BOOK REVIEWS


It is depressing to be disappointed by a book on human rights edited by a distinguished barrister and a highly regarded academic and boasting a galaxy of star contributors from the higher, more intellectual regions of the Bar. What a surprise, and how welcome, this book would have been just a few years ago! Now however it is almost a commonplace, the result of a collaboration between 1 Crown Office Row and the human rights group Justice which gave rise initially to two seminars on the Human Rights Act and which has now produced this short but attractively designed volume from Richard Hart. For today we are all human rights lawyers: the few remaining doubters should cast their eye over Michael Smyth’s excellent Business and the Human Rights Act 1998 (Jordans, 2000), not the least of the virtues of which is that it starts with Lord Hope’s extraordinary but entirely accurate remark, in R. v. D.P.P., Ex p. Kebilene [2000] A.C. 326 at pp. 374–5), that “It is now plain that the incorporation of the European Convention on Human Rights into our domestic law will subject the entire legal system to a fundamental process of review and, where necessary, reform by the judiciary.”

So what do Havers and English have that Smyth, Pannick, Lester, Grosz, Beatson, Duffy, Coppel, Wadham, Mountfield, Starmers and Baker (to mention just a few) do not have, sufficient to make it worth reading, or—I suppose more to the point—buying? I was going to say that it has a useful chapter by Owain Thomas entitled “Bibliography and Guide to Sources” until I noticed that Mr. Thomas’s list states Van Dijk and Van Hoof’s well known work to be by Van Dijk alone (at p. 238) and (also at p. 238) that Starmer’s book (perhaps the most highly regarded of all the recent texts on the Act) is jointly authored with “S. Sedley” when in fact Lord Justice Sedley merely contributes a short foreword. The most original chapter is undoubtedly that by Philippa Whipple who starts brilliantly: “Academic guidance abounds on the effects of incorporation of the European Convention on Human Rights. But to those of us who practice ‘on the front-line’, the Human Rights Act is less about debates on paper and more about bringing and defending real claims on behalf of our clients. The purpose of this chapter is to provide a practical demonstration of the way Convention arguments can be deployed once the Act is in force” (at p. 103). Ms Whipple then proceeds to achieve with style and clarity exactly the unpretentious goal that she has set herself.

There are plenty of solid chapters such as the two on remedies and confidentiality/libel by Rosalind English and the piece on Article 6(1) by Guy Mansfield Q.C. (though this could usefully have addressed the interesting question of whether, and if so which, Convention rights are also “civil rights” for Article 6(1) purposes). David Hart is authoritative on

200
environmental rights. So is Jeremy Hyam on medical health, though a discussion of the possible incompatibility of the M’Naghten rules with Article 5 would have been a refreshing gloss on his summary of the extremely well-trodden decision in Winterwerp v. Netherlands (1979) 2 E.H.R.R. 387 (wrongly cited on p. 223 as (1979) 2 E.H.R.R. 38). For example, see the recent, as yet unreported, decision from Jersey refusing to apply the M’Naghten rules in the Bailiwick. Jonathan Cooper from Justice has written an interesting and well researched piece on the interminable horizontality issue.

The overall effect of the book is not entirely satisfactory. Its difficulty is that it sets out to be a specialist work, dealing specifically with the relationship between the common law and the Human Rights Act. This is an important subject on which even preliminary thoughts are to be welcomed. But it is not plumbed here quite as it should have been. The introduction to the Act by Philip Havers and Neil Garnham provides a very basic 22 page overview of the Act but such has been the frenzy over human rights over the past couple of years, who now needs this, particularly since it does not take account of the decisions that, after 2 October 2000, have begun to pour from the law courts? And then there is William Edis’s introductory chapter, three-and-a-half pages long and sitting right at the start of the volume. Its discussion of the very well known discrimination case involving the West Indian cricketer Leary Constantine (Constantine v. Imperial Hotels Ltd. [1944] K.B. 693) seems to proceed on the assumption that the Convention would have made a difference to his case when a really interesting exploration would have been into whether it would have made any difference: see Abdulaziz, Cabales and Balkandali v. United Kingdom (1985) 7 E.H.R.R. 471.

