BOOK REVIEWS


In this fine book, Professor Bigwood reviews the legal grounds on which it is possible to argue that a contractual obligation should be set aside, or at least not enforced, because the contract is “exploitative”. The first virtues that the reader will find this work to possess are that it is comprehensive and authoritative. The relevant legal doctrines, principally economic duress and unconscionability, but much else besides, are as fully considered as is consistent with anything but an encyclopaedic treatment, and material from all those jurisdictions which (following Cane) Bigwood calls ‘Anglian’ is thoroughly discussed. This book invites comparison to part three of Cartwright’s Unequal Bargaining, but it sets out to cover that ground in much more detail, and the reader will benefit from Bigwood’s guide to what is now a very large body of doctrine.

The greater virtue of this book is, however, that it refuses to be swamped by the amount of material it discusses. In the face of the lack of a coherent theoretical foundation for doctrines which developed largely discretely but which are now felt to raise a common issue, textbook treatments of this issue, and even most monographs on it (though certainly not Cartwright’s), tend to take the form of a mere omnium gatherum. The issue of exploitative contracts is particularly susceptible to this because, as has long been theoretically recognised, and which became all too clear when it was sought to place the law on the basis of “inequality of bargaining power”, most (if not all) contracts concluded in a capitalist economy can be described in such a way as to have some tinge of exploitation. Bigwood, by contrast, seeks to advance a coherent “conception of legal exploitation” which keeps the notion within sensible confines, and does so in an extremely interesting manner.

Anyone familiar with the practical difficulties of the legal regulation of economic activity in general, and of regulating exchanges by means of the law of contract in particular, finds it difficult not to assume a superior attitude when reading much of the recent political philosophical literature addressing inequality and exploitation. There, all sorts of desirable “end-states” are set out, often in the most careful detail, drawing the nicest distinctions; but this effort seems wasted as it is quite impossible to conceive how those states might as a practical matter be brought about. The concept of exploitation which Bigwood puts forward is resolutely “juridical” or “legalist” in that it is based on authoritative discussion of the law, and eschews “utopian” speculation in order to put forward an argument that, so far as one can say at this early stage, is capable of surviving the first stage of being put into practice, since it can be stated in coherent doctrinal terms.

Bigwood’s argument against abstract theory is in one sense perhaps overdone, for it is sometimes put forward in epistemological terms about
the necessity of confining oneself to “satisficing” “approximation” because the “essentially contested” nature of “moral concern” about exploitation makes it impossible to bring “order to the possible universe” of discourse about it. This all tends to push what is valuably pragmatic over into what is questionably pragmatist, and, having set these hares running, Bigwood inevitably fails to hunt them down. But this is all incidental to the core of Bigwood’s argument, and does not affect its assessment.

This core is that Bigwood does not reject the end-states he discusses in favour of another end-state he prefers, but rejects the whole approach of valuing the substance of end-states as the basis of a law of contractual exploitation. Bigwood’s is a “purely processual conception of legal exploitation”, and, as the play on Rawls emphasises, is an attempt to draw on the critique of “patterning” which has so thoroughly undermined attempts to plan the allocation of economic goods. Acknowledging the force of this critique, the political philosophies mentioned above have tried to turn away from “equality of outcome” to “equality of opportunity”, but the transparent trick has been to impose an “equality of resources” which will so skew starting positions that equality of opportunity will lead to equality of outcome. Now this trick multiplies the practical difficulties of the egalitarian policy, and Bigwood’s argument does not turn on redistributing initial endowments, but on reforming the contracting process itself so that it does not reproduce unacceptable inequalities. Bigwood says this is an argument about “corrective” rather than “distributive” justice, and, for once in recent legal theory, there is some concrete meaning to this claim. This represents a very important switch in our attitude towards addressing exploitation, one that even goes beyond Rawls, who, of course, himself concentrated on initial endowments. It is not an entirely novel switch, but it is carried out with an authority about the legal detail absent even in most of Hayek. Perhaps only one so thoroughly familiar with the law of contract as Bigwood could so convincingly argue that important things can be done about the allocative process itself, rather than about the resources citizens bring to that process.

The ethical and political attraction of purely processual justice, as with Rawls’ conception of fairness, lies in that it revives liberalism—in Bigwood’s case “the classical liberal conception of contract”—but in a way that seeks to avoid the telling points made in the critique of liberalism that has, for good and, increasingly, ill, brought us to our present situation. The extent and the nature of the state action needed for laissez faire is one of the most misunderstood issues in social theory, and classical liberalism certainly laid itself open to the left-wing critique of the emptiness of “purely legal” or “formal” freedom of contract when it gave legal sanction to contracts established on unfair bases. This is not a matter of “respecting” sanctity, for unfair contracts do not enforce themselves, but of backing unfairness by action of the state.

