. In this respect it was successful in enabling the national debt to be manoeuvred into the tradable stock of the South Sea Company. It was only subsequently that problems arose as final subscription instalments drained the market of residual liquidity.

The book combines an excellent analysis of the structural effects wrought by technological innovations and social need. In each period the text charts the industrial booms, the difficulties in accessing investment, and
the bursting of speculative bubbles that formed in the absence of market
disciplines and information networks. The book also covers the special
investment regimes developed to ensure stability in strategic sectors such as
shipping and mining. Deriving from a doctoral thesis the book has the
strength of a clear analytical structure, comprehensive and accurate
referencing, and a good bibliography. Whilst the analysis drifts into a
dramatic narrative during the last section, this only serves to make the
book exciting to read as well as a good source of reference. In the context
of recent events such as the adoption of limited liability partnerships and
the collapse of Enron, the book also provides a reminder that the legal
framework within which commercial ventures take place is likely to remain
under constant re-evaluation.

Nicholas Sinclair-Brown

Legal Recognition of Same-Sex Partnerships: A Study of National, European
and International Law. Edited by Robert Wintemute and Mads

The veritable necessity for a book of this ilk is unquestionably long
overdue. As nations from all continents grapple with novel concepts,
theories and socio-legal models intended to deal with the regulation and
recognition of homosexuals’ relationships, the previous lack of
interdisciplinary and international research had somewhat hindered this
progress. This book not only goes some way to fill that gap but in doing
so accomplishes it in a truly valuable way to all those interested in this
field. By providing a theoretical basis to the issue of same-sex partnership
regulation, followed by in-depth national, European and international legal
surveys, this book is an essential tool to all those involved in research
related not only to the position of homosexuals within society, but also
those involved in family law in a broader sense.

The book itself is divided into four parts, to which forty-two chapters
are apportioned. A foreword by the Honourable Justice Edwin Cameron of
the Supreme Court of Appeal of South Africa sets the legal tone of the
book as well as furnishing the underlying raison d’être for its publication,
that being that “in our newfound optimism, we must not forget that for
most lesbian and gay people throughout the world, the legal recognition of
same-sex partnerships is still a prize not yet even open for discussion”
(p. vii). By providing a forum for legal practitioners and academics, students
and professors alike to proffer their countries present legal climate with
regard to homosexual partnerships, this book provides a point of reference
for other countries wishing to follow a similar path.

In the introduction to the book, it is stated by Robert Wintemute that
a book on race discrimination would be unlikely to include contributions
from people who were opposed to equality in terms of race. This argument
is likewise used for the absence of arguments against the equivocalisation
of laws relating to homosexuals and is probably most evident in the first
five chapters of the book dealing with the theoretical aspects of
homosexual partnership recognition. Yet in being able forcefully to argue
ones position, the recognition of ones opponents’ arguments is a most
fundamental prerequisite. This is thought-provokingly achieved by Nicholas Bamforth in the second chapter of the book, where he acknowledges that the arguments for the legal recognition of same-sex relationships are fundamentally flawed in numerous ways, before attempting to combat these flaws by revising and altering the legal foundation upon which the arguments advanced for legal recognition of homosexual partnerships are based.

The second, and most substantial part of the book, is devoted to the national legal situation in twenty-three worldwide jurisdictions. This part is further sub-divided into five sections each dealing with a different global geographical territory: the United States; Canada; Africa; Australia and Latin America; Asia and the Middle East and Europe. The breadth of material is extremely impressive and includes all but three of the countries, which have in some way regulated homosexual partnerships. In covering jurisdictions which have traditionally been inaccessible to those without native fluency in the local language (for example, China), this book provides easy access to once unchartered territory.

In a longer review, every national legal system would deserve attention, but here a couple of brief comments will suffice. The complex nature and interdependence of federal and state law in America and Canada is explained with great precision and clarity, although it may have been helpful for one of the chapters to specifically compare the situation at American federal and state level. It is here where the accuracy and clarity is sometimes lost. The Chinese section for example explains from basic principles how homosexual relationships have historically been treated. Yet reference is often made to American law, which seemed to be of little, if any, relevance to the state of affairs in China itself, leaving the reader somewhat perplexed.

Part III is devoted to developments at the European level and contains contributions both from a European Community perspective as well as analyses based on the European Convention of Human Rights. The inclusion of both a chapter on the importance of the new Article 13 EC by Mark Bell as well as a chapter by Kees Waaldijk on the possible influence of evolving trends in the field of national law upon the recognition of same-sex partners at European Union level is welcomed. In a similar vein as the criticism made before, one chapter in this section, begins by providing examples from English law whilst purporting to discuss the European Convention on Human Rights. Although the interrelationship should not be underestimated, this should be made clearer from the outset.

One strength of the book, maintained through the inclusion in Part IV of two chapters dealing with international law, is its completeness. However, the absence of a index is at times a hindrance as there is no overall proviso for immediate access to all chapters on a given topic. The conclusion written by Robert Wintemute is cogitative, issue-provoking and provides an excellent summary, bringing together all the relevant threads and lines of argument of the preceding chapters. Small comparisons are made, and although this book does not set out to be a comparative study, this chapter does begin upon the road towards a comparison, leaving open that question for another book in the future. The issue of private international law is also raised and once again, due to the unmitigated scope of those questions, the foundations for another book are also established. Nevertheless, a chapter on the private international law
questions raised by such partnerships may well have served a useful purpose in such a book, in bringing the question to the forefront of discussion.

In summary, the book’s greatest strength lies in its ability to bring together the legal climate of some twenty-three jurisdictions, along with the activity at both the European and international level as well as providing a theoretical basis to the discussion, and in that it is an excellent book. Its objectives are clear and it achieves them in a convincing, yet stimulating manner.

