BOOK REVIEWS


It seems that it is becoming increasingly difficult to keep the Lord Chancellor out of the headlines. The fact that this publicity has often related to matters which some dismiss as trivial should not blind us to the serious substance which underlies such attention and concern. Some aspects of the rôle of the Lord Chancellor have received greater scrutiny than others in recent years: discussions concerning the judicial appointments system and the personal judicial position of the Lord Chancellor have been frequent, as has criticism of his party fund-raising exploits and expensive taste in wallpaper. However, an overall picture of the function, tasks and powers of the Lord Chancellor has been more difficult to draw together, particularly in the light of developments in recent times which have conferred greater responsibility upon the Lord Chancellor and his Department. Diana Woodhouse's admirable and critical book seeks to provide both such an overview and proposals for possible (and arguably very necessary) reforms.

Woodhouse's study begins with a brief historical sketch of the position of Lord Chancellor, its importance in the modern British constitution and the increasing attacks upon its rôle and importance, especially in the late 20th and early 21st centuries. This critique is then placed in context by a discussion of the position of the Lord Chancellor through his different functions (constitutional, executive, judicial and legislative), interspersed upon the nature and responsibilities of the Lord Chancellor's Department, a chapter covering the current judicial appointments system and one discussing the accountability of the Lord Chancellor. The volume concludes with a set of recommendations for the reform of the Office of the Lord Chancellor.

For Woodhouse, the constitutional function of the Lord Chancellor is concerned primarily with the protection of the independence of the judiciary and she summarises the arguments from the rule of law and the separation of powers. The justification for the Lord Chancellor's position as the "hinge" joining the executive (and Parliament) and the judiciary is subjected to scrutiny: this communicative function is very often more personality-dependent than office-dependent and may, due to the secrecy involved, create suspicions of executive-judicial collusion. Far from supporting modern, democratic institutions, the Lord Chancellor is unelected, with tenure subject to Prime Ministerial whim, and is not accountable to an elected body. Safeguards of judicial independence are also under strain. Judicial appointments (covered in detail in a separate chapter, which emphasises the current government's apparent change of heart over a judicial appointments commission since having left opposition) are within the gift of the Lord Chancellor, a government minister. Tenure
of office for many judges can be rather weak (especially for our numerous part-time judges such as lay magistrates). Judicial salaries, while legally protected from government reductions in actual amount, have regularly failed to keep pace with the rising cost of living. This last point has reared its head again in early 2002, raising fears on recruitment at all levels of the profession and begging the question whether it is appropriate for the Lord Chancellor to decide on the adequacy of such salaries. After all, his responsibility in this sphere is an executive one and he is unlikely to depart from government policy on the matter, despite being charged with the defence of judicial independence.

One of the most revealing parts of this study is the discussion of the increased executive responsibilities of the Lord Chancellor and his Department. This growing role underlies and exacerbates many of the tensions inherent in the position of the Lord Chancellor in modern government. The Lord Chancellor’s Department has seen a massive increase in staff numbers and budget over the last few decades and various legislative developments (such as the Courts Act 1971) and policies have placed greater responsibility and administrative burdens upon the Department. Legal aid and the management and administration of the entire court system are now within the purview of the Department, foreshadowing an increasing focus upon the administration of the courts and a move away from concentrating upon the judges themselves. When combined with the extensive executive functions which have been undertaken by successive Lord Chancellors (but especially by the current incumbent) in Cabinet Committees and in trying to push through (often controversial) government policies, it has become clear that the relationship between the Lord Chancellor and the (senior) judiciary is under great strain. As Woodhouse comments, the “key to the effectiveness of the Lord Chancellor … is his ability to retain the trust and confidence of both Cabinet colleagues and the judiciary” (p. 96). Lord Irvine’s claim that the office is now coming into its own and can be “of the greatest use to the government” only underlines that the balance needed to retain that trust from both sides is becoming institutionally impossible to maintain.

The judicial role of the Lord Chancellor as president of the Supreme Court and the Chancery Division and as an ex officio member of the Court of Appeal is, it appears, on the wane. The very fact of the Lord Chancellor having a judicial function at all is one more of the historical accidents of the British Constitution, yet the influence of various Lord Chancellors in their judicial role has often been considerable. Woodhouse analyses the background history, the influence and judicial record of the various Lord Chancellors (including the frequency with which they sat as judges). Limitations upon the Lord Chancellor sitting as a judge have, in the past, been largely a matter of appearance: for example, maintaining the integrity and independence of the judiciary by avoiding cases with a party political element or government interest. Lord Irvine’s statement that the Lord Chancellor should not sit in “any appeal where the Government might reasonably appear to have a stake in a particular outcome” seems not to show a great deal of prior self-restraint. Indeed, he sat in cases involving public order (D.P.P. v. Jones [1999] 2 A.C. 240) and public authorities (Boddington v. British Transport Police [1999] 2 A.C. 143), which led to expressions of concern about the propriety of his involvement. The advent of the Human Rights Act, which Lord Irvine himself introduced and
piloted through Parliament, may end the judicial role of the Lord Chancellor for good, except perhaps in cases of an entirely private law nature. Woodhouse makes this argument on the basis of the well-known case of McConnell v. United Kingdom [2000] 30 E.H.R.R. 289. She notes that “any direct involvement in the passage of legislation, or executive rules, is likely to be sufficient to cast doubt on the judicial impartiality of a person subsequently called on to determine a dispute over whether reasons exist to permit a variation from the wording of the legislation or rules at issue”. The danger is not so much that modern Lord Chancellors are likely to try to use their office for political ends, but rather that “they may . . . fail to recognise that they compromise themselves and their fellow judges” if they sit in inappropriate cases (p. 130).

In conclusion, Woodhouse’s prescription is bold and far-reaching. The Lord Chancellor’s judicial role must go, as must his control over judicial appointments. Executive responsibilities should be transferred to a Minister of Justice who is elected and sitting in the Commons. Even the Lord Chancellor’s position as Speaker in the House of Lords is shaky (depending upon the final outcome of the process of reforming the composition of the House of Lords). This book is succinct, generally clear and well argued and presents many compelling arguments in favour of the need for fundamental reform of the Office of the Lord Chancellor. Its contribution deserves to be taken very seriously indeed.

ANGUS JOHNSTON


This book rests on what may well seem to most lawyers to be a self-evident truth: that “all policing systems are profoundly influenced by the constitutional order in which they are situated” (p. 1). But the author states that for many, particularly sociologists, this would be a debatable or false proposition. These would consider either that “occupational culture [was] the primary determinant of police behaviour” or would at any rate stress the discrepancy between the “legal ideal and profane reality” (p. 1, footnote 1). These latter propositions appear to be as self-evident as the first one: we live in a fallen world and so there will always be a gap between “legal ideal and profane reality” and who can doubt that police culture influences police behaviour.