Bigwood’s reformed contracting process will regulate the abuse of “contracting power” that is inherent in bargaining between self-interested parties in the presence of inequality of bargaining power (and perhaps, therefore, in the institution of bargaining itself). The reformed process will leave inequality within certain parameters, for this is a necessary corollary of trying to establish “responsibility” for outcomes. But the recognition and imposition of limits to the exploitation of contracting power will seek to bring the exercise of that power within normatively acceptable limits.
One who wishes to receive endorsement of his bargains by the state cannot consistently act in such a way as to make a mockery of the publicly stated goals of the contract system; and the structural exercise of contracting power in such a way as to negative the “reasonable expectations” of the other party to the contract does make such a mock. When given concrete doctrinal application by Bigwood, this is a powerful argument, as, of course, it is bound to be: it is an application of Kant’s argument for finding autonomy to be a postulate of pure practical reason (although Bigwood does not set out these Kantian foundations of his argument in a sustained way).

Repeatedly throughout his treatment, and especially when he shows the untenability of the idea that an exploitative contract is one to which the defendant did not consent, Bigwood shows that what is at issue is the fairness of the bargaining process. (He more or less ignores fairness in performance and enforcement.) Yet the common conception of “fairness” in contract is usually bound up with the imposition of desirable end-states, and Bigwood does not outright pursue a processual theory of fairness, but instead rather equivocates at this vital point. One regrettable consequence of this is the invention of a battery of neologisms, from “active” and “scalar” exploitation to “transactional neglect”, which seems to be necessary if one is to avoid saying one is seeking to ensure contracts are fair when that is indeed what one is doing. Some of the lucidity Bigwood gains from resolutely focussing on common law general principles, to the exclusion of the detail of much consumer legislation, is lost as a result.

Such is the ambition and achievement of this book that it deserves to be judged by the highest standards. I am afraid that Bigwood has made a decision which is bound to mean that, by these standards, this book will ultimately be judged a failure. As I have said, Bigwood’s very valuable idea of processual justice involves an important criticism of the postulation of end-states in modern political philosophy. However, there already is an overwhelmingly important purely processual idea of justice in social theory, albeit one typically but poorly understood. This is Pareto optimality, the purely processual claim on which the legitimacy of the market is based, and on which, in its earlier form of “the system of natural liberty”, “the classical liberal conception of contract” was based. This claim is given only indirect and perfunctory consideration by Bigwood. Leaving aside the undoubted possibilities of deepening his ideas which he has therefore foregone—there is no possibility whatsoever of writing anything of first rank importance about the pure procedure of market allocation that does not address Pareto optimality—this unaccountable lacuna in Bigwood’s argument undermines what is in all other respects a very important book.

DAVID CAMPBELL


The third edition of Lewison J.’s book will be warmly welcomed by all those interested in the interpretation of contracts. A lot has happened since 1997 when the second edition was published, above all the highly significant House of Lords’ decision in _Investors Compensation Scheme v._
The objective of the book remains “to provide a source book of material to help the practising lawyer to deploy arguments in support of the particular interpretation that he or she wishes to advance”. The author accomplishes this objective remarkably well. The scope of the book is wide, making it unlikely that the practising lawyer will be confronted with an interpretative problem outside its scope. The first ten chapters are about interpretation of contracts generally, covering topics such as the object of interpretation, the materials available, the use of precedent, the meaning of words, the canons of construction, uncertainty, mistakes and inconsistencies, the preliminary parts of a deed and implied terms. The last six chapters deal with more specific matters, such as exemption clauses, penalty clauses, stipulations as to time and certificates. Each topic is examined in detail through a sequence of clear propositions, with each proposition supported, expounded and qualified using case law from the United Kingdom, and sometimes from other jurisdictions. When a case is referred to, the author usually quotes important passages from the judgments, thus enabling the busy practitioner to understand immediately if the case is capable of supporting an argument. One of the great strengths of the book is that the cases come from a variety of fields where contractual disputes arise: one finds, for example, references to cases concerning mortgages, leases, insurance policies, building contracts and charterparties. Thus the insurance lawyer can reinforce an argument with a suitable passage from a landlord and tenant case—a passage he might have had difficulty finding without the aid of Lewison J.’s book. On the other hand, this means that the book cannot be comprehensive (which the author recognises in the preface) and cannot examine in any detail the interpretation of particular types of contract. Accordingly, it is most potent when used as a supplement to specialist texts.

The most obvious change from the previous edition is the addition of a new chapter at the beginning of the book devoted to the five principles of contractual interpretation enunciated by Lord Hoffmann in the Investors Compensation Scheme case. This is useful for two reasons. First, it provides a handy overview of the subject, making the book more accessible to the beginner. Second, these principles will in many cases be the court’s starting point, and it is therefore useful to have them all grouped together in one chapter. The exposition of the principles is fairly detailed, with references to cases which have applied, explained, developed or criticised them. On the other hand, the exposition is not self-contained, and unfortunately there are not enough cross-references to link each principle with related paragraphs elsewhere in the book. Such cross-references would have allowed for quicker navigation through the work, but this is only a minor criticism.