IAN SUMNER


The voluntary euthanasia debate in the United Kingdom has a lengthy history, and the public continues to grapple with the possible legalisation of the practice. Hazel Biggs enters into this debate with Euthanasia, Death with Dignity and the Law, a timely contribution that has as its focus the question of whether legal reform to accommodate active voluntary euthanasia is an appropriate response to a perceived need for the option of “death with dignity”. The book’s seven discrete chapters explore aspects of the overall theme of achieving dignity in dying through the mechanism of euthanasia, from the perspectives of clinicians, patients and others who are indirectly affected. Emphasis on “autonomy”, “self-determination” and “human dignity” permeates the text and underpins the author’s stated position in favour of legal reform.

The early chapters (1–4) examine end-of-life decision-making within the current legal framework, analysing in particular the relationship between euthanasia and the law of homicide and consent. The author touches upon the legal and ethical issues raised by the practices of euthanasia, assisted suicide, administering palliative care, and withdrawing life-sustaining treatment. She calls attention to what she feels are injustices created by the existing legal situation. Patients’ choices are necessarily “limited” by legal constraints which prevent doctors from complying with their requests for active, deliberately hastened death, thereby resulting in a “loss of dignity”.

Although the non-law reader will find the author’s overview accessible, Biggs creates confusion when she links together as “other forms of euthanasia” assisted suicide, double effect and mercy killing. While the distinctions between these practices may in certain circumstances become blurred, the administration of palliative treatment and euthanasia in particular implicate wholly different ethical, legal, and social policy concerns, all of which must be firmly borne in mind.

The author challenges, primarily in chapters 3 and 4, the legal irrelevance of consent in the context of euthanasia performed by a medical professional at the patient’s request. She observes an inherent inconsistency in a legal approach which denies competent patients the option of an assisted death, notwithstanding their expressed consent and their articulated wish to avoid the perceived indignities associated with protracted suffering, but which may permit incompetent patients (who are not able to decide for
themselves) to die by withholding or withdrawing treatment when, ironically, these people are usually not suffering or even aware of their potential to suffer. In this respect, the author emphasises, the law is “at best in need of clarification, and at worst riddled with inconsistency”. To remedy this incongruity, Biggs suggests that consent may adequately safeguard a patient’s interests and wishes at the end of life, and that the law of consent should therefore be extended to legitimate requests for euthanasia.

Biggs’ justification for euthanasia rests on the consent of a competent patient. Although she stipulates that any legislative initiative in favour of voluntary euthanasia would need to contain mechanisms for ensuring that a person’s consent is “freely given, informed and valid”, nowhere in the book does she furnish a concrete, workable proposal for legal reform. This seems a serious omission, for although Biggs envisages a “highly regulated system of medically assisted dying”, the inherent difficulties of regulation have been well documented and confirmed by the reality of abuse in the Netherlands (where euthanasia has been legally tolerated for almost two decades in accordance with specified criteria). Given the fundamental significance of Dutch practice to the debate, any thoughtful argument in favour of legalised euthanasia ought, at least, to attempt to deal with evidence from the Netherlands demonstrating that effective regulation has proven impossible, and to consider the implications of the Dutch experience (particularly when the author herself advocates an “incremental approach” based on the Dutch model). Equally conspicuously, Biggs omits any detailed reflection on the “slippery slope” argument. Her dismissal of the argument consists of a single paragraph in the introductory chapter, and questionably assumes that it is predominantly the associations between the word “euthanasia” and “the genocidal activities of the Nazi regime” or “the heinous crimes committed by Dr. Harold Shipman” that are “at the root of” slippery slope objections to euthanasia. It seems an oversight that this is all the space afforded to perhaps the outstanding argument against legalisation. Although there will inevitably be a divergence of opinions concerning the validity of slippery slope claims, if a critical issue to be addressed and resolved within the contemporary euthanasia debate concerns the implications of legalisation, then the slippery slope argument, accurately understood, has a major role to play. Biggs has missed an opportunity to inform this aspect of the debate.

The heart of the author’s analysis is found in chapters 6 and 7. Here Biggs links together the threads of her argument in favour of legal reform, focusing largely on the concept of “human dignity” and how it relates to euthanasia. In the author’s view, respect for human dignity dictates that dying should be “attended by a degree of dignity that reflects the quality of the life lived until that time”, and that “the ability to govern one’s own conduct according to self-formulated rules and values should be upheld and personal choices endorsed, enabling people to control their own destinies”. Biggs evidently regards human dignity as an extrinsic rather than intrinsic characteristic—something attributed as opposed to ascribed equally to all people. Although there is considerable rhetorical purchase in the concept of “human dignity”, a recognisable danger of Biggs’ interpretation is that it enables her to assert that human dignity is something that can be “lost” (whether through pain and suffering,
disability, illness or dependency) and therefore that those without dignity no longer require our respect.

Overall, Biggs’ book perhaps falls short of its aim to demonstrate persuasively “how and why” legalising voluntary euthanasia is the answer. It nonetheless succeeds in presenting complex issues in an approachable way and will undoubtedly stimulate further exploration of this troublesome area.

WENDY E. HISCOX


OXFORD University Press has initiated a new series on the European Convention on Human Rights and, in light of recent world events, could not have found a more timely first instalment than Evans’s book on freedom of religion. However, the choice of topics is sound even when one sets aside the current interest in the interplay between law and religion. First, as noted in the general editor’s preface, there is a “considerable body of literature” on the Convention, “including many works providing an overview of the Strasbourg system and its jurisprudence. Less common are studies like Dr. Evans’s book concerned with the interpretation and application of individual provisions” (p. vii). Second, “[i]t is particularly apt that the present volume should appear at a time when, as a result of the Human Rights Act 1998, courts in the United Kingdom are for the first time being called upon to take account of the European Convention. In a multicultural society religious freedom is plainly fundamental and lawyers, judges and others with responsibilities in this area will find Dr. Evans’s book extremely useful” (pp. viii–viii).