The first chapter of the book is an essay on the constitutional influences on policing. The author finds that there are constitutional paradoxes in policing that arise from the fact that constitutions both empower institutions and limit the powers of institutions. “In a nutshell,” says Professor Walker, “it is the capacity of the police to use force . . . which marks them out as indispensable to the protection of the institutions and interests endorsed by the constitutional order; yet it is these same attributes that which make them more liable than any other agency within the executive branch of the state to endanger or corrupt that order. As both guardian of, and threats to, the constitutional order, police institutions have an inherently double-edge quality, paradoxical quality.
This basic paradox of the police function can only be resolved by fashioning a regulatory framework which encourages the police to use their special position to promote a high level of societal security and a satisfactory accommodation between its different aspects, rather than permitting them to undermine security generally or to give undue priority to some of its aspects at the expense of others” (p. 6).

As the author recognises, it is inherent in constitutions that they should both empower and limit powers. Nevertheless, is that really paradoxical? And, while not wishing to be complacent at all about the failings of the police, is it at all plausible to suggest—at least as far as the mainland UK is concerned—that the police are liable to “endanger or corrupt” the constitutional order? The recent establishment of a police authority for the Metropolitan Police has reduced the Home Secretary’s direct influence over the most powerful force in the country. And the continuing organisation of the police into 43 separate and independent forces means that the scope for any threat from the police to the constitutional order must be slight. But even to think in such terms, it seems to me, presupposes a conception of the police at variance with the everyday reality. The constitutional threat I perceive is to the police as the central government for some good reasons and some bad reasons takes power (in the Police Reform Bill 2002) to direct police authorities and chief constables.

Enough has been said to show that I am out of sympathy with the general approach of this book. But this should not conceal the fact that there is much of value in it. There is a good account of the origins of the orthodox tripartite system of police governance—with governmental authority over each force being split between the independent chief constable, the police authority and the Home Secretary. And this goes on to a valuable account in Part 11 of the changing face of tripartism after the Police Act 1996. Under the new tripartism police authorities are smaller and have, through their approval of the local policing plan, more concrete responsibility for the direction and performance of the force. Under the new tripartism the chief constables have enhanced managerial control over the force but must perform work more closely with the authority than in the past. Professor Walker recognises that the new authorities have been depoliticised but still finds that they have a “compliance culture” in that they have “a reluctance or inability” to challenge their chief constables and other senior officers. But a cordial relationship between the authority and its chief constable is no evidence that either is not doing their job properly. And it should not be forgotten that the authority sets the budget. It also appoints and can dismiss or discipline its chief officers. So it should surprise no one that a wise chief constable and a sensible police authority should work together well.

A significant aspect of the book is the fact that its reach is not limited to England. Valuable accounts are given of tripartism in both Scotland and Northern Ireland. The account of Northern Ireland is particularly valuable and interesting tracing the origins of the Police Authority of Northern Ireland (which was national, not regional and contained no elected element), through to the Patten Commission, the reform of the RUC and the establishment of the Police Board (with a substantial elected element drawn from the Northern Ireland Assembly) and local accountability delivered through District Policing Partnerships. There are many constitutional circles to be squared before policing in Northern Ireland will
be straightforward. How can the new force win the enduring trust of both communities? Can the British state relinquish sufficient control to enable such trust to be built up without threatening the security of Northern Ireland? There are tightropes to be walked in this area and the author’s “paradoxes” may here have some explanatory power.

Another important aspect is the consideration of what the author calls “new dimensions” in policing. He rightly points to the “national dimension” and gives an account of the nationalising trends within the national system pointing to the national criminal intelligence service, the national crime squad and the security services. All of this does undermine the tradition of local forces: but national and international problems do call for national and international responses. The important issue is not the existence of these institutions but the arrangements made for their accountability.

This leads on naturally to the European dimension. Although “police forces around the world have had nation states as their nesting sites” (p. 229 citing Sheptycki), the author describes the development of the European Police Office (Europol) whose foundations were laid in the Maastricht treaty. The details of these developments are inevitably complex and difficult to understand but the prospect of a transnational policing capacity without proper democratic accountability is a worrying one—as well as a more than usually profound threat to national sovereignty. The answers to these fears, we are told, lie in “metaconstitutional law” which claims “within its own terms a higher or deeper constitutional authority than state constitutional law. Metaconstitutionalism [sic] always conceives of its own authority as original and irreducible” (pp. 283–284). I am not sure what all this means. But if metaconstitutional law ordains that one day Eurocops are to replace local bobbies the man or woman in the street will not like it.

Christopher Forsyth

crimes, but invariably, and very usefully, seek to identify a clear and acceptable rationale for the existence of the particular offence. Simester and Sullivan’s approach to theory is sensible and welcome. Essentially, they are subjectivists, who deplore constructive liability and reject strict liability offences, at least without a clearly defined due diligence defence.

Although the analysis of criminal law theory is of profound importance to the future development of the criminal law, much of the recent academic theoretical analysis has been disappointing. Many of the writings of these theorists, on both sides of the Atlantic, is unnecessarily convoluted and pedantic and sometimes shows an appalling ignorance of the realities of the application of the criminal law in practice. Further, these theorists often fail to appreciate the historical origins of the criminal law and pay insufficient attention to the political and policy implications of that law. Such theory is sterile, as reflected by the fact that it is almost completely ignored by the courts, by Parliament and the Law Commission. This is a cause for real concern, since a clear theoretical foundation is essential before any detailed reform of the criminal law can be contemplated. This is the real importance of Simester and Sullivan’s work since it places theory in context, but with a consistent appreciation of the real world. Law reform bodies of whatever description should take note of their careful and sensible exposition of theory. The authors regularly examine some theorist’s new theory and find it wanting, but only after detailed, and often tortuous, exposition of what the theory entails. This reviewer was regularly left feeling that the authors should have spent less time examining and rejecting particular theories, which did not deserve the authors’ energies being wasted on them, and spent a bit longer on some good old-fashioned doctrinal exposition. This is not to undermine the importance of theory but simply reflects the irrelevance of too much recent writings in this field.

There is much in this book to be admired. In particular the treatment of the complex topic of causation is masterly. There is further a very useful examination of statutory interpretation and proof, which is a model of clarity and good sense, and excellent analyses of intention and the impact of the Human Rights Act 1998. There are other particularly good chapters on vicarious and corporate liability, mental disorder and the defences, especially necessity. But other sections of the book are less convincing. For example, the cursory treatment of the rationale of punishment is, frankly, unhelpful. This is a matter of particular regret, since it is vital to have some understanding of the reason for punishment before it is possible to engage with some of the more complex theoretical debates. The treatment of joint enterprise liability is unorthodox. The authors consider that this is a distinct form of liability from that of accessorial liability. This is unconvincing, especially because the authors fail to appreciate the growing significance of recklessness as the fault for accessorial liability, regardless of whether there is a joint enterprise. The doctrinal incoherence of the crime of gross negligent manslaughter is also virtually ignored.