Philip Havers’s and Neil Sheldon’s chapter on “The Impact of the Convention on Medical Law” and that by Robert Owen Q.C., Sarah Lambert and Caroline Neenan on “Clinical Negligence and Personal Injury Litigation” are both at one level excellent: there are many cases and a great deal of assiduous legal analysis of a variety of issues. But there is nothing on the underlying principles that inform the Human Rights Act or on the ethical assumptions that lie behind the measure, surely relevant considerations in chapters devoted to health and medical law. (For a salutary warning about the deployment of the Convention in novel areas see R. v. North-West Lancashire Health Authority; Ex p. A, D and G [2000] 1 W.L.R. 977). The status of various medical practitioners under section 6 is not fully analysed, though some remarks of the Lord Chancellor are referred to as though they had independent status as law; see p. 137. But the issues here are complex: are all practitioners of medicine and other health professionals public authorities, and if they are not, when are their functions sufficiently public to be caught by the Act? Similarly the authors’ treatment of abortion law is solely in terms of the possible applicability of Article 2, when the really key questions relate to the application of sections 3(2) and 6(2) of the Act itself.

Richard Booth’s chapter on “General Common Law Claims and the Human Rights Act” provides an overview of recent Strasbourg cases in a variety of areas but offers little attempt to connect the material with pre-existing UK law in his areas of interest or (more disappointingly) with the actual provisions of the Human Rights Act itself (especially sections 3 and 6). Like so many of the chapters in this book, and so much literature on
the Human Rights Act generally, it is the Convention in schedule one rather than the terms of the Act itself that get the attention. But seeking to clarify what the law is on this or that Convention right without regard to the way in which the right under scrutiny has been located in UK law via the substantive sections in the Human Rights Act is to give the practitioner only a part of what he or she needs to be decently competent on human rights law. And any book which eschews principle in favour of extensive case law citation in the old British tradition is bound also to seem incomplete and to grow quickly out-of-date.

Conor Gearty


The need for legislation on this topic was suggested by several members of the House of Lords in various cases. For example, Lord Diplock in Swain v. Law Society [1983] 1 A.C. 598, 611, admitted that the common law relating to third parties was in a chaotic state, and he revealed impatience with the legislature, referring to various:

jurist subterfuges to which courts have, from time to time, felt driven to resort in cases in which English private law is applicable, to mitigate the effect of the lacuna resulting from the non-recognition of a tui quaestum tertio, an anachronistic shortcoming that has for many years been regarded as a reproach to English private law: see the Law Revision Committee’s Report of 1937 (Cmd. 5449) . . .

What does the Contracts (Rights of Third Parties) Act 1999 say? The Explanatory Notes to Contracts (Rights of Third Parties) Act 1999 (L. Chancellor’s Dept., 1999, 10 pp.) succinctly explain the Act’s main features:

The Act reforms the rule of “privity of contract” under which a person can only enforce a contract if he is a party to it . . . The Act sets out the circumstances in which a third party is to have a right to enforce a term of the contract (section 1), the situations in which such a term may be varied or rescinded (section 2) and the defences available to the promisee when the third party seeks to enforce the term (section 3). It makes it clear that section 1 does not affect the promisee’s rights, or any rights that the third party may have which are independent of the Act (sections 4 and 7(1)). The Act does not apply to certain contracts (whether wholly or partially) (section 6) . . . The Act implements, with some amendments, the recommendations of the Law Commission in its Report on Privity of Contract: Contracts for the Benefit of Third Parties, Law Com. No. 242 (1996).

It is clear that the commercial legal world has been greatly stirred by this important statute. Many practitioners are wary of it, certainly in the worlds of construction or insurance law, at least until it is tried and tested by the courts (naturally, in litigation which is res inter alias acta).

Under Merkin’s editorship, the Act now has a handsome commentary. Chapter 1 is a short historical survey of the privity rules. Chapter 2 examines various doctrines and statutes which, independently of the 1999
Act, qualify or create exceptions to the common law bar on enforcement by third parties of contractual rights. Chapter 3 continues the common law theme, treating the benefit of exclusion clauses and third parties. Chapter 4 concerns the difficult topic of “burdens” and third parties. This aspect is largely untouched by the Act, except to the extent that a third party can take a conditional benefit under the statute, for example a right to payment but which is conditional on disputes being submitted to arbitration. Robert Merkin has written these impressive chapters which are clear and learned and as good as anything available elsewhere.