Otherwise, the structure of the book has remained largely unchanged. The author has generally done a good job incorporating the new materials into the existing structure of the book. Parts of the text have been modified and, mainly in response to recent case law, the author has added helpful new paragraphs dealing specifically with, amongst other things, strict construction (para. 2.09), entire agreement clauses (para. 3.10),
construction in favour of the consumer (para. 7.08), distributive
construction (para. 7.13) and exemption from liability for consequential
loss (para. 12.14). Though there is room for dispute here, in the opinion of
this reviewer some of the text in chapter two, which deals with the object
of interpretation, could have been modified further, to make it more
harmonious with the new materials included in that chapter. For example,
in the light of Investors Compensation Scheme, it is confusing to state that:
“For the purpose of the construction of contracts, the intention of the
parties is the meaning of the words they have used. There is no intention
independent of that meaning” (para. 2.03).

Although the book is primarily intended for practitioners, academics
will find it very useful as well. The great number of cases referred to makes
this book an excellent resource for research purposes, while sometimes the
author departs from his reportorial style to discuss some difficult issues,
and offers valuable insights, such as in his discussion of the differences
between interpreting contracts and interpreting utterances in ordinary life
(para. 1.03). Although there are more references to secondary sources than
in the previous editions, these are however still rather limited.

Although in Investors Compensation Scheme Lord Hoffmann declared the end of “[a]lmost all the old intellectual baggage of ‘legal’
interpretation” ([1998] 1 W.L.R. 896, 912), since then a strongly constituted
Court of Appeal (Lord Phillips M.R., Jonathan Parker L.J. and Lord
Mustill) has correctly observed that “a little intellectual hand luggage is no
bad thing when approaching the task of construing a contract” (The Tychy
(No.2) [2001] 2 Lloyd’s Rep. 403, [29]). The new edition of Lewison J.’s
book, like its predecessors, remains essential hand luggage for all those
embarking upon any journey which will at some stage require the
interpretation of a contract.

Marcos Dracos

The Law of Privacy and the Media. Edited by Michael Tugendhat and
Iain Christie. [Oxford: Oxford University Press. 2002. lxxiv, 613,
(Index) 39, (Appendices) 117 and (Bibliography) 5pp. Hardback
£145.00. ISBN 0–19–925430–3.]

RARELY HAS THE NEED for the protection of privacy been so well expressed
as by Sir Stephen Sedley in the foreword to The Law of Privacy and the
Media. Having referred to Ronald Dworkin’s analogy between the common
law and a chain novel, he writes: “Our generation inhabits a world
unimagined by those who wrote the earlier chapters, a world in which the
media possess power of which the state itself stands in fear and against
which the individual has relatively few resources. But it is our turn to write
a chapter”. Tugendhat, Christie and other members of 5 Raymond
Buildings have done just that: this book is a comprehensive survey of the
modern English law of privacy complete with useful comparative examples
and insightful arguments about how the law should be developed. Unsurprisingly, its contribution to the developing law has already been
significant.

As its title suggests, the book is about the law of privacy as it relates to
the media in English law. It is divided into six parts: I Sources, Principles
and Rights (which examines privacy principles and protection in general terms); II Personal Information (which discusses the Data Protection Act 1998 and the concept of “information” generally); III Causes of Action (which deals with breach of confidence, defamation and copyright); IV Defences; V Remedies; and VI Issues of Special Interest to the Media (which includes discussion of the Freedom of Information Act 2000, contempt of court, the media codes and the protection of journalistic sources). The authors are deft at presenting both sides of the privacy debate: they take a balanced approach to the relationship between privacy and freedom of expression and explain ways in which the media can obtain and protect information as well as ways in which individuals can stop them from doing so. They also add depth to their analyses by drawing extensively on comparative material (particularly on French and American case law) and by placing English developments firmly in their EU and human rights contexts.

Despite the wide range of material covered, a number of consistent themes also emerge from the book. One is left in little doubt, for example, that its authors believe that the development of a specific privacy action is both necessary and desirable and that such an action should focus on the nature of the information disclosed rather than the way in which it was obtained (which has traditionally been the crux of the breach of confidence action). This critical, prescriptive approach is very welcome. (Although it is perhaps regrettable that the idea was not developed more fully in the “rights” and “principles” sections of Part I. Given that many theoretical definitions of privacy focus on the ability to control access to oneself—and hence on the circumstances in which information or access is obtained—it would have been useful to have this “type of information” approach examined in that context.)

There is also implicit approval throughout the chapters of the American approach (adopted from the work of W.L. Prosser) of dividing the privacy action into four discrete torts: appropriation of personality or likeness; intrusion into seclusion, solitude or private affairs; publication of private facts; and casting a person in a false light. This approach is a helpful one: as its use in the chapter on defences clearly illustrates, the fourfold analysis provides a useful framework for examining English privacy developments.

Finally, a number of chapters press for greater coherence between the law of privacy and defamation, especially in pre-trial applications. It is nonsensical, the authors argue, that a court should be able to restrain publication of true personal details about an incident but not untrue allegations about the same incident (because of the Bonnard v. Perryman [1891] 2 Ch. 269 presumption against prior restraint in defamation cases where a defendant intends to plead justification at trial). This argument could perhaps be met with the claim that different interests are at stake in privacy and defamation claims—false reports can be corrected and reputations restored whereas breaches of privacy cannot. However, this important issue is often neglected and, whatever view one takes of the matter, it is useful to have it highlighted here.