Some of the authors’ conclusions are, at times, rather naïve. They advocate legislative intervention at virtually every opportunity, often at a high level of abstraction, but without regard to the difficulties of drafting. For example, they demand legislative definition of serious and grievous bodily harm and dishonesty. This is probably impossible and is likely to be unhelpful.
Although the book takes the form of a comprehensive text for students studying criminal law, and is usefully updated by means of a web page, the authors make few concessions to student needs. The style of the book is often idiosyncratic. This reviewer welcomes such an approach, although experience has shown that the convoluted style can be off-putting to the student who is approaching the subject for the first time. The numerous cross-references to paragraphs and sub-paragraphs, rather than to page numbers, are especially unhelpful. The treatment of particular topics is also somewhat uneven, making the book less useful as a teaching tool. For example, 18 pages are devoted to the complex crime of handling stolen goods, all of it doctrinal, but virtually no reference is made to other key Theft Act offences, such as blackmail, evasion of liability by deception and making off without payment. Whilst detailed treatment of these offences is perhaps unnecessary, some analysis of their reach is surely important to understand the range of protection afforded by the criminal law to property. Similarly, the rather cursory treatment of sex offences is confined to rape and indecent assault, without any real sense of the range of such offences, which restricts the relevance of the offences they do cover. The book ignores public order offences and criminal damage, save for the odd cursory reference, this too reduces the usefulness of the book.

Despite the criticisms of certain aspects of this book, the essential achievement of Simester and Sullivan must not be forgotten. Their approach is ground-breaking and deserves to be developed through future editions.

Graham Virgo


Academic criminal lawyers enjoy discussing the reform of English homicide law so much it almost seems wrong to suggest that Parliament should deprive them of the pleasure. The current volume originates in papers presented at the Oxford “Rethinking Homicide” conference and aims to reawaken interest in legislative reform. Perhaps we should be careful what we wish for. But certainly one could not wish for a more considered set of essays on the subject than this. Fusing empirical and theoretical reflections on murder, voluntary manslaughter, involuntary manslaughter and sentencing, the book matches its description whilst the inclusion of comparative material in each chapter successfully highlights the peculiar dilemmas of English homicide law and its possible futures.

Following a stylish introduction from the editors, the book sensibly begins by rethinking the definition of murder and, in particular, how it should be distinguished from manslaughter. William Wilson sees the paradigm case of murder as an intentional attack on the physical interests of another. Consequently, he seeks to restructure the upper boundary between murder and manslaughter via an extended fault element that takes into account two forms of risk-taking (intending to expose a person to mortal danger and risk-taking in the course of violent crime). Three chapters concerned with voluntary manslaughter follow, with
R.D. Mackay offering a state-of-the-art critique of the operation of the
defence of diminished responsibility. Long-standing objections to this
partial defence are given a new spin, following the implementation of the
Criminal Procedure (Insanity and Unfitness to Plead) Act 1991 and the
House of Lords decision in Smith relating to provocation. Celia Wells
follows this up by contending that the defence of provocation encourages a
view of human behaviour that is sexist, homophobic and racist; an
argument that may be enough in itself to induce in some a sudden and
temporary loss of self-control. Thirdly, Nicola Lacey argues that there is a
strong case not only for maintaining the existing partial defences to murder
but expanding them to include duress of circumstances or threats and the
use of excessive force in self-defence. Turning to involuntary manslaughter,
Christopher Clarkson outlines his proposals for reform, which are largely
consistent with the (coincidental) publication of the Government’s own
plans. For Clarkson, constructive manslaughter can be justified in principle
as long as it belongs to the “family of violence”. Clarkson’s observation
that offence specificity depends in part on the sentencing system segues
neatly into Martin Wasik’s closing evaluation of sentencing principles.
Usefully, Wasik considers the sentencing parameters that are likely to
emerge in the event either of the abolition of the mandatory penalty for
murder, or the reshaping of the law of involuntary manslaughter.

In spite of differing empirical and theoretical perspectives, recurring
themes emerge. The main theme is the need for doctrinal integrity in the
law of homicide, achieved by means “fair labelling” and a transparent
hierarchy of relative seriousness that accords with popular moral intuitions.
Accordingly, ethical issues are writ large with much effort expended on
how best to capture and communicate the significance of different kinds
of killings. Most authors illustrate the difficulty of framing the law of
homicide in such a way as to enable lay persons to make moral sense of the
world whilst simultaneously avoiding excessive particularism in the
delineation of offences (Wilson, Lacey, Clarkson and Wasik). The difficulty
of articulating such moral values in an age of value-pluralism is largely
skirted, although Lacey’s chapter squares up to the problem of mobilising a
“reasons” approach in a morally pluralistic social order (pp. 127–128).
Despite this worthy quest for clarity there remains a question whether
ambiguity is not itself a virtue in the law of homicide, making it easier for
the courts to police the boundary between murder and manslaughter and
enabling judges to express, like ventriloquists, their own moral judgments.
Lacey and Clarkson see the law of homicide as a “communicative
enterprise”, requiring the labelling and structuring of offences to be done in
such a way that assists, rather than obscures, communication. It is a key
issue that begs the question of to whom one is seeking to communicate, given
that there are a number of different semiotic groups to whom one
might appeal.

In a shift that reflects an admirable concern to stay close to popular
conceptions in this most emotive and symbolic of crimes, the discussion
about murder focusses on narrative rather than semantic concerns with
different writers referring to “paradigm cases”, “focal instances”, “fuzzy
detail” and “family resemblances”. Such typifications should arguably be
more widespread in other areas of the criminal law. Befitting a book on
murder, disturbing scenes linger in the mind but these are of moral rather
than visceral outrage. Two stand out; Mackay’s trenchant critique of
manslaughter convictions for those who might formerly excused on the basis of legal insanity and Wasik’s urgent warning of the need to reverse the momentum towards life sentences. The book eschews completeness but given that the age group at most risk of being killed remains that of children under one year of age, some consideration of reform of the law of infanticide might also have been fitting.

The book aims at stimulating legislative reform and whilst a univocal reform agenda from six academics is not to be expected there is some agreement, chiefly on the need to abolish the mandatory life sentence for murder and for a definition of murder that excludes genuine mercy killings. The Government response has not been encouraging with the previous Home Secretary remaining “completely opposed” to abolishing the mandatory life sentence. Such intransigence guarantees further rides on one of the criminal lawyer’s favourite hobbyhorses. Even so, like the tragedies of antiquity, this book ranks as a homicidal classic.

J.P. BURNSIDE


With the establishment of the International Criminal Court (ICC), one of the most pressing tasks, as Safferling observes, is to identify the procedure that will govern its proceedings. The author’s thesis is that the elements of this procedure are to found in a “structural combination” of the principal domestic legal traditions—the common law and the Continental—“reconciled” as required by the dictates of international human rights law. The result, it is claimed, is a “unique legal order” that is consistent with the aims of criminal prosecution, is fair to the accused, and corresponds to the specific circumstances of the international context.

Safferling’s approach is avowedly academic, in contrast to most of the now numerous descriptive or practitioner texts and commentaries on the ICC, and it tackles the question from two perspectives. The first is that of a comparative lawyer analysing the way in which different legal systems deal with each stage of a criminal proceeding, from the initiation of an investigation through to release on parole. The second, which is “by no means subordinate to the first”, is that of the international human rights lawyer critically assessing the fairness of each of these steps. The pursuit of these two perspectives, however, does not always result in the articulation of the international procedural order that the author seeks. In many places, the work tends towards a normative comparative analysis of the two distinct legal traditions, with the yardstick of human rights being used to judge which is the superior.