Chapter 5, however, is manifestly the book’s core. Here Merkin supplies a 51 page analysis of the Act. In this important chapter he discusses the Act systematically and precisely. He explains each provision, sub-section by sub-section, or even word by word, by incorporating the Law Commission’s discussion, any relevant comment during the Parliamentary debates and by referring to background doctrine. This reviewer spotted only minor slips at nn. 9, 13, 15.

Other authors have written the remaining chapters and these are mostly practitioners. Professor Tettenborn discusses the Act’s impact on “Professional Negligence” (chapter 7). The other authors are specialist practitioners: Andrew Jamieson, barrister, “Shipping Contracts”, chapter 6; Jane Jenkins and James Duckworth, solicitors, “The Construction Industry”, chapter 8; Christopher Henley, solicitor, “Insurance”, chapter 9. No doubt these chapters will be pored over by other specialist lawyers to see whether they accord with the “in-house” view on particular points. A gap perhaps is that there is not a chapter dealing with the Act’s impact on real property and landlord and tenant law. This reviewer’s legal grape-vine reveals that the Act is quite significant in this field.

There are generous and helpful appendices supplying the full text of the statute, the Law Commission’s Report and Consultation paper, and Hansard materials (this last appendix is especially convenient). The timing is perfect. Although the Act has been fully in force since 10 May, 2000 (Royal Assent, 11 November, 1999), by the end of 2000 the main series have yet to reveal a case in which the Act has been judicially considered. Counsel and judges will do well to seek guidance from Merkin, as well as recent editions of the general contract textbooks which have already incorporated the 1999 Act into their chapters on third parties.

This reviewer is grateful for the opportunity to read and review this work, which he enjoyed. Of course the reality is that only university libraries and practitioners will be able to afford it. Other impecunious connoisseurs of contractual triangulation will need to review the work in another journal!

NEIL ANDREWS


This translation of an important work published in Italian in 1994 is very welcome. It is usually assumed that the legal unity of continental Europe
was the product of the 12th century rennaissance which produced the Romano-canonical *ius commune* and that the period between the end of the Roman Empire and the rise of that *ius commune* was a dark age, when a variety of different barbarian peoples were in the ascendency. Lupoi challenges this view directly. The period between the fifth and 11th centuries, he argues, saw “the advent of substantially uniform legal rules, types of government, documentary forms and modes of trial” (p. 1). The immigrant peoples who seised power (Lupoi eschews the term “barbarian” in favour of “new dominations”) combined with their subjects to produce different institutional structures in each territory, but gradually the differences were eliminated and replaced by common structures.

The main ingredients of the common European system that emerged in the ninth and 10th centuries were vulgar Roman law, which gradually became less precise than the classical Roman law as it was simplified and turned into unwritten custom and mixed with the various traditions of the immigrants. Although many of the peoples considered were Germanic, Lupoi denies the existence of any common Germanic law. “Germanic law did not exist, but Roman law no longer existed either. What did exist was an oral culture that was moving towards writing, and a written culture that was moving towards orality. And it was the encounter between them that bred the society, and therefore also the law, of the early Middle Ages” (p. 25).

Two chapters survey the history and institutions of the late Roman empire and of the new arrivals, with particular emphasis on the Visigoths, Anglo-Saxons, Franks and Lombards (Ireland, in Lupoi’s view, did not participate in the European common law; it was the only country which had professional jurists). Lupoi distinguishes between *principia*, “the main mechanisms for the solution of social issues” (p. 434), which form the core of his common law, and *regulæ*, which were usually enunciated by one nation and then accepted in others and became common. His argument concentrates on the former, and specially on the need for consensus both in law finding and in judicial decision.