If there is a criticism to be made of The Law of Privacy and the Media, it is that it has suffered from some of the vicissitudes of shared authorship. The discussion of general principles in Part I, for example, is less coherent than it might be: material is repeated in places and, although a number of interesting ideas are considered, no clear theoretical conception of privacy
emerges. Further, aspects of the book’s general structure are slightly illogical. It seems odd, for example, that the discussion of possible defences to trespass and other intrusion actions appears in chapter 9 whereas detailed discussion of the actions themselves does not appear until chapter 11. It is also surprising that Part II on “Personal Information” contains a section on the intentional infliction of harm (which seems to relate more closely to intrusion into “solitude or seclusion”) but does not have a chapter on breach of confidence (which is dealt with instead under the heading “Causes of Action” in Part III). However, given the range of actions which had to be covered, these observations should perhaps be seen as reflections of the state of the developing law of privacy and not just as criticisms of this work.

In sum, The Law of Privacy and the Media would be an invaluable resource for any academic or practitioner examining either the basic principles of the English law of privacy or the more complex issues which underlie it. The book’s most obvious attraction is that it brings together the disparate aspects of English privacy law for the first time, but it has a great deal else to recommend it: the authors outline often confused areas of law succinctly and clearly; they extrapolate creatively from other actions to fill the many gaps left by the privacy cases; and they illustrate convincingly the degree to which the “new” right of privacy is already entrenched in our law. This, combined with countless suggestions as to how the law of privacy should develop, means that The Law of Privacy and the Media is deservedly becoming known as the book on privacy in this jurisdiction.

N.A. MOREHAM


Year in, year out, students are confused by the House of Lords’ decision in Barclays Bank Ltd. v. Quistclose Investments Ltd. [1970] A.C. 567. To be fair, the confusion is not unjustified, given the contents of the decision itself and of its progeny: judges and academic commentators alike have struggled to explain the nature of Quistclose trusts. Coupled with his experience as leading counsel in Carreras Rothmans Ltd. v. Freeman Mathews Treasure Ltd. [1985] Ch. 207, this prompted Lord Millett to write his well-known extra-judicial explanation of the Quistclose trust ((1985) 101 L.Q.R. 269), which he acknowledged influenced his exposition in Twinsectra Ltd. v. Yardley [2002] 2 A.C. 164. In turn, his speech in that case prompted the essayists in this valuable collection to recast a critical eye over the trust. The result is an important contribution to academic understanding of the Quistclose trust which will also be valuable to practitioners considering the possible reach of the trust in organising transactions and in litigation concerning those transactions. The essays are frequently in conflict with one another, which will make the book less attractive to students. But the book is not aimed at students, and it is precisely the conflict among the ideas presented by the essayists which is the book’s strength in academic terms: better students, alongside academics and practitioners, will find much food for thought between its covers.
Following Mr. Stevens’ interesting outline of the historical background to the Quistclose litigation, Mr. Swadling makes a concerted attack on the correctness of the House of Lords’ decision. This is successful in highlighting the difficulty in identifying on the facts of each case whether a lender intended that the money would be at the free disposal of the recipient (Twinsectra, para. [74]), although it is less than clear that it establishes (as it sets out to do) that the Quistclose trust is based on flawed legal analysis and was an error. There is little conceptual difficulty in understanding a trust under which a lender transfers legal title to money but remains beneficial owner of it (as the recipient is not at liberty to dispose of it other than for an exclusive and agreed-upon purpose) but where the recipient possesses a power to overreach the lender’s equitable title, and thereby pass good title to a third party, in pursuance of the identified purpose. This explains how the lender can revoke the power and recover the money if it has not been applied in accordance with the power. In essence, this is how Lord Millett explained the Quistclose trust in Twinsectra and, contrary to the belief of many students, the other members of the House of Lords agreed with this understanding (Twinsectra, paras. [2], [7], [13] and [25]). As Professor Birks observes (p. 125), little is to be gained by magnifying possible differences between the analyses offered by Lords Hoffmann and Millett in Twinsectra.