The analysis usually follows a four-step methodology. The first step is a detailed and comprehensive examination of the provisions and operation of domestic legal systems. Here, Safferling selects England and Wales and the United States of America as representative of the common law tradition, and Germany as representative of the civil law tradition. The choice of German law, rather than the more usual French law, is justified on the
basis that the differences that exist among civil law systems are limited and, in any case, are not important for the purposes of the study. The second step involves measuring these against the requirements of international human rights law as contained in international treaties and as interpreted by bodies such as the Human Rights Committee of the United Nations and the European Court of Human Rights. At this stage, the author draws attention to what he calls the “institutional reflexes” of human rights norms, that is that the recognition and protection of “human rights provisions can have structural and institutional consequences lying beyond their precise scope of application” (pp. 62–63). For example, he concludes that the right to an independent and impartial tribunal requires that there be separate institutions for the prosecution of crimes and for the judging of them (p. 62). The third step in the methodology is an analysis of the operation of the criminal procedure in use at the International Criminal Tribunal for the former Yugoslavia. The final step looks at the development of an international procedural order for the ICC through the work of the International Law Commission (ILC), the preparation of the Rome Statute which establishes the ICC, and the adoption, by intergovernmental negotiation, of the Rules of Procedure and Evidence for the ICC.

The first substantive chapter of the book covers a wide range of matters under the rubric of “the necessity of respect for the alleged offender”. It starts with a brief review of the origins and aims of criminal prosecution in the common law and civilian traditions. It then examines the development of “fair trial” as an internationally-recognised human right and assesses where it fits into the dialectic of first generation/civil and political rights and second generation/economic and social rights. Not surprisingly, Safferling concludes that the right to a fair trial does not fall neatly into either of these classical groupings, but he then overstates his conclusion that the right to a fair trial “therefore has a unique status” (p. 30); better is the author’s characterisation of the right to a fair trial as a “kaleidoscope” of rights (pp. 30–31). The final part of the chapter addresses the question of an international criminal procedure and the author’s thesis that international human rights law must underlie such an order.

The bulk of the book is then made up of two detailed chapters focussing on the pre-trial inquiry stage and on the trial itself, and a number of more succinct chapters. These deal with confirming the indictment, post-conviction matters (such as double jeopardy and appeals) and post-trial matters (such as treatment in prison, pardon, remission and parole). The chapter focussing on the trial is perhaps the most interesting. In addition to examining the roles of the various parties and the procedural steps of a trial, Safferling also looks at several important “principles of the trial”. These include the publicity of proceedings, the principle of a speedy trial, and the presumption of innocence. The author also discusses the rules of evidence.

However, it is possibly in this part of the work that Safferling departs most conspicuously from his aim of articulating an international procedure and instead engages in a comparative assessment of the merits of the common law and civilian approaches. It is also at this point that his greater familiarity and understanding of German law is at its most pervasive. For example, it is one thing to come to the very reasonable
conclusion that the institution of the jury is not an appropriate one for adoption in international criminal proceedings, but it is altogether another to conclude that “the jury is a more than dubious institution” (p. 216) that “tends to run counter to respect for the dignity of human beings” (p. 215). Similarly, the proposition that a mixed adversarial-quisitorial procedure is to be preferred at the international level does not need to be based on the problematic conclusion that “[a]dversarial systems do not seem to have their main focus on finding the truth” and that they resemble “a sports contest” (p. 221).

International criminal law and procedure is a quickly evolving subject and Safferling’s work is overshadowed by recent developments, some of which might have been taken more into account. (The book was published in 2001 and Safferling’s Acknowledgments are dated October 2000). There is now an international procedural code, comprising the Rome Statute of the ICC (adopted 17 July 1998) and the draft Rules of Procedure and Evidence (adopted as final on 30 June 2000), so it might have been more useful to analyse the consistency of these instruments with human rights norms, rather than to seek to construct a new code from domestic law sources. The references to these recent instruments are poorly integrated into the text and generally consist of brief observations tacked on to the end of relevant sections. There is also substantial analysis of the ILC’s draft Statute for an ICC, which is undoubtedly of historical interest. However, with the adoption of the Rome Statute, which establishes a somewhat different body from that envisioned by the ILC, it is questionable whether the not inconsiderable focus on the work of the ILC is consistent with the aims of the book.

Ben Olbourne


Over forty years have elapsed since Hart and Honoré first lamented the uncertainties and confusions surrounding causation. There is little sign of improvement: only this year the Court of Appeal recognised that the application of orthodox principles of causation to mesothelioma (an asbestos-related disease) revealed “a major injustice crying out to be righted” (*Fairchild v. Glenhaven Funeral Services Ltd.* [2001] EWCA Civ 1881 [2002] 1 W.L.R. 1052, at [107]). The problem is particularly acute in tort claims for industrial injuries and medical negligence, where causal uncertainty is prevalent.

*Tort Liability under Uncertainty* is a comprehensive study of how the law of torts does—and should—solve the problem of indeterminate causation. Chapter I explores the theoretical basis for the general rule that the claimant must prove his case on the preponderance of evidence; by reference to probability theory and some economic analysis, the authors establish that the rule is justified on the grounds of both utility and fairness. But in certain cases undiscriminating application leads to under-compensation of claimants and under-deterrence of defendants. This frustrates what the authors assert to be the objectives of tort law: deterrence and corrective justice (there is, however, very little consideration
of *distributive* justice, despite the recent forays of the House of Lords into this area: e.g. *McFarlane v. Tayside Health Board* [2000] 2 A.C. 59).

Chapter II contains a most helpful analysis of these troublesome cases, divided into five paradigms: (1) where the wrongdoer is unidentifiable (there is a very full discussion of the notorious “two hunters” dilemma); (2) where the defendant has acted wrongfully but his victim is unidentifiable; (3) where wrongful conduct has occurred but it is unclear whether it has resulted in damage; (4) where damage has been wrongfully inflicted by separate defendants in such a way that it is impossible to determine who caused what; and (5) where damage has originated from both tortious and non-tortious causes, but it is again impossible to apportion the damage between these causes. This categorisation is undoubtedly valuable for the purpose of exposition. Whether or not there are underlying normative differences between the five groups to substantiate the classification is less clear; although the authors do occasionally advert to distinctions, a more detailed treatment might have been desirable.

There follows an examination of the doctrinal solutions currently employed to resolve causal indeterminacy. The discussion has a strong (and refreshing) comparative element: English and US law predominate (pp. 61–67 contain a useful summary of the American “Market Share Liability” theory), supplemented by a handful of Israeli and Canadian cases. It is perhaps understandable that the authors focus on reform rather than exposition, but a consequence of this is that their presentation of the case law is occasionally incomplete and potentially misleading. For example, at p. 75 they cite *McGhee v. National Coal Board* [1973] 1 W.L.R. 1 as authority for the proposition that if an employee is negligently exposed to a risk of injury, the burden of proof is reversed and his employer will be liable unless it can prove that it was not responsible for the injuries. They do not, however, explore the qualification to this principle affirmed in *Wilsher v. Essex Area Health Authority* [1988] A.C. 1074, which highlighted a significant difference between single and multiple cause mechanisms (this distinction appears, incidentally, to have survived the recent House of Lords’ decision in *Fairchild* [2002] UKHL 22, [2002] 3 W.L.R. 89). Similarly, when discussing the possibility of claiming for the “loss of a chance”, the authors do not consider the important decision of the Court of Appeal in *Allied Maples Group Ltd. v. Simmons & Simmons* [1995] 1 W.L.R. 1602.