Indeed, the relative underdevelopment of religious liberties in the UK makes this work of critical importance. Until the coming into force of the Human Rights Act 1998, no general freedom of religious belief and practice existed in this country. Religious discrimination was prohibited only in Northern Ireland. Courts faced with the difficult task of blending existing laws, which for the most part grew up piecemeal out of historical necessity, into a cohesive whole will have great need for recourse to the European jurisprudence that Dr. Evans has so ably presented in her book. The book begins with the theoretical justifications for protecting religious belief, a discussion which may be somewhat too brief for those who are unconvinced of the propriety of religious liberties. While the existence of religious discontent and conflict cannot be denied, critics in this country and abroad have argued that granting “special protections” to religious minorities does more harm than good. Instead, opponents of religious rights invoke the spirit of toleration that ought to be present in contemporary societies as a means of protecting the relevant interests. Unfortunately, “ought” does not imply “is,” and the toleration that should exist is often absent in religious matters, either consciously or unconsciously. If one advocates a system of religious rights, rather than religious toleration, one needs a stronger theoretical justification for religious liberty than exists in Dr. Evans’s book. However, since her
primary goal is to set forth the boundaries of the European system rather than defend the need for a formal rights regime per se, these shortcomings are relatively minor.

More successful is Dr. Evans’s discussion of one of the central dilemmas in religious rights jurisprudence, namely the definition of religion itself. After discussing the problems associated with both wide and narrow definitions, she notes that the breadth of the European Commission’s definition of the term is cut down—in some cases quite restrictively—by the European Court and Commission’s interpretation of what freedom of religion or belief entails.

Proponents of liberal legal theory often suppose that freedom of religious belief is absolute, and, indeed, many national and international systems claim to support that position. Dr. Evans challenges that presumption and demonstrates that the right is circumscribed in many European cases by “[t]he Court and Commission [having] tended to assume that the issue of interference in the forum internum is not in question” (p. 102). In addition, “the Court and Commission have been highly deferential to the needs of the State and the historical role of established Churches in Europe” (ibid.). While one can argue that deference may be appropriate for pan-European institutions dealing with the highly controversial and culturally sensitive issue of religion, deference that approaches an abdication of any oversight capacity makes a mockery of the enunciated right.

The right to manifest a religion or belief is an even more difficult issue, since here the religious actor operates in the forum externum and there is an obvious need for state intervention to protect the rights of others and/or society. Dr. Evans devotes two chapters to this subject and provides a useful and comprehensive discussion of the relevant case law.

Dr. Evans believes the key question involves the identification of what constitutes religious worship, teaching or practice. She points to Arrowsmith v. United Kingdom as initiating what she calls “the necessity test” in Article 9 jurisprudence, namely that applicants must “show that they were required to act in a certain way because of their religion or belief” (p. 115). She then goes on to discuss how limitations on religious practices fare under the usual European Convention requirements that limitations on individual rights be prescribed by law, be necessary in a democratic society and have a legitimate aim.

In all, this is a very well written and researched book. While Dr. Evans includes some comparisons to the law of other jurisdictions, primarily the US, she does not make the mistake of straying too far from her discussion of freedom of religion under the European Convention. Article 9 has generated more than enough material to justify a book of its own, and it is remarkable that such a work has not come out before, given the importance of the subject. Indeed, most works on civil liberties give a scant paragraph or page to religious liberty, despite its being one of the longest standing individual freedoms. Admittedly, the issues associated with religious freedoms are thorny, but such difficulties suggest an increased, rather than decreased, need to address this area of law. Dr. Evans has done a fine job in showing how such analyses can and should be done.

S.I. Strong

It has now become common ground that legal rules are contingent and are not enough in themselves to present a real image of a legal system. They are only one manifestation of the legal culture from which they stem. As Merriman put it, to understand a legal system, “you have to know where it comes from and what its image of itself is”. This is the premise on which Professor Bell wrote his latest book. However, he takes the argument one step further and states that it is not fully accurate to speak about the French legal culture as a single, homogeneous entity. Rather, he submits that there are several French legal cultures: one for each area of law under scrutiny. In his book, he therefore refines the now widely accepted view that a legal system consists not only of a set of rules but also of a complex of perceptions, attitudes, values and modes of reasoning.

The book is divided into seven chapters. The first two chapters are introductory and give a theoretical description of the nature of a legal culture as well as a general account of the institutional setting of French law—focussing mainly on the court system, the legal professions and the key concepts. The next four chapters are more specific and deal with different branches of French law, reflecting its major divisions: civil law, criminal law, administrative law and constitutional law. Each of these four chapters is structured in a similar way, which allows the reader to make comparisons more easily between these branches. Bell concludes in the last chapter by reviewing the traditional picture of French law which private lawyers have developed, asking how far it is appropriate to describe a single French legal culture which is in fact made up of numerous subcultures.

This book is a breakthrough in many respects. Firstly, it is thoroughly researched. Bell relies on a variety of up to date sources, ranging from doctrinal writings and courts decisions to recent surveys, all of which are convincingly analysed. Secondly, the concepts used are defined with precision and in plain English, however specific they are to French law and difficult to grasp. Bell also illustrates the arguments he puts forward with several practical, concrete examples. This pragmatism makes it possible for the reader to understand accurately a system of law with which he or she may not necessarily be familiar. Moreover, in his quest for clarity, Bell does not indulge in any oversimplification. On the contrary, by identifying subcultures within the French legal culture, Bell succeeds in making fine distinctions within a whole without at the same time threatening the coherence of the whole. The conclusions he draws in chapter 7 in particular display a high level of analysis. Some refinements had already been made to the traditional, often oversimplistic, description of the French legal culture. However, the broader picture was missing; overall conclusions needed to be drawn together in a single, comprehensive book, and this is precisely what Bell has persuasively achieved.