Warrior assemblies, as the main channels of communication, were prominent in achieving consensus; they were asked to give their approval to laws proposed by their king and trials were often conducted before them. Further evidence of the search for consensus is the fact that judges everywhere took care to surround themselves with prominent personages, whose names were recorded so that the presence of large numbers attending the hearing was stressed. For the Germanic peoples monarchy was a new experience and so was legislation in the sense of new laws imposed from above. Kings emerged in different ways, often by nomination from among the members of a particular stirps, occasionally by election.

As each kingdom became Christian, so the king was anointed and assumed a priestly function. The spiritual and temporal orders came to depend on each other. Already in 511, the Frankish king gave royal sanction to the decisions of church councils and this practice was followed by the Visigoths, Lombards and Anglo-Saxons. So the notion of *utrague lex* as the combination of civil and canon law has its roots in the sixth century. The notion of exclusion of outlaws from the community gradually became universal. “It was the king who decided whether an offence was serious enough to warrant expulsion and the community was forbidden to succour the outcast” (p. 387).
It is only towards the end of his argument that Lupoi confronts the notion of personality of law. Agobard of Lyons’s famous remark that if five people sat at a table, each would follow a different law is “a paradox enunciated for polemical purposes”. Every part of Europe recognised the distinction between the law that applied throughout a kingdom and the law that applied to the inhabitants of a particular area or a particular ethnic group. But there were so many variations that the conclusion must be that “the personality of law was not a universal principle. Indeed, the circumstances and motives that gave rise to it were so diverse that it is virtually useless as a general category” (p. 396). Personal and territorial laws intersected without any principle. The oft-cited provision of the law of the Ripuarian Franks that the church lives by Roman law was merely implementing a decision of the Fifth Council of Orleans that allowed enfranchisement in Church secundum patrioticam consuetudinem. Roman law as such had no ethnic or political connotations and was beyond the legislative power of kings; it was produced by a clerical bureaucracy, which claimed to state the universal law of the church. And it suited the rulers to accept it. The acceptance of the new ius commune from the 12th century onwards meant the break-up of this earlier law, except in England, where the English version of it survived.

Distributed throughout the text are no less than six Excursus, dealing respectively with the term “barbarians,” the days of the week, Anglo-Saxon Charters, authority and consensus in judicial decisions, the Anglo-Saxon writ, and textual “coincidences” in documentary forms. The last is the longest and the most important, being the fruit of Lupoi’s examination of cartularies from every part of Europe throughout the early Middle Ages. It reveals an extent of verbal similarity which can only be the result of copying.

Hints of this thesis have appeared in the non-legal literature but Lupoi’s is its first comprehensive statement and it is generally convincing; the supporting notes are exhaustive and show a quite remarkable familiarity with the literature in all the main European languages. The translation is clear and fluent. Loose ends are inevitable in a book of this complexity but they are few (e.g., Mainz is still Magonza, p. 137). The wrapper is in the form of an old map with the main names in Italian and with some odd locations, e.g., Jarrow appears to be somewhere in Aberdeenshire.

PETER STEIN


Anyone familiar with The Legal Issues of the Maastricht Treaty will not be disappointed by the new volume of the same series, this time focussed on the Amsterdam Treaty. Following the model of its predecessor, the book is a collection of first-class papers, some of which were presented at a joint UKAEL (United Kingdom Association of European Law) and UACES (University Association for Contemporary European Studies) conference
held at King’s College, London in June 1998, on the changes introduced by the Treaty of Amsterdam.

The process leading to this Treaty started in Turin in March 1996, when, as required by the Maastricht Treaty, an Inter-Governmental Conference (IGC) was launched. The IGC mandate was threefold: prepare the Union for enlargement to the countries from Central and Eastern Europe, give the EU a greater capacity to act on the international plane and make the Union more relevant for its increasingly critical citizens. Despite the length and intensity of negotiations, the compromise agreed upon by the Heads of State and Government at the Amsterdam European Council fell short of the high and multi-faceted expectations.

Divided into several sections, the book is organised following the Treaty’s architecture. Constitutional and institutional matters are covered by the first two sections, followed by several analyses of specific policy areas under the headings of “Internal Market Issues” and “External Relations”. The final papers explore selected aspects of Union citizenship under the title of “Non-Discrimination and Nationality” preceded by an extensive chapter on the “Area of Freedom, Security and Justice”, one of the key conceptual novelties introduced by the Amsterdam Treaty.