Three of the doctrinal solutions receive extended treatment. Chapter III explores *res ipsa loquitur*. That maxim is rather unfashionable nowadays, and the suggestion that in truth it is no doctrine at all, but merely a convenient label, has brooked little dissent. Yet Porat and Stein mount a spirited defence: in their view, *res ipsa loquitur* is neither redundant nor anomalous, but quite properly identifies situations where courts can infer negligence merely from statistical evidence. Chapter IV discusses the imposition of liability for the creation of risk and lost chances, and highlights the important difference, in terms of corrective justice, between recurrent and non-recurrent wrongdoers. Chapter V assesses possible mechanisms for imposing collective liability on a group of defendants.

The main thrust of the authors’ argument is that the piecemeal solutions adopted by the courts lack coherence, and should be supplemented by a new doctrine of “evidential damage” (chapters VI and VII). This insight neatly circumvents the problem of liability under
uncertainty by imposing liability for uncertainty: if causal indeterminacy results from the defendant’s wrongdoing, he is liable for the evidential incapacitation he has inflicted upon the claimant. The full consequences of this idea cannot be conveyed here, but it can be said that a number of orthodox principles of tort law would need stretching to accommodate such liability. Firstly, the courts’ reluctance to allow claims for pure economic loss would need to be overcome: a claim for evidential damage redresses the reduced prospects of obtaining compensation at trial. Further, in many of the difficult cases the causal uncertainty stems not from the defendant’s actions but from a lack of scientific proof. In Hotson v. East Berkshire Area Health Authority [1987] A.C. 750, for example, the claimant failed because he could not prove that when he arrived at hospital there were sufficient live blood vessels to prevent the onset of permanent disability. This uncertainty was assured before the negligent doctor became involved; therefore (despite what the authors say at p. 195) it does not seem appropriate to make the defendant liable for the evidential uncertainty. Likewise, in many of the industrial disease claims, uncertainty would have existed even if the defendant had contributed to the risk non-negligently (e.g. by reducing emissions to a reasonable level or by giving a suitable warning); thus it is difficult to say that any evidential damage was caused by the defendant’s wrongdoing.

But the above points are only minor criticisms. Overall, this is a bold, stimulating, and original contribution to the literature. It deserves to be widely read and discussed.

Benjamin Parker


As volume four of Current Legal Issues demonstrates, commentary on the interplay between law and religion in the UK is growing, although the subject still attracts nowhere near the level of attention it does in other countries. The newest addition to the literature constitutes a welcome advance to lawyers working or interested in the field. For example, many existing collections of essays on law and religion focus primarily on sociological issues. This compilation, on the other hand, contains many essays that stress truly legal dilemmas, although sociological, philosophical and other approaches to the question are still well represented among the thirty contributions.

However, the project illustrates two problems common in this field. First, its very diversity indicates a lack of consensus on what direction research in the area should take. Second, the content of some of the contributions suggests a need for increased sophistication in analysis of the legal issues at hand. It may be that commentary in this country suffers when compared to analysis in other countries simply because other nations’ constitutional or legislative concerns have given rise to a large amount of complex litigation. However, as the contributors to this collection amply demonstrate, the situation in the UK is not so clear-cut as to eliminate the
need for critical analysis. Indeed, recent legislation on religious matters makes academic research more necessary than ever.

Those who are interested in the direction of research into law and religion should begin with Anthony Bradney’s contribution. Not only does he offer a brief overview of the evolution of this field to explain why commentary on law and religion is less developed in the UK than in other countries, he also provides an intriguing proposal for new research agendas in this area. While others may prefer to follow different directions in their research, Bradney nevertheless brings to the reader’s attention the need to begin to conceptualise the future shape of this area of law.

Another essay that addresses the question of first principles (one of the editors’ broad subject matters) concerns the proper conception of religion in a postmodern world. The author, Gary Watt, brings a fine jurisprudential turn to his discussion of the extent to which rationality is relevant to accommodations granted to religious beliefs and practices. The piece demonstrates nicely that critical analysis need not rely on a massive backlog of case law.

The second major grouping of essays concerns “Religion and the Constitution”, a topic which overlaps somewhat with the third grouping on human rights. Not surprisingly, essays in these sections are orientated more towards lawyers than some of the other selections, which tend more towards philosophy, hermeneutics and religious law per se, including Jewish and Islamic law. Unfortunately, at least for those interested in the status of domestic law, only one contributor, Peter Edge, focusses primarily on matters in the UK. While his evaluation of the religious elements in Parliament is helpful, the scope of his article does not allow him to consider two questions that he rightly acknowledges as important: the religious commitment of elected officials whose offices are not explicitly “religious” and the extent to which religious ideas affect legislative policy. These issues are often termed questions of public reason and are the subject of hot academic debate in other jurisdictions. It would be interesting to see how scholars in the UK view the matter, and this might be a fruitful area for future research.

The other pieces in this section focus less specifically on matters in the UK. For example, Peter Cumper considers the case law from the European Court of Human Rights (“ECHR”) and discusses the extent to which judges in the UK can and should rely on European jurisprudence in applying the Human Rights Act 1998. While this topic is of considerable importance in the UK, the discussion might have benefited from a longer format. Javier Martínez-Torrón also deals with the jurisprudence of the ECHR, investigating the various strengths and weaknesses in the European case law with respect to freedom of religion and belief. He concludes that while the ECHR has condemned religious intolerance, it has failed to realise the threat that secular intolerance poses to religious liberty.

While there is much of merit in the contributions appearing in these sections, several of the essays seem to operate under the assumption that the reader has little, if any, familiarity with the subject matter. For example, in his essay entitled “Human Rights, Religious Liberty, and the Universality Debate,” Malcolm Evans spends a great deal of time reciting the provisions of various human rights instruments which concern religion. While his later discussion about the manner in which human rights and
religion offer competing claims to universal truth is more of the calibre that one expects of a scholar of Evans’s stature, the opening section appears unnecessarily expository. It may be that Evans, like other authors in this section, believed it necessary to establish a certain amount of common ground. However, when so much time is spent laying the groundwork, little time is left for more complex analysis.

Yet another group of papers emphasises the role that group rights theory plays in ideas of religious liberty. Julian Rivers looks at the individual and collective aspects of the freedom of religious association, while Rex Adhar and Ian Leigh place the debate about whether the state should be able to interfere in the internal workings of religious groups in the context of discrimination on the grounds of sexual orientation. These last two papers segue easily into a series of papers related expressly to the extent to which the law of the state is and should be allowed to regulate purely internal affairs.

This collection of essays is full of positive messages about research in the field of law and religion. Broad support for and interest in this type of research obviously exists. If this field of inquiry is to progress, however, there must be more opportunity for lawyers to discuss issues of particular concern to them. Not only will this focus the research agenda on matters that are of legal (as opposed to sociological or philosophical) import, it will increase the degree of sophistication in the analyses offered as authors no longer feel the need to familiarise their readers with the existing state of affairs. The current collection shows there is no shortage of talent in this field. Each of the commentators offers able and novel insights. Now it is merely a matter of taking the analysis to the next level.