The only ground for criticism of French Legal Cultures is that the author sometimes gives a priority to the institutional setting in which French law has evolved over its substantive content, thus creating a slight imbalance. For example, the legality principle (principe de légalité) is mentioned only briefly on pp. 132 and 133 while it is a cornerstone of the
French criminal legal culture and would consequently have deserved at least as much attention as the legal actors of the French criminal process. The legality principle is defined in Article 112–2 of the New Criminal Code; it empowers Parliament to legislate to determine what elements are necessary to constitute a crime or a délit and what penalty should be applicable ("la loi détermine les crimes et les délits et fixe les peines applicables à leurs auteurs"). An important consequence of this principle is that the role of the judge in this area of French law has been constrained by the duty to interpret the provisions of the Criminal Code very strictly. As a rule, the criminal law judge is not empowered to fill in its gaps, however obvious they may be. This is in stark contrast with the freedom of the civil law or the administrative law judges. Bell could perhaps have further expanded upon the impact of this principle on French criminal legal culture by relying on more decisions that have expressly restricted judicial creativity in this area of the law.

In any case, Bell confirms with French Legal Cultures that he certainly is among the leading British experts on French law. His book is worth reading not only by those who are new to French law, but also by those who would welcome a new approach to the French legal system.

AMANDINE GARDE


The Constitution of India is a mammoth instrument—the largest Constitution in the world—with 395 articles, 12 Schedules and 83 amendments. Accounts of the constitutional law of India are thus inevitably very large. The late H.M. Seervai’s multi-volume Constitution of India (4th edn., 1993) is well known and rightly described as “monumental”. But now a new work is making its presence felt. Arvind Datar originally intended to write no more than a Student’s Edition of Seervai. But Seervai refused permission for this project, taking the view, probably with justice, that his work could not be summarised. So Datar decided to write an article by article commentary of the Constitution and Datar on Constitution of India is the result. The resulting book is monumental in its own right. It deals exhaustively with each of the articles of the constitution. The author makes it plain that he could have written a much longer book in that he refers only to decisions of the Supreme Court of India. Only where the Supreme Court has been silent does he refer to relevant decisions of the several state High Courts. None the less, his approach is commendably comparative. The Constitution of the United States is often referred to (and it is in fact reproduced in an appendix) as are decisions of the US Supreme Court. But the work as a whole shows that “Not the Potomac, but the Thames, fertilises the flow of the Yamuna”

The author’s style is very clear—even when dealing with very complicated matters the reader never has any doubt what he means—although he does split infinitives with enthusiasm. He has a vivid turn of phrase which he often deploys to criticise judgments. The remark made by Islam J. that English case law was “abhorrent” to India since the amendment of the preamble to the Constitution to ordain that India was a “socialist” state is firmly castigated as “shocking ... grammatically wrong, historically incorrect and logically absurd” (p. 4). Indeed, when appropriate he turns his tongue on politicians too. In discussing Article 105 (which deals with the powers and privileges of Parliament) he remarks that the “manner in which members of Parliament as well as the legislative Assemblies have conducted themselves has shown that they have consistently abused their powers and privileges and are completely immune from any sense of responsibility or shame” (p. 440). And there are many similar passages. Although this criticism is sharp, it always seems to be moderate and to the point. There is clearly much to criticise in the operation of the Constitution by the various constitutional actors and it is heartening to see it so well done. It would, of course, be even better to see it heeded. It is sad to see the mocking discrepancy between India’s noble constitutional heritage and the “rampant maladministration” of today (p. 4).

For the busy practitioner looking for the law on a particular point or the reach of a particular article of the Constitution this book will prove invaluable. The book is doubtless regularly mined by practitioners in search of an argument or telling phrase to aid their client. For the comparative public lawyer it must be said that the method of presentation of the commentary article by article is not ideal. If one has no prior knowledge of the Constitution one does not know which articles are the most important. And thus valuable material that could so easily be overlooked is to be found tucked away behind an article. There is indeed a four page introduction to the Constitution which tells in the briefest terms the story of Indian constitutionalism since Independence. The struggle between judiciary and legislature over fundamental rights which eventually led to the present position where the legislature can amend fundamental rights with the restriction that the “basic structure” of the Constitution could not be altered is sketched. But this is a great and important tale and deserves more prominent telling. As does that of the Emergency declared by Mrs. Gandhi after her election had been set aside by the courts—and the failure of the Supreme Court even to consider granting habeas corpus to those detained without trial (and overruling seven High Courts in order to do so). The author would say with justice that all these matters are dealt with in detail as commentary to the appropriate section of the Constitution. But I would urge him, having produced this book with such elan, he should now return to his original idea of a shorter book. He should excavate from his detailed commentaries the overarching constitutional principles immanent within the Indian Constitution and set that in an historical context.

Human Rights in India: Historical, Social and Political Perspectives is a very different kind of book. Whereas Datar on Constitution of India campaigns in favour of sound constitutional government and the rule of law, this book campaigns against “suffering, ... poverty and cruelty” (p. xxvii). There are a range of distinguished contributors who often take
different perspectives of various human rights problems in India and internationally. Although there are contributions both on “Religious Freedom and Human Rights” and “A Feminist Perspective on Human Rights”, the strongest accent lies on the relief of poverty as such. It would be impossible to give each of the thirteen contributions the attention they deserve but the paper by V. Vijayakumar on the working of the National Human Rights Commission is particularly useful. And it was especially interesting to note how the National Human Rights Commission had taken the lead in approaching the Supreme Court and asking that court to direct state government to take the action necessary to protect the human rights of particular persons or groups of persons. The introduction and the final chapter—“Setting an Agenda”—by Chiranjivi Nirmal are forceful and leave no doubt of the author’s commitment to the protection of human rights in India. But he looks with scepticism on the law’s delays.

Christopher Forsyth


Not everyone will agree with the author’s claim that the International Criminal Court (ICC) is “perhaps the most innovative and exciting development in international law since the creation of the United Nations,” (p. 20) yet the current degree of interest from academic international lawyers is undeniable. Much of this interest has been channelled into detailed and sophisticated analyses of specific provisions or themes in the ICC’s Statute. Schabas has a different aim in mind. As he states, “[t]he goal of this work is … to provide a succinct and coherent introduction to the legal issues involved in the creation and operation of the ICC, and one that is accessible to non-specialists.” (p. viii) With minor qualifications, this goal is achieved and this work is an excellent introduction to the ICC.