At various points in the book there is discussion as to whether the Quistclose trust is an express trust or a resulting trust (especially in Dr. Penner’s chapter at pp. 50–56). However, it is difficult to see why this is important. Quistclose trusts can arise for a variety of reasons, in a variety of situations, and the arrangement can take a variety of forms. Contrary to Dr. Penner’s analysis (p. 54), it is not every transfer of funds for a purpose which will give rise to a Quistclose trust: see Twinsectra, para. [73] and Professor Chambers, p. 87. Quistclose trusts are best understood as a general description of the type of arrangement where one party (B) is granted limited access to the resources of another party (A) exclusively in order to achieve an identified purpose with those resources, under which B does not receive absolute title to the resources (as the beneficial interest remains with A) but B may (by the authorised exercise of a power granted to it by A) pass absolute title to a third party, with the result that B is left owing a debt to A. Property rights, and especially equitable property rights, “to a great extent only establish default rules” (see Nolan, “Property in a Fund” (2004) 120 L.Q.R. 108, 109–110), so the terms and conditions of each Quistclose trust “must depend on the circumstances of the particular case” (Twinsectra, para. [100]). Lord Millett identified the Quistclose trust as a resulting trust in Twinsectra, but there is no reason why the arrangement cannot be express, as is shown by the Privy Council’s advice, delivered by Lord Millett, in Latimer v. Commissioner of Inland Revenue [2004] 1 W.L.R. 1466. It will be a very rare case indeed which involves land as the subject-matter of a Quistclose trust, and so the formalities required by section 53 of the Law of Property Act 1925 will not generally impede their express creation. The resulting trust analysis is important where the lender did not intend the recipient to take beneficial title but where it did not identify who was to hold that title in the meantime (Air Jamaica Ltd. v. Charlton [1999] 1 W.L.R. 1399, 1412; Professor Chambers, p. 82). The Quistclose trust is an institution rather than a single formulaic trust with pre-defined terms and conditions arising
in response to a single category of events. Provided it is understood as a type of secured lending mechanism which takes advantage of the ring-fencing effect which the law of trusts has in relation to property, the difference between express and resulting Quistclose trusts is unimportant and uninformative as to their nature: they may be either. As Lord Millett comments in the foreword, responding tentatively to the question whether the Quistclose trust is an express, implied, constructive or resulting trust: “it may be any of them, depending on the facts of the particular case and the boundaries between these various forms of trust, on which not everyone is agreed .... The problems which will face the courts are not likely to derive from any difficulty in analysing the nature of the trust, but from the need to distinguish the case where it arises from the ordinary case of the lender who naturally wishes to know why the borrower wants the money” (p. vii).

Understood as a secured lending mechanism, the Quistclose trust has the potential to raise further difficult questions regarding its validity and effect in the context of insolvency. Ordinarily, the importance of trust assets being “ring-fenced” is that they will be immune from the effects of the recipient trustee’s bankruptcy, but, as Mr. Stevens’ discussion shows (pp. 157–165), there are difficult questions yet to be answered as to whether the recipient’s hand in creating a Quistclose arrangement might mean that it can be unwound as a preference or might constitute fraudulent trading.

This collection of essays contains far more important material than can possibly be addressed in a short review. The conflicting views expressed by the numerous eminent contributors are particularly stimulating, as they do not present a “textbook” account of the Quistclose trust but rather encourage the individual reader to weigh the competing arguments.

MATTHEW CONAGLEN


SINCE THE GOVERNMENT’S SURPRISE ANNOUNCEMENT of its proposal to establish a Supreme Court, much newspaper coverage has focussed on where the new court will be housed. However, it is the more detailed questions of the court’s design that will determine the impact of this reform. Underlying this lie questions concerning the function and legitimacy of top-level courts, which are considered in this collection of fourteen essays by leading legal academics and practitioners. Since the proposals continue to change and work their way through Parliament, the essays understandably do not examine the proposals in detail. Instead, the decision to establish a Supreme Court in the United Kingdom is seized as an opportunity to rethink the workings of the top court in terms of internal management, and its relationship with other legal and political institutions at both national and international level. This volume of essays draws attention not only to the breadth of these issues, but also to the difficult choices that will define the constitutional role of the Supreme Court. The essays differ in focus, examining different aspects of the new
court in the UK, while offering comparisons with the experience of supreme and constitutional courts in other jurisdictions, including Spain, Germany, Canada and the USA.

While the book’s title refers to the government’s most recent proposal, many of the essays focus on the consequences of the earlier phase of constitutional reforms, in particular devolution. Aidan O’Neill QC considers the impact of the Privy Council’s role in adjudicating on devolution issues and explains that in this field the Privy Council has already become a top-level court for the UK which can potentially upstage the House of Lords on human rights issues. Consequently, the House of Lords is bound by the decisions of a Scottish dominated Privy Council. O’Neill concludes that the system would be more coherent if the Supreme Court absorbed the judicial role of the House of Lords and the devolution jurisdiction of the Privy Council (as the current reforms propose).

The issue of regional representation in the top court is also discussed in two further essays. Kay Goodall provides an historical account of the House of Lords’ role as an appellate court for Scotland and Ireland, but is sceptical of the need for such representation. According to Goodall, it is not clear whether representation is supposed to add specialist legal knowledge (for example of Scottish law) or familiarity with the region. By contrast, Professor Brice Dickson stresses the need for representation to enhance the court’s legitimacy and independence in the eyes of the public. With reference to Northern Ireland, Dickson explains that where politically sensitive cases are appealed to the Supreme Court, the absence of a local judge may generate suspicion. But even if it is agreed that representation is necessary, that raises further questions of whether representation is best achieved by creating a separate Supreme Court for Northern Ireland or adding judges from Northern Ireland to the UK court.