S.I. Strong


The conception of Labour law as a distinctive branch of legal studies was a product of the late 19th century and the first half of the 20th century. The underlying theories (such as British collective *laissez faire* and US industrial pluralism) and the categories of legal thinking (such as “employee” and “contract of employment”) were shaped in industrialised nation states where the typical subjects of the law were Fordist manufacturing companies employing full-time male workers in life-time jobs on standardised contracts often regulated by collective agreements with trade unions. That “classical” model of labour law is plainly untenable in the post-industrial 21st century world in which union density and collective bargaining coverage have dramatically declined, and the “contract of employment” has lost much of its analytical value as paid work is increasingly performed outside conventional employment relationships. The feminisation of the workforce is now an irreversible fact, with profound consequences for the division between “work” and “family”, between paid and unpaid work, and between “jobs” and “careers”. Perhaps, the most important changes are those resulting from modern
globalisation: the liberalisation of trade and investment, the domination of transnational companies (TNCs), the growth of a worldwide networked society, and increasing global competition. A major consequence of this is the reduced power of nation states to regulate labour within their own borders or migration across frontiers, the growth of complex multivalent legal orders with murky boundaries between supranational, transnational, national and workplace legal norms, and the prevalence of “soft” law such as corporate codes of conduct.

Some academic labour lawyers continue to work on particular conceptual problems as if the classical model is still relevant, but there are others who are attempting to develop new theoretical frameworks and legal concepts to comprehend the changing world of work. One school of thought on the Right would abandon labour law altogether and dissolve its subject matter back into the realm of the general law of obligations and property. Another, underpinning the social-democratic “Third Way”, seeks to invoke regulatory theory in the context of individualised labour markets by focussing on the competitiveness of the employer, human resource techniques (such as information and consultation), “flexible” work rules and “family-friendly” policies.

This collection of 26 essays starts from a different viewpoint. Since 1994 a group of scholars on the Left, the International Network on Transformative Employment and Labour Law (INTELL), has been developing an alternative response. Their focus is on the welfare and human rights of workers, rather than on market success or failure. The values of the contributors are avowedly egalitarian and democratic. Their approach is self-consciously political, and owes much to the thinking of the American Critical Legal Studies movement. Like the Legal Realists before them, the critical legal scholars in this volume highlight the distributive consequences of legal rules, between classes, races and genders, and between regions, communities and nation states. Unlike the Realists, however, they are more at home with the ideological implications of law than with hard observation and assessment of the “law in practice”. There are a few studies in this book firmly based on empirical evidence. These include Mundlak’s description of the situation of Palestinian workers in Israel, Ishida’s account of death and suicide as a result of overwork in Japan, Hyde’s study of professional work in Silicon Valley, and Atleson’s story of the troubled voyage of the Neptune Jade (a cargo ship caught up in a dockworkers’ dispute). Nevertheless, the emphasis of most of the contributions is on the values or ideology of the new order.

The strength of the collection is that it contains critical, interdisciplinary and international perspectives on a wide variety of topics organised under various themes. The deconstruction of the categories of “work”, “worker” and “employment” (Conaghan, Benjamin, Williams) is one. Another is the potential of international and national labour laws to respond to global integration (Rittich, Langille, Davis). Other themes are the employment relationship in the new economy (Deakin, Fischl), labour migration and social citizenship (Caruso, Kraamwinkel, Bosniak), labour solidarity (Raday, De Buen Unna, Ontiveros, Selmi with McUsik), and the utility of legal activism in social transformation (Collins, Arthurs, Kilpatrick, Davis with Macklem and Mundlak). But this very diversity is also a source of weakness. At this stage of the “transformative” project a more unified, coherent and rigorously argued discourse is needed. The
book starts with two extremely important and thoughtful essays by Karl Klare, “father” of INTELL, and the late Massimo D’Antonina which complement each other in providing a new theoretical vision. Unfortunately, the promise of these contributions is dissipated in the profusion of topics and authors that follows. To argue for a more focussed approach is, in a sense, contrary to the very spirit of INTELL (which I discovered as a participant in one of their meetings is open, tolerant, and enjoyably participative). The result of being hospitable to all-comers, however, is that the book is like a bag of mixed sweets which will stimulate different tastes according to personal likes and dislikes. It does not provide a worked-out alternative theory of labour law, simply a taste of many flavours of critical thinking.

Klare (chapter 1) makes the important point that the law regulating work cannot be fitted into a single over-arching paradigm. But this transformative project of egalitarian redistribution and democratic participation, needs more than negative ideological criticism. I would suggest that a new structure of labour law requires at least four pillars. The first is the dialogue between the multivalent legal orders that shape power relations. Arthurs’ chapter 24 on the external functions of corporate codes is a model in this respect. The dialogue between these orders may lead, in Kilpatrick’s words in chapter 25 on the EU and gender equality, either to “emancipation through law” when new opportunities are created for groups struggling for equality, or by contrast, “emasculating by law” when the result undermines more favourable treatment under another legal order. The second pillar is a new conception of the law of work, not restricted to dependent labour, that embraces both employed and “self-employed” paid labour. Moreover, as Conaghan’s penetrating critique of “family-friendly” policies in chapter 3 indicates, the privileging of paid work above “family” work is incompatible with gender equality. Williams concludes (chapter 5) that “labour law will become increasingly stultified and marginalised” within the framework of labour markets unless it engages intensively with the redistributive functions of welfare law.

The third pillar, as Klare argues, is the unification of “public” and “private” law in this field—still unfulfilled ambition of Sinzheimer and the early 20th century founders of the subject. This goes beyond removing technical distinctions; it involves treating the private law of property and contract as a form of regulation that sustains inequality. The 20th century belief in the USA and Britain was that collective bargaining could compensate for this bias in the common law; the INTELL scholars approach the subject of “countervailing workers’ power” by fostering the idea of institutional participation, but much remains to be said on the forms of such participation. The fourth pillar is the notion of “social rights”. Only in the last chapter (Davis with Macklem and Mundlak) does this receive an interesting comparative analysis, on the basis of South African, Israeli and Canadian experience. Some of the familiar objections to the constitutionalisation of social rights (lack of positive right to particular allocation of resources, vagueness, and undermining of the separation of powers) are a little too readily dismissed, and the weakening of the social dimension by judicial protection of the individual is underestimated. The discussion rests on a problematic notion of “social citizenship” (effectively criticised by Bosniak in chapter 17) rather than that of international human rights, and the crucial problems of enforcement are
neglected. (These questions are now examined in Hepple (ed.), Social and Labour Rights in a Global Context, Cambridge, 2002.)

I would have liked to have seen these four pillars, and possibly others, more systematically and fully explored without the distractions of many peripheral chapters. However, there is much in this book to stimulate teachers, researchers and students of a subject in transition. INTELL has a solid basis here for further research and international dialogue.