The text consists of eight chapters, each dealing broadly with an aspect of the ICC’s creation, structure and operation. The first chapter focuses on the creation of the ICC. It includes the seemingly mandatory yet cursory hop, skip and jump though historical antecedents such as the post-World War I and II war crimes trials and the various drafts and proposals of organisations such as the International Law Commission. It dwells more on the contribution of the ad hoc International Criminal Tribunals for Yugoslavia and for Rwanda (ICTY, ICTR), noting that they have provided “a reassuring model of what an international criminal court might look like” (p. 12), and it concludes with a brief but engaging description of the drafting process of the ICC Statute from the perspective of one who was present at the preparatory conferences where the details were hammered out.

The second chapter, on the crimes to be prosecuted by the ICC, is the most substantial of the text. As may befit its subject-matter, the analysis here descends at times into a level of detail that might give the non-specialist cause to hesitate before proceeding. The author considers each of the principal crimes over which the ICC is to exercise jurisdiction—
genocide, crimes against humanity, war crimes, and aggression—and endeavours to synthesise the relevant sources, primarily the Statute and the “Elements of Crimes”, and also the jurisprudence of the ICTY and ICTR. The author highlights how the negotiations over the definitions of the crimes developed, and how the results achieved reflect necessary compromises. The prime example of this is perhaps the decision to include the crime of aggression in the Statute, but to withhold the ICC’s jurisdiction over it until such time as the elements of the offence have been further defined.

Subsequent chapters deal with jurisdiction and admissibility, general principles of criminal law, procedure at the investigation, pre-trial, trial and appellate stages, and punishment and the rights of victims. The final chapter examines the technical provisions governing the structure and administration of the ICC. The treatment is largely descriptive and uncritical, with emphasis on a number of “hot topics” that required resolution, such as the independence of the Prosecutor, the possibility of trials in absentia, and the non-inclusion of the death penalty as one of the sentencing alternatives open to the Court. Throughout, the author attempts to describe the contests between adherents of the common law, civilian and other legal traditions, each devoted in their belief of the superiority of the procedural codes and judicial models with which they were most familiar. He observes that the melding of the various traditions into a procedural code intended to be ideally suited to the work of the ICC came from an appreciation that “there was much to be learned from different legal systems” (p. 94), even though the text leads more naturally to the conclusion that the result was, in reality and all too often, the outcome of uncomfortable compromises.

Although on first glance, this appears to be a lengthy work, in reality it is not. The text itself runs to only 164 pages. The remainder of the book comprises three appendices: the Statute of the ICC, the “Elements of Crimes”, and the Rules of Procedure and Evidence. There is a comprehensive index which, surprisingly and most usefully, also indexes the material contained in the appendices.

Two critical observations may be made of the work. The first concerns its scope. The work is intended, at least in part, for non-specialists. On rare occasions the level of analysis probably exceeds this stated aim. More fundamentally, however, the author at times assumes a level of knowledge of international law in general, and of international humanitarian law in particular, that may not be possessed by the non-specialist. For instance, there is no indication in the text why defining the crime of aggression has proved to be problematic. Nor is there any discussion of the difficulties in extending the coverage of international criminal law to non-international armed conflicts. Issues such as these obviously involve much wider questions, of which an understanding or at least an awareness is vital. This might be the price paid for a concise and succinct text.

The second criticism concerns the substance of the work. The author focuses on the human rights aspects of the ICC: it is referred to as “a benchmark in the progressive development of international human rights” (p. vii); it is said to be “concerned, essentially, with matters that might generally be described as serious human rights violations” (p. viii); and it is claimed that “[w]ithout any doubt its creation is the result of the human rights agenda that has steadily taken stage within the United Nations …"
While this is plainly true in many respects, the focus on human rights serves to downplay the importance of the ICC project. By impacting directly upon the individuals that lie behind the behaviour of states, the international community is also seeking to restrict the use of force, and the means of force employed, by states. The overlaps between human rights law, international humanitarian law and the law of international peace and security are clear, but so too are the differences. It is the promotion of all of these goals that inspires progress towards an international criminal court.

These points aside, this is a most accessible introductory work on the ICC. It is easy to read and one is not slowed down by over-referencing or sophisticated or nuanced arguments. The incorporation of some “behind-the-scenes” glimpses into the process of negotiating the Statute certainly enlivens the text. By and large, the book achieves its goals of succinctness and coherence, but its simplicity and uncritical voice will limit its appeal for the advanced student or the professional who may find themselves promptly reaching for the more detailed, sophisticated texts.

*BEN OLBOURNE*


This is an excellent addition to the Oxford series of works on litigation. The main author is a London solicitor with a commercial practice (but also a part-time academic). He has assembled a team of English and foreign specialist lawyers. The book is aimed at practitioners, but the author has not eschewed critical and theoretical literature. Overall, Hodges has produced a minor miracle: a book which is useful, comprehensive, accurate, up-to-date, stimulating and outward-looking. The book is also handsomely produced. It is hoped that a second edition might include a bibliography and perhaps paragraph headings throughout the text. It is also suggested that discussion of representative proceedings (see below) and of the American class action might be expanded.

The main focus is the new English regime concerning “Group Litigation”, contained in the Civil Procedure Rules, Part 19, section III (effective August, 2000). This type of proceeding allows parallel and substantially overlapping cases to be decided efficiently, speedily, consistently, with finality, and with appropriate costs orders. Part II of the book is a detailed, trenchant and comprehensive analysis of this new regime. Part III on “Funding” impressively explains the systems of legal expenses insurance, conditional fee agreements, and public funding, each a formidable can of worms.

Part IV of the book contains details of multi-party procedure, including class actions in the USA, certain Canadian provinces, and Australia. Hodges has assembled specialist authors, all of them practitioners, to write these valuable summaries.