The role of the court in determining the balance between central and regional government is considered in some of the comparative essays. Touching on the issues mentioned above, Professor Andree Lajoie is sceptical as to whether a court can be designed to accommodate regional differences. She argues that providing territorial representation merely provides formal protection, without fully representing the values of the region. In another essay based on the Canadian experience, Warren Newman illustrates how the Canadian Supreme Court’s emphasis on the autonomy of the provinces has been inherited from earlier decisions of the Privy Council, even though this emphasis works against the intentions of the framers of the Canadian Constitution. This illustrates the expansive power of the court in deciding how powers will be allocated, particularly in the early years of a settlement. The political power of top-level courts is also underlined in Rainer Nickel’s chapter on the German Federal Constitutional Court, which examines how that court has become involved in politically sensitive issues, such as the role of religion in education. The decisions of the German F.C.C. are now used in political argument and shape the actions of the legislature. The essays highlight how the powers given to the UK courts in the government’s first phase of constitutional reform will give the top court greater prominence and influence in political affairs.

The volume also considers the relationship between the top-level courts and international institutions, particularly the European Court of Justice and the European Court of Human Rights. Two chapters show a similar
concern over the limits imposed on national top-level courts by the European Union. Nickel argues that despite past attempts by the German F.C.C. to assert its supremacy against the E.C.J., it may in the future “shrink to courts in the second row” of the European Constitution. David Anderson QC, however, contrasts the German experience with that of the UK, where the House of Lords has shown greater subservience to the E.C.J. He believes this subservience partly explains why the House of Lords has little impact on EU jurisprudence and proposes a repeal of Article 234(3) to allow the new Supreme Court to decide issues of EU law. His proposal is not an attempt to assert the supremacy of the national courts, but rather to give those national courts a greater role in developing EU law.

While the issues discussed above concern the relationship between top-level courts and other institutions, several chapters focus on the internal management of the court itself. Kate Malleson notes that as the court takes on a new role and becomes involved in more politically sensitive issues, the thinking underlying the appointment of judges must change. Malleson then goes on to give an overview of the different procedures for appointing judges and how these may affect the legitimacy and status of the court. A further internal issue facing the new court is the increase in petitions and consequent increase in workload. Richard Gordon QC proposes a number of changes, such as greater reliance on written arguments, and shorter, more focussed hearings, to help the court work more efficiently. Deciding which cases are to go to the Supreme Court is not simply a matter of limiting workload, Professor Andrew Le Sueur argues, but will define the court’s judicial role. Le Sueur calls for the Court to be proactive in selecting cases that determine its influence. However, with this power come greater accountability and transparency, for example in requiring the court to give reasons for decisions on leave to appeal. While some of the earlier chapters tend to discuss the problems of current or past practice of the House of Lords, this group of chapters gives greater attention to the future of the court and outlines the range of options open to the designers of the Supreme Court.

The collection of essays covers a diverse range of issues with top-level courts as a broadly unifying theme. The essays are diverse not only in topic, but also in style and approach. The book is a valuable and timely contribution that will leave the reader with a sense of the competing demands and pressures on the designers of the Supreme Court. The book does not so much prescribe a vision for the court, but rather identifies how the various choices will have a substantive impact on the UK’s political and legal culture. Any reader of this volume will gain a clear understanding of the important and complex issues that have been raised by the government’s decision to create a Supreme Court.

JACOB ROWBOTTOM
Competition in Energy Markets: Law and Regulation in the European Union

The involvement of the European Community in the energy sector seemed for many years highly unlikely: EURATOM dealt with the promised land of the peaceful use of nuclear energy, while the ECSC covered coal; the EEC, by contrast, seemed mired in internal institutional wrangling over myriad issues concerning agriculture and the future direction of the project. While the oil shocks of the 1970s led to some legislative activity on minimum oil stocks, the absence of any specific mention of energy in the EEC Treaty coupled with the close ties between state control and the downstream energy sector meant that electricity and gas remained firmly off the agenda for many years. The Single Market Programme stemming from 1985 provided the impetus that was to change all of this and Peter Cameron’s book charts the progress made from these humble beginnings through increased EC legislative activity in the 1990s up to the proposals for reform finally implemented during 2003. His focus is on activity at the EC level and his aim is both to cover the substantive rules enacted to liberalise the European energy sector and to place these developments squarely within their institutional context, including legislation, supervision and enforcement. This aim is both laudable and wholly necessary if the reader is to be able to locate these developments within the broader framework of the EC and to make sense of progress to date and the law’s likely future direction.

The scene is set in Chapter 1 by a discussion of the changes in economic thinking that provided the impetus for a new approach to the organization of the electricity and gas industries. This includes both an historical discussion of government intervention in these sectors, and the reasons for the “paradigm shift” in thinking, and also an account of the criteria for the successful introduction of competition into network-bound industries. This latter issue is covered in a careful and succinct analysis of key themes which recur in the more detailed substantive material throughout the book: regulation and an independent regulator; industry structure, unbundling of functions and questions of natural monopoly; and liberalisation and ownership. Finally, a brief introduction to the European dimension of these changes is given, as well as a salutary warning that the new consensus on approach (such as it is) is recent and the new paradigm open-ended (p. 32).