The limits, not to say lack, of institutional reform and innovation are recurring themes of the first eight articles of the volume. Joseph Weiler starts the first section on “Constitutional Issues” with a prologue dealing with the Treaty’s failure to remedy the much-debated democratic deficit of the Union. Going beyond the traditional debate on the role, legitimacy and the relative power of Community institutions, the author concentrates on the regulatory and administrative functions of the Community known as “Comitology” which he conceptualises as part of a broader “infranationalism”, alongside supranationalism and intergovernmentalism. Like Weiler, Deirdre Curtin is concerned with democracy. Though applauding the new Treaty principle according to which “decisions are taken as openly as possible”, she advocates, for the sake of further transparency, an “active information obligation” on the part of the EU authorities through the establishment of a public register.

Indeed a lot remains to be done to ensure transparency. Under the telling title “If I’d wanted you to understand I would have explained it better”, Stephen Weatherill analyses, in an impressive article, the limits and possibilities of closer cooperation, a mechanism whereby a number of EU Member States may, provided the relevant conditions are met, further cooperation in a field covered by and in the framework of the Treaty. Having acknowledged their little practicability, Weatherill underlines that the provisions on closer cooperation are emblematic of a trend of declining Community exclusive legislative action and of increasing flexibility. Such developments tend to compromise the sacrosanct, although overstated, principle of uniformity, but mostly generates further complexity and “intransparency”. He concludes that “the EU needs to be demystified” and that care must be taken to ensure effective democratic control.

Contemplating solutions to the consequent lack of legitimacy, Ian Ward draws on the wisdom of liberal philosophers, Kant in particular. Ward argues that “further European integration depends not just on law, or perhaps not on law at all” and emphasises the need for a European public policy, and solidarity between citizens, not only between Member States. The ultimate aim should be the search for a community different from
those of the Member States; such a community would be defined in the
Kantian manner—“by mutual respect for the integrity of each individual”.
However, the reality looks more prosaic. Laurence Gormley depicts the
legal structure of the Union constructed in Amsterdam as a “house built
on sand, appearing solid but without the necessary foundation piles to
make it a credible entity, either in the eyes of its international partners or
in the eyes of its citizens”. Looking for reasons why the construction is so
weak, Franklin Dehousse, the Belgian representative on the reflection
group in 1995 and later at the IGC, points out the negotiation games and
procedures of the Intergovernmental Conference.

The second section of the book, “The Institutions”, moves on to the
substance of the reform, from the institutional point of view. Considering
the failure of the 1996 IGC to tackle the issue of the Commission’s
composition and the Council weighing of votes—the celebrated Amsterdam
“left-overs”—the book “only” covers, thanks to two experts’ contributions,
the impact of Amsterdam on the European Court of Justice (Anthony
Arnulf) and the European Parliament (Kieran St. C. Bradley).

There follows a chapter on “Internal Market Issues”. Erika Szyszczak
looks at the “new parameters of labour law” which, she argues, is for the
first time dealt with in its own right in the Community legal order. Thanks
to the introduction of a specific, although “perhaps not coherent”, legal
base, labour law measures may be enacted at the community level. Silvana
Sciarra then looks, in a critical way, at the new employment title. The
consolidation of environmental provisions and the shift of position of
competition law and policy within the Community’s constitutional
framework are examined by Richard Macrory and Leo Flynn, respectively.

The contributions of Alan Dashwood, Marise Cremona and Dominic
McGoldrick deal with the Amsterdam changes in the field of external
relations which is the object of the fourth section. Dashwood investigates
the various reforms introduced both in the EC treaty and in the larger
framework of the TEU. Of particular interest are his views on the
international legal personality and capacity of the Union and his comments
on the role of the European Council in the reformed decision-making
process, within the Common Foreign and Security Policy. Marise Cremona
explores the reform of Article 133 EC dealing with the Common
Commercial Policy (CCP). Under Amsterdam the political institutions, the
Council in particular, may overturn the European Court of Justice’s
opinions on the scope of the CCP by deciding that services and intellectual
property rights fall into it. Cremona gives a comprehensive account of the
reform’s background, its implications for the external economic relations of
the Community, as well as its significance from the judicial point of view.
Another open perspective is explored by McGoldrick. Looking at the
provisions on EU citizenship, the new membership requirements, the
provisions on suspension on membership rights and the EC international
agreements, he foresees the EU moving towards an organisation with
general human rights competence.