Various large English group actions, based on the pre-2000 procedure, are chronicled by Christopher Hodges and his team in Part V. These cases from Hell include: the Hillsborough Stadium football tragedy, the “Opren”

Hodges provides little discussion of English representative proceedings, perhaps because the author feels that they are relatively rare (ibid., pp. 124–216). It should be noted that in group litigation each interested person is formally a party rather than a represented absentee, as under class actions or the English “representative proceedings”. The latter allow a class of identically placed claimants or defendants to be represented by a principal party. They have been available for over a century, and appear in the new rules (CPR, Part 19, section II). However, they have had little impact in England, for two reasons. First, prospective representatives fear that they might be forced to bear the entire cost of such litigation if the case is lost. Secondly, there is little incentive to sue as a representative, rather than personally, because the courts do not award damages on behalf of a represented class of claimants, except in narrow situations. Neither obstacle existed in Equitable Life Assurance Society v. Hyman [2000] 3 W.L.R. 529, H.L., where the claimant, representing others so numerous they would once have filled Wembly Stadium (90,000 other policy-holders) sought a declaration that the defendant life insurance company had been acting unlawfully in its administration of a fund. The litigation was funded by the defendant company, which hoped for “closure” of this dispute.

Is the English system of group litigation an adequate response to the challenge of multi-party litigation? Lord Steyn in the Foreword to the present volume certainly thinks so. After noting various differences between the English and U.S. approaches to multi-party litigation, he concludes that there is:

a general perception among judges, in this respect reflecting public opinion, that the tort system is becoming too expansive and wasteful. There is also an unarticulated but nevertheless real conviction among judges that we must not allow our social welfare state to become a society bent on litigation. Introduction of United States style class actions cannot but contribute to such unwelcome developments in our legal system.

With this Hodges concurs: he is certainly no advocate for US class action, and is indeed critical of much (unsuccessful) English group litigation during the last decade or so.

For other views the reader might consult the stimulating papers delivered at a congress in Geneva in 2000, where these matters were debated by lawyers from many jurisdictions, including the USA (“Debates Over Group Litigation in Comparative Perspective”, (2001) 11 Duke Jo. of Comp. and Int. L. 157–421).

Both Lord Steyn and Christopher Hodges participated in the Geneva debate, but they undoubtedly left it fortified in their belief that “group litigation” rather than class procedure is the only sensible mechanism for conducting English multi-party litigation.

NEIL ANDREWS

In the introduction to *Transforming the Law* Professor Susskind supposes that the development of the World Wide Web has created a population of people who read in short digestible chunks, leaving the “cover-to-cover experience” uniquely for readers of fiction novels. If this is indeed the case, then this book is ideally suited to such a reader, being a collection of Susskind’s own brand of legal IT strategising and crystal-ball-gazing in self-contained and comprehensive chapters. Readers who have heard Susskind speak will recognise some proportion of the various essays. However, the book does also provide an extremely comprehensive collection of his thinking on developments in the practice of the law at many different levels.

The readership for this book might be somewhat broader than Susskind’s previous work *The Future of Law* because it is far more readable. The division of the material into essays makes it easy to identify material of interest to the reader. The text is written in a relaxed tone which betrays the fact that much of it springs from presentations made by Susskind over the last couple of years. The broad diversity of the subject matter will mean that different sections of the book will appeal to students and practitioners with an interest in the area, as well as to academics, the judiciary and indeed anyone with a role to play in developing strategies for the application of the law.

The first section relates to “Legal Services in the New Economy”. At the outset Susskind makes a simple but powerful graphical representation of his view of the development of the various different applications of IT within the practice of the law—The Grid. This Grid comprises a horizontal axis dividing at the left extreme “technology”, and the other “knowledge”. The vertical axis represents from bottom to top, “internal” to “client”. This arrangement allows Susskind to allocate pretty much all the foreseeable developments in the application of IT, including back office systems, internal and external knowledge management tools, and client relationship arrangements. It is upon this solid framework that the book builds its arguments for forward thinking by those responsible for development of IT within law firms. These arguments are cogent, and largely critical of the development of any firm which is not entirely committed to covering all sections of the Grid within the foreseeable mid-term future. Susskind is quite the doom-sayer for larger firms which do not fully apply themselves to the issues he raises. The Grid as a guide to development is possibly focussed more on medium to large firms, although it does also give some food for thought to smaller firms considering the best application of limited resources to such projects. Finally, the Grid is notable in that it is a work of strategic generality, rather than attempting to provide a specific route for the implementation of the necessary systems. To suggest that a book could provide such a “shrink-wrapped” guide would be to underestimate the complexity of building a solution to match each particular practice. Therefore, Susskind sometimes identifies a certain problem, but leaves the reader to develop theories for how to overcome it. For example, he recognises that there are often a number of reasons behind
institutionalised resistance to the development of successful knowledge management systems, but does not propose particular solutions. In the broader perspective, however, Susskind identifies issues which senior partners or managers will face, and often proposes a strategy which might be considered.

“The Future of Law” forms the second part of Transforming the Law. Here Susskind looks back on his previous book, to re-appraise the themes covered and to integrate subsequent progress with the benefit of just over half a decade of hindsight. It is remarkable to note that rather than requiring any major reworking of those original proposals, the main adjustment that Susskind has had to make is that the developments in the application of IT to the legal sphere have occurred more quickly than even he anticipated. Chapter 3 is an excellent summary of the original piece, and is recommended reading for anyone wishing a short introduction without reading the entire previous book. Susskind looks at the changes in the types of legal services which will most likely be required, and the ways that those legal services might be delivered to the client. In the medium to long term, three separate and distinct kinds of legal service are identified: traditional legal service, commoditised legal service, and service of the latent legal market—the third being a kind which is only just beginning to emerge. It is difficult to deny these categories, and Susskind makes a compelling argument towards their identification and distinction. Lawyers in firms of all sizes should find interest in considering where their particular specialisation lies, and how the subsequent issues relate to them.