Chapter 2 moves to consider in more depth the legal basis (or, perhaps more accurately, “bases”) for the EC-level creation of a European Energy market. Care is taken to place the various Treaty provisions and the Commission in their constitutional and institutional context, while remembering the significance of the wider picture. Thus, the likely impact of the EEA is discussed, as is the potentially very significant Energy Charter Treaty; further, the consequences of the (now completed) enlargement of the EC for the energy acquis are treated, including references to the relevant institutional framework for dealing with the transition to membership, as well as future EC relations with Mediterranean countries in the context of securing future energy supplies from North Africa and the Caucasus.
The next six chapters provide the substantive meat of the book: chapters 3 and 4 detail the protracted political and legislative process by which the EC Directives on the establishment of a single European energy market made their way into existence, illustrating a strong degree of resistance from various Member States and vested interests, particularly in the gas sector. The final text of the first major legislation on electricity and gas illustrates clearly the nature of the compromises that had to be reached, for example the inclusion of two possible models for access to transmission, the watered-down terms on unbundling of functions and the perceived need for a safeguarding reciprocity clause. Chapter 5 provides an extremely helpful survey of the application of primary EC Treaty law to the energy sector in the period leading up to the adoption of the legislation: this covers important questions of the grant of exclusive or special rights by Member States to energy undertakings, issues relating to refusal of access under the EC competition rules and free movement problems related to monopolies over imports and exports and to security of supply. These were all areas where little or nothing had been done to subject the energy sector to general EC law, yet alongside the political and legislative process the Commission and the Community judicature took a number of decisions that narrowed the available scope for the energy sector's exemption from the Treaty rules.

Chapters 6 and 7 then proceed to examine the implementation of the legislation, its successes and the need for further changes, again highlighting the use of the Treaty rules on competition in the process of securing open and liberalised markets across the Member States. Of particular interest here are the monitoring provisions that charged the Commission with careful scrutiny of the steps taken by the Member States to implement the Directives, and the analysis of the role and impact of the regulatory fora of Florence (electricity) and Madrid (gas). This latter development was intended to make progress on issues that still remained after the first round of Directives, so as to co-ordinate the liberalisation strategies of the different Member States. To take the Florence example, such matters included transmission pricing (especially the provision of tariffs for cross-border transfers) and congestion management (to ensure efficient use of limited transmission capacity, again especially on interconnectors between countries). While some successes from this process can be seen (pp. 299, 310), ultimately a number of Member States were frustrated with this technique, due both to the slow rate of progress on key issues and to the intransigence of a number of those involved in the market who refused to reach solutions to common problems. In the eyes of many commentators, this experience was a major impetus behind the proposals for accelerated market opening by means of further legislative developments, the start of which process is the subject of chapter 8. This outlines the proposed changes to the legislation intended to accelerate the process of market opening and the breaking down of barriers between national markets, thereby encouraging the development of a single European energy market. These new Directives were adopted in 2003 and make some significant steps forward in the liberalisation process; further, a Regulation on cross-border exchanges of electricity has been introduced and proposals are now in place to adopt a similar instrument covering natural gas.
Overall, this sector continues to develop at a rapid pace. Environmental issues are covered by Cameron’s book, but since its publication their relevance to questions of market regulation has become greatly increased. Emissions trading is soon to commence on an EC level, while dissatisfaction at the progress made in some countries with regard to promoting electricity generation from renewable sources continues to pose difficult questions on the interaction between national environmental regimes and EC rules on free movement and competition (as illustrated, for example, by the PreussenElektra litigation in Germany, which reached the E.C.J. in Case C-379/98 PreussenElektra v. Schleswag AG [2001] E.C.R. I-2099). One thing that is clear, however, is that a proper appreciation of the context, problems and prospects in this area demands that attention be paid both to the legislative context at national and EC level, and to the application of the primary law of the EC Treaty. The latter has relevance to decisions taken by national energy regulators, national competition authorities and national courts, as well as to the role to be played by the Commission. Cameron’s book provides an excellent introduction to the genesis of EC legislative activity in the energy sector and shows how the legislative and Treaty material must be co-ordinated to achieve the (sometimes conflicting) goals of liberalisation, competition, security of supply and environmental protection to which the sector will increasingly be subject.

ANGUS JOHNSTON


WHEN E. J. BOND PUBLISHED A BOOK entitled Reason and Value in 1983 with the Cambridge University Press, he made no mention at all of Joseph Raz. By contrast, the book under review—similarly titled, but published just over two decades later—carries the subtitle Themes from the Moral Philosophy of Joseph Raz. It is a fine collection of essays edited by four distinguished moral and political philosophers, with contributions from an array of eminent scholars (most of whom are from broadly the same generation as Raz, but a few of whom are from the younger generation). Although there is no contribution by Raz himself, most of the essays in the volume engage sustainedly with his work. All in all, the collection is a richly rewarding and thought-provoking addition to moral philosophy.