BOB HEPPE


The financial crises that spread through East Asia, Russia and Latin America in the late 1990s have led to renewed calls for reform of the “international financial architecture” that would involve legal and institutional changes for the regulation of international financial markets. Since the end of the Bretton Woods system in the early 1970s, there have been over 100 financial crises while 132 of the 184 members of the International Monetary Fund have suffered varying degrees of banking fragility and distress. Although the term “banking crisis” and “financial crisis” are often used interchangeably, the IMF defines a financial crisis as a currency crisis, which is a speculative attack on the currency either causing a devaluation or forcing the authorities to spend large amounts of foreign exchange reserves to purchase its currency or to raise interest rates sharply. A banking crisis refers to actual or potential bank runs or failures, which induce banks to suspend the internal convertibility of their liabilities or to compel the government to intervene. Financial and banking crises often have systemic consequences, impairing markets’ ability to function effectively and may have major adverse effects on the economy. Many experts agree that adequate regulation at the domestic and international levels has not accompanied the progressive liberalisation of financial markets and, in particular, of short-term capital flows. It is a serious defect with the current system that the development of international monetary and financial law—at least in the areas of regulation and supervision—has only occurred haphazardly and principally as a result of a series of financial crises that began in the mid 1970s. Indeed, this book is a welcomed contribution to understanding many of the complex issues that arise in international monetary and financial law.

Professor Giovanoli has assembled an impressive group of academics, policy makers and practitioners to examine the difficult and complex issues that arise from the globalisation of financial markets. The book’s various authors analyse international monetary and financial law from a number of perspectives that include the Articles of Agreement of the IMF, the legal and institutional structure of European Monetary Union, the law regulating electronic money and cross-border payment systems, and conflict of law rules of international financial transactions. This is a comprehensive book containing 27 chapters that are arranged in five sections: “International Financial Architecture”; “Impact of the European Monetary Union”; “Central Banks, Supervisory Authorities and Deposit Insurance”;
“Impact of Technological Developments”; and “International Monetary Obligations”.

The first section contains five chapters addressing, respectively, the legal aspects of international standard setting in financial markets, the origins of the Bretton Woods system, the changing roles of the IMF and World Bank, the IMF’s role in preventing and resolving financial crises, and the public international law principle of the *lex monetae* and how globalisation is eroding monetary sovereignty. In Chapter 1, Giovanoli’s main theme concerns the legal effect to be given to international standards and rules for regulating international financial markets. To this end, he analyses three specific issues: first, who is involved in the rule-making process; second, what is the legal character of the rules; and, third, how are these rules going to be implemented. He notes the various international bodies (*e.g.* the Basel Committee on Banking Supervision) and inter-governmental organisations (*e.g.* the IMF) that are involved in international financial standard setting. Decision-making in these bodies and organisations is almost invariably dominated by the G10 industrial countries. It therefore lacks political legitimacy and accountability to the international community because many countries outside this group have, by and large, not played a role in influencing the development of international financial norms. Moreover, he characterises the existing institutional structure of international financial regulation as fragmented and “decentralized” with overlapping supervisory responsibilities and little formal coordination between international bodies and organisations.

In addition, Giovanoli examines the important role of international soft law in developing international principles of banking supervision and financial regulation. He defines international soft law as legally non-binding standards, principles and rules that influence and shape state behaviour but do not fit the traditional definitions of public international law. Giovanoli provides an incisive summary of the major views in the international soft law debate. For too long, international lawyers have disregarded the role of international soft law in the formation of customary international law. Indeed, this book shows how traditional sources of public international law are inadequate in explaining the legal relevancy of many complex areas of international relations.

Although international soft law is viewed as a more flexible mechanism to regulate state behaviour in complex areas of international relations, its Achilles’ heel lies in its implementation and enforcement in domestic jurisdictions. To address this, attention should be given to the use of official and market incentives. Giovanoli notes that, although implementation of international standards should occur according to the rules and procedures of each national jurisdiction, exclusive reliance on national regulatory approaches might result in disparate impacts across countries, which might be difficult to reconcile with the objective of harmonised or uniform international standards. The lack of harmonisation in applying and interpreting international standards could result in significant divergence amongst national legal systems, thus creating obstacles for international transactions on global markets. This is where market incentives in a global financial market can play a role in reducing the discrepancies between national regulations. Liberalised capital markets will result in capital flowing to its most efficient and profitable use, and this will likely occur in jurisdictions with the most efficient regulatory regimes.
that emphasise financial transparency, sound banking supervision and robust corporate governance standards. Official incentives can also induce states to implement international standards through the use of a variety of measures including direct surveillance, supervision and conditionality programmes.

Giovanioli suggests that future research should develop a theoretical framework to explain how legally non-binding principles and rules can influence the development of effective and legitimate international standards of financial regulation. Moreover, he proposes institutional reforms in global governance that would involve the establishment of a treaty-based “Governing Council” which would strive for universal membership. It would delegate standard-setting authority to informal bodies of financial supervisors, such as the Basel Committee, but these bodies would have broader membership that included regulators from emerging economies. These bodies would have responsibilities over particular issue areas that reflected their expertise. A broad consultation process would ensue which would produce recommendations that could be adopted later by a more formal overarching institution that would be established by multilateral treaty and composed of universal membership. Under this arrangement, most countries would have the opportunity to participate in the standard setting process, either directly or indirectly through constituencies or regional groupings, and to select which sets of standards they would implement in their national jurisdictions. This proposal would expand and build on the success that the Basel Committee has had in recent years in expanding its consultation process to include the regulators of nearly 100 jurisdictions.

The other chapters in the first section devote primary attention to the “hard law” treaty framework of the IMF’s Articles of Agreement. Lichtenstein provides a useful description of the IMF’s legal and institutional origins as the first intergovernmental organisation with responsibility for maintaining a fixed exchange rate system linked to gold, and for providing short-term credits to members suffering temporary current account imbalances. More detailed analysis could have been provided in this chapter regarding the important recent debates in the IMF regarding whether the Articles of Agreement should be amended to give the IMF jurisdiction over a member’s regulation of cross-border capital flows. The chapters by IMF General Counsel Francois Gianviti and EBRD Counsel Andre Newburg each shed important insights from the policymaker’s perspective concerning the IMF’s modern role as a crisis lender of last resort and the evolution of its surveillance and conditionality programmes that encourage members to adopt IMF-approved macroeconomic policies and banking regulatory standards. Professor Treves’ chapter examines the public international law of the lex monetae and cites the Serbian and Brazilian Loans cases for the proposition that customary international law allows a state “to regulate its currency”. This chapter could have expanded more on how this principle has been eroded because of the globalisation of financial markets.

The book’s second section examines the public and private law issues arising from the transition to European Monetary Union. Of particular importance are the chapters dealing with the legal powers of the European Central Bank in the area of monetary policy and the regulation of the interbank payment system. Although informative, there could have been
more discussion regarding whether Article 105 of the Maastricht Treaty provides the ECB with the necessary authority to exercise banking supervision powers in the eurozone and the jurisdictional and regulatory implications of this for EU member states. Other chapters address the legal effect of the euro on German monetary law, and the exchange rate regime between the euro zone and other non-euro EC and EFTA countries with a focus on Norway, and the impact of EMU on European Community participation in international organisations. Bertold Wahlig provides a thoughtful analysis of the scope of the lex monetae and the transition to the euro. He adopts a broad conceptual definition of monetary law and then describes the legal basis for monetary union as set forth in the primary law of the Treaty of Rome and the Treaty of Maastricht. He notes, however, that too often the lex monetae is wrongly “conflated” with the question of continuity of contracts (lex contractus) in the context of European Monetary Union.