The fourth section of the book covers “Expert Systems in Law”. Susskind’s early writing and doctoral work centred on the study of expert systems. It becomes clear that this part of the book returns to a subject with which the author is intimately familiar. The section looks at various types of practical expert systems which have been conceived, and considers the various questions of feasibility regarding each. Further consideration is given to “A Jurisprudential Approach to Expert Systems in Law” in a more philosophical chapter with very close links to chapter 13—“The Computer Judge: Early Thoughts” and it seems unfortunate that the two chapters are divided across different sections of the book. A further chapter on the topic is titled “Expert Systems in Law: From Theory into Practice”. Although having a more practical leaning, this section has aged more obviously. This is perhaps unsurprising as it originates from a 1987 lecture. The material has been freshened with some newer insight but still shows some element of antiquity for a book relating to cutting-edge technological developments. The reader is left feeling that there are many more newer developments about which Susskind could write an entire further work.

The final section of the book is headed “IT in the Justice System”. It looks at the development of the use of IT within the justice system itself, and offers a valuable insight due to Susskind’s involvement with Lord Woolf’s Access to Justice enquiry and other public sector projects. Susskind is obviously passionate about the role of IT in enabling greater access to justice for a broader spread of the population, and this comes across in his writing. Certainly it is a compelling vision that a cheaper, quicker and more transparent justice system could be delivered to the general public via the utilisation of IT and the Internet. As is almost unavoidable in such a fast-moving subject area, there is an addendum
considering further developments between the first draft of the chapter in mid-1999 and the first half of 2000.

Susskind has advised the highest levels of Government and industry on the implications of IT developments in law, and it is clear that in this respect he stands practically alone in a position of unique experience and insight. This work is a relatively comprehensive collection of Susskind’s thinking on those developments likely over the next decade and beyond, and as such it should be required reading for anyone considering strategic or implementation issues. The structure and tone of the book is relaxed, and overall it succeeds in making complex principles understandable to a wide audience.

DANIEL BATES


ONE OF the most important achievements of the General Agreement on Tariffs and Trade (GATT) and the World Trade Organization (WTO) to date has been a substantial reduction in the level of tariffs applied in international trade. The average tariff on industrial products has diminished from more than 40 per cent. in 1947 to less than 5 per cent. today. As a result of this success, multilateral negotiations within the WTO have begun to place more emphasis on non-tariff barriers. Nevertheless, tariffs remain an important issue. Many OECD countries, for example, continue to impose high tariffs on agricultural products and other products of particular interest to developing countries. The work programme adopted at the Fourth WTO Ministerial Conference held in Doha late last year provides for negotiations to improve market access for agricultural products and to reduce or eliminate tariffs on non-agricultural products and environmental goods.

Therefore, Professor Hoda’s recent book is of important historical and current interest. Hoda worked in India’s Ministry of Commerce, dealing with international trade relations and negotiations, from 1974 until 1993. He was Deputy Director-General of the GATT and then the WTO from 1993 to 1999. Drawing on these experiences, Hoda reviews the evolution of the provisions on tariff negotiation and renegotiation under the GATT/WTO as well as the procedures and practices adopted by members engaged in such negotiation and renegotiation. This review provides a welcome addition to broader histories of the GATT/WTO, such as Jackson’s World Trade and the Law of GATT (1969) and Croome’s Reshaping the World Trading System: A History of the Uruguay Round (2nd rev. edn., 1999).

The book is aimed at the specialist audience of trade negotiators, members of government trade ministries, economists, and academics focussing on trade policy. Unfortunately, this means that readers with only a limited background in GATT/WTO law and practice are likely to struggle with the material and the manner in which it is presented. Not much is offered by way of introduction to the field or explanation about the broader context and significance of tariff negotiation. Indeed, the book
contains no separate introduction, and the short preface is largely composed of acknowledgements and a basic outline of the contents of the chapters. In addition, Hoda’s technical language and neutral writing style do little to enliven the subject-matter.

This is a pity, since the book does contain some intriguing details in an area that could potentially interest a wider audience. The sheer scale of the tariff negotiations in question makes the continual achievement of agreement during the past half-century quite remarkable. For example, Hoda reports that during the Geneva Tariff Conference of 1947, 123 pairs of countries completed negotiations. In 1949, the figure had grown to 147, and by 1950, 400 negotiations were expected at the Torquay Tariff Conference. Moreover, the complexity of these negotiations escalates due to the multilateral nature of the forum and the most-favoured-nation principle (MFN), with countries granting concessions to other countries taking into account benefits derived from negotiations between other pairs of countries (pp. 45–46).

Chapter I outlines the legal framework for tariff negotiations and renegotiations under GATT 1994. This is a very dense chapter, and it is only later in the book that the significance of the provisions and concepts set out here becomes clearer. To be fair, in some ways this chapter does serve as a general introduction to the rest of the book, although it could have been better organised to assist non-specialist readers. As an example, the explanations of key issues such as schedules of concessions, and MFN in the context of tariff negotiations (pp. 18–19, 23), would have been better placed earlier in the chapter, before discussions about modalities of tariff negotiations and the difficult notion of “principal supplying interest” (pp. 8–9, 13–14).

Chapter II describes the eight tariff conferences and rounds of multilateral trade negotiations held between 1947 and 1994, while Chapter III concentrates on bilateral and plurilateral negotiations conducted outside these general rounds. One highlight of the latter type of negotiations was the successful sectoral negotiations held between 28 WTO members and would-be members in 1996, which led to the execution of the Information Technology Agreement for the elimination of customs duties and other duties and charges on certain categories of information technology products (pp. 79–81). As Hoda notes in his concluding chapter, such plurilateral negotiations conducted on a sectoral basis “can help to maintain the momentum for liberalization of world trade when more comprehensive negotiations are not taking place” (p. 135).

Chapter IV covers practice and procedures in renegotiation, which refers to the modification or withdrawal of tariff concessions subject to certain conditions and in consultation with certain members—those with whom the concession was initially negotiated (who are said to have “initial negotiating rights”) and those with a certain interest in the concession (pp. 11–18). For instance, renegotiations took place upon the establishment of the European Economic Community, and again upon its enlargement to nine and later to ten then twelve members (pp. 99–107).