As might be expected from a book focussed on Razian themes in moral philosophy, the contributors are especially concerned with the nature, bearings and limits of reasons-for-action. Indeed, the titles of nine of the first eleven essays in the volume each contain the word “reasons” or some cognate term. In diverse ways, some of the contributors (such as John Broome, Harry Frankfurt and Peter Railton) contend that Raz has overestimated the role of reasons in human thought and interaction. Others (such as Thomas Scanlon, Ruth Chang, Samuel Scheffler, Jonathan Dancy...
and Ulrike Heuer) are especially interested in the roles or sources of reasons-for-action. These and the remaining contributions cannot all be discussed, even cursorily, in a short review. Instead, I shall focus here on two essays by three of the volume’s editors: a piece on deontology by Philip Pettit and Michael Smith, and a piece by R. Jay Wallace on the relationship between moral constraints and the good life.

Pettit and Smith understand deontology along Nozickian lines as the doctrine that certain constraints on conduct are binding even when one’s transgression of those constraints would serve to maximise overall compliance with them. Pettit and Smith accept that such constraints are prominently present in human affairs, and they seek to explain why and when those constraints are operative. After observing that the rules of ordinary games bind the players of the games with deontological force (in the sense just indicated), Pettit and Smith ask whether any general practices of human life produce similar effects more broadly. They fix upon the practice of deliberative exchange, whereby people engage with one another as discursive partners seeking and offering counsel about various potential courses of action. Though the essay’s delineation of the features of deliberative exchange is open to objections in some of its details, it is on the whole a careful and subtle investigation of human intercourse. What Pettit and Smith maintain is that “[t]he constraints that one explicitly or implicitly claims to endorse in assuming the profile of a deliberative partner, like the constraints associated with the games we discussed earlier, are deontological in character” (p. 166). Given as much, and given that sincere or insincere participation in the practice of deliberative exchange is a pervasive element of human interaction, the deontological requirements imposed by deliberative norms are themselves ubiquitously present in people’s lives.

Having endeavoured to champion the cause of deontology, Pettit and Smith then conclude their essay by upholding consequentialism (namely, the doctrine that the rightness or wrongness of any action is determined by its consequences rather than by its inherent character). They suggest that “[n]o matter how central deliberative practice is in human life, it is still possible that fidelity to this practice is required, as consequentialists maintain, only so far as it makes for the best overall” (p. 175). Their closing argument reveals the central weakness in their otherwise illuminating and perceptive contribution. They contend that the conspicuous sway of deontological constraints is due to a certain type of practice, and they thereby leave open the possibility that those constraints should be flouted on the infrequent occasions when there are sufficiently strong consequentialist reasons for departing from that practice. However, no full-blown deontologist would allow that basic deontological prohibitions are confined to some practice (even a very widespread and important one). A full-blown deontologist will insist that some moral prohibitions, such as a prohibition on torturing babies for pleasure, are moral absolutes which are always binding on everyone irrespective of whether anyone is engaging in some particular practice.

In the final chapter of the book, Wallace takes up the vexed problem of the relationship between morality and the good life. He observes that morality imposes its requirements categorically, and he seeks to determine whether the impartiality of the moral point of view can ever reasonably be given priority over the personal relationships and projects that make up a
valuable life. After exploring the matter in some depth, he concludes that, at least when morality is understood along contractualist lines, “moral values [are] things whose pursuit could make a direct contribution to the choice-worthiness of the agent’s own life” (p. 407).

Although Wallace’s conclusions are unexceptionable, and although his analyses are thoughtful and sophisticated, his essay is intermittently misleading in one respect. The essay is structured by an underlying focus, but the nature of that focus is not always as perspicuous as one might wish. Through much of his discussion, Wallace appears to be pondering the basis for the categorical imperativeness of morality (that is, the basis for the overriding applicability of moral requirements to each person regardless of his or her aims and inclinations). For better or for worse, that matter has received considerable attention from some philosophers during the past couple of decades. Wallace, however, is addressing a quite different problem (albeit a superficially similar one), as eventually becomes fully clear. In response to doubters such as Bernard Williams, he is asking whether it could ever be rationally sensible for someone to attach overriding importance to the demands of morality. Why would anyone ever credibly feel motivated to give priority to impersonal moral requirements over the personal attachments and endeavours that form the vibrant texture of his or her life? It is that question of moral psychology on which Wallace insightfully concentrates.

Although Reason and Value would have benefited from the inclusion of a general introductory essay, the book as a whole is admirable indeed. Quite apart from the extremely high quality of the philosophical content, the volume as a physical product deserves praise. The spacing between the lines of type is comfortable on the eye; there are not many typographical errors (and there are some chapters without any such errors); the index is useful; and the paper and binding are sturdy. Plaudits go to the publisher as well as to the editors and contributors. Though the £50 price will probably deter most individual purchasers, the book merits a wide audience.

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