The third section contains five chapters dealing with issues of central bank governance in Asian markets, international harmonisation of banking supervisory and regulatory frameworks, and whether deposit insurance schemes can be reconciled with market discipline and financial stability. Although the subject area of this section lacks focus, there are some informative chapters addressing the role of international standards in reducing systemic risk in financial systems and the role of central banks in implementing such standards. Yu Syue Ming’s chapter on how the Asian financial crisis impacted the Taiwanese and Hong Kong financial markets demonstrates the importance of national regulatory policies in mitigating the impact of financial crises. Hong Kong fared much better than Taiwan because of more transparency and effective banking regulation and corporate governance standards. By contrast, Taiwan’s poorly regulated banking sector and lack of transparency in its financial industry exacerbated the problems that arose because of the 1997 crisis. Klaus Follak’s chapter provides a very useful discussion of the evolution international financial standards in the areas of capital adequacy and global consolidated supervision and of how these principles have been incorporated into hard law in the European Community. He gives a detailed discussion of how the regulatory definition of risk-based assets has expanded to include exposures to market and other trading risks. This is particularly important and sheds much light on current negotiations in Basel over proposed amendments to the Capital Accord.

The fourth section addresses one of the most technical areas of financial regulation, that is the law governing inter-bank payment systems and electronic money. The chapters cover respectively the legal principles governing large-value credit transfer systems, a survey discussion of some of the issues related to the use of electronic money, and recent developments in the regulation of electronic money in Japan. Baxter and Heller’s chapter on how inter-bank payment systems work provides an excellent discussion of how real-time gross settlement systems have become the international standard among developed and many emerging economies for settling cross-border payments.

The fifth section contains seven chapters that address various aspects of international monetary obligations and the conflict of laws. Michael Blair QC examines the English and US case law that addresses the legality of a state’s unilateral restriction on a bank’s repayment of US dollar liabilities.
to foreign creditors. US courts generally rely on the act of state doctrine and the law of the situs of the debt to determine the legality of a state’s restrictions on contractual performance. By contrast, English courts will invalidate or refuse enforcement of a contract only if the governing law of the contract is the same as that of the state imposing the restriction, or has become illegal in the place of performance. Professor Dolinger provides a comparative analysis of these issues with respect to Brazilian and English law.

The remaining chapters examine a number of technical issues that involve the enforcement of foreign arbitral awards denominated in a particular currency. One chapter discusses EU regulations that permit index clauses to be used for contracts denominated in euros, and what type of harmonised indices can be used as external reference values for contracts in euros. Taylor provides an insider’s discussion of the criteria used by the EBRD to decide the governing (usually English or New York) law for contracts it uses for syndicated loans and other types of investment and venture capital activity in emerging economies.

The book will serve as a valuable reference for researchers, policymakers and practitioners. It covers many different but related themes extending from the public law aspects of regulation to the private law issues of contracts and conflict of laws. Some coverage should have been devoted to the differential impact of international regulatory standards in countries with different economic structures. This is an important area that draws on differences in corporate governance standards. Nevertheless, Giovanoli’s proposal for a global governing council for international financial markets is an important contribution to the ongoing debate and should serve as a basis for more interdisciplinary research in this area. The chapters on the IMF provide a useful overview of the origins and changes that have occurred in international monetary law. Many of the other chapters deal with the multitude of private law issues that have arisen as a result of the privatisation of foreign exchange risk in the post-Bretton Woods era. Indeed, the increasing severity and frequency of financial and banking crises in recent years suggests that many of the issues examined in this book will be relevant reading for international lawyers and policymakers.

KERN ALEXANDER


This latest addition to the Palgrave series on Social History in Perspective is a concise and systematic overview of the Poor Law system from the beginning of the 18th century through to its demise in 1930. Well written, The English Poor Law is intended as an introduction to the subject for students of law, history, and/or society, and therefore offers a very short account. Fortunately, the knowledgeable Professor Brundage (whose earlier books include an analysis of the New Poor Law and a biography of one of its facilitators, Edwin Chadwick) provides first-rate end notes and an
extensive bibliography. In consequence, those wishing to learn more of this interesting topic have been afforded the means for additional research.

Organised chronologically, the eight chapters of *The English Poor Laws* include an introduction and conclusion. The inductive chapter (“Approaching English Poor Law History”) sets forth the author’s methodology. Brundage briefly describes the competing Poor Law historiographies that have risen to prominence over the last half century, including the economic, political, and social history schools, and states his purpose as a synthetic “narrative survey” of that literature.

Chapter two (“The Poor Laws in the Eighteenth Century: Changing Patterns of Relief in a Maturing Capitalist System”) provides an overview of the Old Poor Law system and its 18th century developments in poorhouses, workhouses, indoor and outdoor relief, and the instauration of Gilbert Act unions and the Speenhamland System of relief. It then describes the intellectual milieu established by Smith, Malthus, and Bentham amid the declining economic fortunes at the end of the century. Continuing on the theme of change, chapter three (“Debates, Experiments, and Reforms, 1800–1832”) explicates the growing discontent with the system, a resentment exacerbated by the cost of caring for the indigent in the hard circumstances that followed Waterloo, and by the social unrest invoked by Luddites and Swing riots. A flurry of debate and experiment ensued, with pamphleteers advocating abolition of the Poor Laws, Parliament promising investigation, and various localities, most prominently among them Nottinghamshire, experimenting with reforms to reduce their burdens.

Chapter Four (“The New Poor Law Takes Shape, 1832–1847”) describes passage of the New Poor Law and establishment of its administrative devices, including the Poor Law Commissioners, Boards of Guardians, and the consolidation of parishes into Unions. Perhaps most notable was the strategy of making workhouses so atrocious that they existed only as places of last resort, a system resented by workers who resisted these reforms, at times in the company of Chartists. Chapter five (“Mid-Victorian Poor Relief, 1847–1870”) details the period of centralisation of Poor Law administration under the Poor Law Board, one which expanded the provision of services to include education, medical care, and treatment of the mentally ill. At the same time, concern mounted over the increasingly urban nature of the indigent, as well as the meanness of outdoor relief.

Chapter six (“The Revival of Deterrence and the Expansion of Services, 1870–1900”) depicts two seemingly counter-currents: the constricting battle against outdoor relief and vagrancy, and the more beneficent treatment of families in the workhouse. This period also witnessed the democratisation of the Boards of Guardians, with some Unions electing women Guardians. Chapter seven (“The Eclipsing and Transforming of the Poor Laws, 1900–1930”) details the political history which led to the demise of the system in favour of alternative social assistance plans. Uncertainty about the national schemes which substituted for the established Poor Laws abounded, as well as “a clear sense that an era had passed.” The concluding chapter, eight, returns to the subject of competing Poor Law historiographies. Having described the course of the Poor Laws from 1700–1930, Brundage urges readers to avoid the “thrall of the evolutionary model” of Poor Law history in favour of the more apposite metaphor of ebb and flow.
The English Poor Laws is a useful exegesis of an important area of English socio-legal history. The book succeeds as an introductory text primarily due to Brundage’s mastery of the subject, even-handed presentation of competing intellectual histories, and clear writing style. Those sufficiently attracted to the growing field of Poor Law history to read this book should be inspired to further investigation.

M.A. Stein