One area where the Treaty of Amsterdam introduces substantial change
is in the free movement of persons. The Treaty formally establishes an
“Aera of Freedom, Security and Justice”, it also operates a
“communitarisation”, although gradual, of parts of the former
intergovernmental “Cooperation in Justice and Home Affairs” (ex Title VI
of the TEU) which have a link with the internal market. Parts of the
Schengen *acquis* are equally introduced in the EC Treaty. Little wonder that the volume is so generous on these issues.

It is difficult to do justice, in the framework of this review, to the six impressive articles that this section contains. They all provide the reader with a comprehensive and critical account of the multi-faceted Area of Freedom, Security and Justice and the implications of further communitarisation. A first price to pay is an increased differentiation as underlined by Martin Hedemann-Robinson whose essay analyses the legal issues and effects of Denmark, Ireland and the UK’s “qualified opportunities to select how much they wish to opt into” the Area of Freedom, Security and Justice. Echoing Weatherill, Hedemann-Robinson sees in these exemptions the fact that the “Community method clearly embraces a multi-tiered, multi-track approach, as well as the concentric circles model”. Another price to pay alongside flexibility is an increased complexity. Welcoming the “three surgical operations imposed on the area of justice and home affairs cooperation by virtue of the Amsterdam Treaty”, Monica den Boer however underlines the complexity not only of the textual product of the reform but mostly of its subsequent implementation. Like Curtin, she stresses the insufficient level of transparency and casts doubts on the legitimacy underlining the poor level of parliamentary scrutiny and citizens’ involvement in the essentially executive-driven third pillar. The latter dimensions are further investigated in Fabio Evangelisti’s essay on the involvement, if at all, of national parliaments in the Area of Freedom, Security and Justice. Patrick Twomey scrutinises the latter in the context of the relationship between the Union and citizen. Examining the way in which the new Area came onto the Union’s agenda, he warns of a “prioritisation of ‘protection’ over participation” and suggests to be alert about what is made of such an Area.

With a more optimistic tone, David O’Keeffe analyses the legal framework for visas, immigration and asylum inserted in the EC Treaty. Acknowledging the various costs of the process leading to communitarisation, he assesses the new competences given to the Community as a substantial progress over the existing legal context and “an outstanding achievement of the Amsterdam negotiations”. Drawing from what O’Keeffe calls “the inclusion/exclusion paradigm”, Tamara K. Hervey’s essay looks at the new Article 13 EC as a legal basis for the EU institutions power and responsibility to combat racism and xenophobia. Indeed, the question of non-discrimination is, alongside nationality, central to the last section of the collection. Article 13 EC is examined “through the looking glass of Union citizenship” by Catherine Barnard. Finally, Hans Ulrich Jessurun d’Oliveira’s essay focusses on “Nationality and the European Union after Amsterdam”.

Summing up, *Legal Issues of the Amsterdam Treaty* is an ideal instrument for getting a proper account of the Amsterdam Treaty, the process leading to it and its implications. Hence, like its predecessor, the collection is an excellent reference for assessing the EU constitutional reforms and also for understanding the intricacies of an ever-more complex process. One already looks forward to a third volume—on the Treaty of Nice.

CHRISTOPHE HILLION


The increasingly specialised nature of European law publications is a direct result of the unrelenting growth of European Union law in recent years. The task of writing a textbook has, in turn, become particularly daunting, given the breadth and complexity of this discipline. The two books reviewed, first published in Dutch in the early nineties and now revised and edited in English, are, however, an example of this challenge being met with remarkable success. Constitutional Law of the European Union and its companion volume, Procedural Law of the European Union, both much wider in scope than their titles suggest, offer a comprehensive and illuminating account of the law of the European Union as a whole.