Chapter V explains how schedules of tariff concessions are rectified, modified and consolidated. In general, modifications may be required in connection with accession negotiations or with bilateral or plurilateral negotiations. Much of this chapter concerns highly practical issues, and reveals the enormous administrative and logistical burden created by tariff
negotiations. In this regard, the Harmonized Commodity Description and Coding System (used for both customs tariffs and international trade statistics nomenclatures) has enabled greater uniformity in customs classification and better monitoring of tariff concessions (p. 124).

The final chapter comprises just over two pages of recommendations and conclusions. This provides a valuable culmination to the book, but the reader is left wanting more. For example, Hoda calls for an update to the 1980 Procedures for Modification and Rectification of Schedules of Tariff Concessions (p. 137), but does not specify what problems such an update should address or what improvements need to be made. In addition, a more extensive examination in this chapter of the likely future trends in and challenges to tariff negotiations and renegotiations would have complemented the preceding discussion of the history under the GATT and the WTO.

The second half of the book is taken up with a detailed index and appendices of useful documents such as decisions and declarations commencing rounds of multilateral trade negotiations.

On the whole, the book could have been enhanced by more of Hoda’s personal opinions and insights, and a more accessible style and structure. Nevertheless, it repays a close reading, and provides a comprehensive understanding of GATT/WTO tariff negotiations and renegotiations. It also makes an important contribution to the goal of transparency in international trade.

ANDREW D. MITCHELL
TANIA VOON


This book comprises papers presented at the first Anglo-German Law Conference organised by the Oxford Law Faculty in autumn 1999. Written by specialists, including members of leading English and German Law firms, the text provides a richly textured insight into the nature and operation of joint ventures underpinned by an informed commentary as to the distinctive considerations brought to bear under two highly developed systems of law.

Globalisation and privatisation have raised the joint venture to a pivotal position in international commercial affairs. It is through joint ventures that market efficiencies of comparative advantage and specialisation can be combined to meet the increasing scale and range of expertise and resources required by expanding markets. Although to practitioners there is little commercial activity of any scale that is possible without joint ventures of some kind, academics specialising in contract law have tended to understate their significance. To a certain extent this is understandable as joint ventures are removed from the ordinary experience of most people and have a degree of complexity that renders understanding hostage to experience. Joint ventures also lie across a number of doctrinal divides, not least that which often consigns the shareholders’ agreements by
which they are often implemented to the rearm of corporate law. It is to be hoped that the initiative taken by the organisers of the Oxford Conference will encourage wider academic interest.

The book opens with a comparative review of the differences in negotiating outlook and drafting style between the two jurisdictions and the distinctive features that come into play should the joint venture turn sour and result in litigation. The second section turns to matters of joint venture structuring. It commences with an assessment of legal vehicles available within each jurisdiction, and then considers constitutional and corporate governance issues such as management structures, duties of directors and shareholders, protection of minorities, and winding up. After looking at tax issues, the section closes with a careful look at the management of preliminary negotiations and related agenda items such as warranties, indemnities, disclosure, and valuation of contributions. The third section brings together an analysis of the main structural problems faced when designing a joint venture including integration of shareholder and director decision-making, resolution of deadlock, protection of minority rights, and employee rights. When those involved in commerce foregather Adam Smith noted that conversation invariably turns against the public interest and the fourth section prudently examines the treatment of joint ventures under national and European community competition law. The book finishes by addressing matters of termination including change of ownership and dissolution.

One of the compelling features about joint ventures is that they are at the same time global and national. As autonomous creations of their parties, joint ventures have developed, through repeated use, internationally harmonised techniques of drafting and conceptualisation. However, when it comes to implementation, the parties also need to have regard to the fragmented nature of national legal traditions. It is for this reason that a comparative analysis provides necessary depth to the evaluation of general principles. It is also a reminder that joint ventures work best when involving countries of comparable stages of development. Unless they can be underpinned by similar values of profit and growth joint ventures can be an invitation to disaster. Such was the experience of many seeking to involve themselves in transition economies during the 1990s where contrary objectives of power and political influence rendered relationships unsustainable.

Through most of the twentieth century the dominant contractual paradigm was of a discrete transaction involving the exchange of enforceable promises and a related emphasis on issues of formation and the pathology of breach. Although it was fashionable in the 1980s to extend contractual analysis to a wider range of economic relationships this was primarily because of their bargain-based nature. Joint ventures evidence a fundamental shift away from such competitive bargaining where the aim of each party is to maximise its share of available gain. Instead each party aims to add value to its own resources through collaboration by creating a formal context within which a such a relationship can be established, sustained, and dissolved when no longer productive. From memoranda of understanding onwards the discipline of the legal mind is involved in developing the techniques and skills necessary to leverage mutuality of expectation in the face of complex future uncertainties. Accordingly, the emphasis is on processes by which the parties can learn and adapt to
changing circumstances. The reliance on agreements to agree and the use of “circuit breakers” as opportunities to understand and resolve performance problems sit uneasily within notions anchored to legally enforceable obligations and condemnation of performance problems as breaches. Similarly, concepts of transparency and good faith are required when risk is something to be defined and managed, rather than merely negotiated, and sustainability is to be immunised against the corrosion of resentment.

The shift from competition to collaboration has had an enormous influence on management and negotiating cultures and has seen the joint venture adopted as a preferred vehicle for the development and dissemination of innovation, best practice, and investment worldwide. It also opens to evaluation the nature and role of relationships generally.

It is to be hoped that the forgoing gives an idea of the exhaustive range of issues covered by this book and will encourage it to be read. The editing has ensured that each section forms an integrated whole and one does not have to untangle the overlaps and gaps that often mar collections of conference papers. The flyleaf claims the collection will be indispensable to practicing lawyers and of real interest to legal academics. This is a justified claim and one looks forward to the publication of the papers given at the second Anglo-German Law Conference which addressed Mergers.

NICHOLAS SINCLAIR-BROWN