Lord Slynn of Hadley remarks in his foreword to the first volume that “one puts the book down amazed that three people could know so much and write so well”. This seems to be a fitting tribute to the authors who set out to produce a thorough and up-to-date guide to the constitutional and procedural law of the European Union. There is no doubt that such goal has been achieved. Every single area of law has been mentioned. While the tone of the books is more descriptive than critical, these are, after all, textbooks, and hence focussed on clear and systematic exposition rather than on critique and discursive treatment. Moreover, traditional EC law battlegrounds such as the direct effect of directives or remedies in national courts are exposed and the reader always finds abundant references to the main academic currents and case law. The law is stated at 1 July 1999, and therefore all the Amsterdam reforms have been included.

The first volume examines the historical backdrop to the establishment of the European Union, the scope of the Community and European Union Treaties, the role of the Union’s institutions and of the Member States, the concept of citizenship, the decision-making process, the sources of law and the external powers of the Union. It explores with accuracy the many ramifications of these topics and it gives due attention not only to the foundations of Community law, but also to areas generally sidelined by other textbooks. Next to the principles of direct effect and supremacy or the different types of Community legislative procedures, relatively unfamiliar areas, such as non-Community decision-making, the territorial scope of the Treaties or non-Community acts of the Union are carefully considered. Although the book has a constitutional outlook, the authors have included in Chapter 4 a helpful overview of the substantive remit of the EC Treaty. This section does not seek to be an exhaustive analysis but has the unquestionable merit of setting out with precision the essential principles and seminal case law pertaining to the various Community policies. Also, areas frequently overlooked in general works such as public health, trans-European networks, economic and social cohesion, industry and research and technological development are skilfully brought to the
fore alongside the four freedoms, the competition law provisions and economic and monetary policy.

The second volume surveys the judicial architecture of the European Union and provides a study of the jurisdiction of the European Court, which analyses the substantive and procedural aspects of direct actions, preliminary rulings and special proceedings. The authors have succeeded in articulating a technical area and in presenting a coherent and progressive picture of the enforcement of European law at national and Union level, and of the judicial review of Community acts. In particular, the use of a similar structure in the analysis of the different routes to the Court greatly aids the understanding of the system of judicial protection put in place by the Treaty.

There is much to commend in the two books. First and foremost, they are truly books on European Union Law, not just on Community Law. Thus, the second and third pillars of the Union are as meticulously covered as the first pillar. The scope of and relationship between these pillars, the powers of the institutions, the characteristics of the legislative process and the differences in the role of the Court are all seamlessly interwoven in the two volumes. Secondly, the clarity shown in the exposition of the legal issues is striking. Principles and concepts difficult to pin down, such as proportionality or the notion of individual concern in Article 230 EC, become accessible to the reader without detriment to the rigorous analysis undertaken throughout. Thirdly, the books combine a concise style with a wealth of references to both academic literature and case law. This makes them not only an invaluable manual for students and practitioners, but also a starting place for any specialised research. Finally, they are reasonably priced and user-friendly with an impeccable layout, a helpful set of tables and guidance on the use of source material. The editor, as well as the authors, deserves praise on all of these counts. It only remains to be hoped that they may consider writing a new edition in the light of the changes recently introduced by the Treaty of Nice. They can certainly be entrusted with shedding light on what seems impenetrable.

Albertina Albors-Llorens


Flexibility was formally introduced in the EU legal grammar by the Treaty of Amsterdam, under the label of “closer cooperation”. The revised Treaty on European Union (TEU) provides for a mechanism whereby a certain number of Member States may, in observance of a set of strict procedural and substantive conditions, further co-operation in a field covered by and in the framework of the Treaty. The introduction of such mechanism, which actually illustrates a broader development of and a claim for flexibility in the European context, has generated controversies, already aired following the signature of the Maastricht Treaty. On the one hand, closer co-operation has been regarded as a positive step, particularly because it could limit a tendency developed by several Member States to
launch new forms of co-operation outside, hence at the expense of, the EU institutional framework. The Schengen agreement represents a well-known example of that trend. On the other hand, flexibility has been understood as a genuine threat to the very foundations of the EU integration process. It is perceived that the provisions on “closer cooperation” further institutionalise differentiation and deepen fragmentation in a process which, in principle, had been based on homogeneity through the observance of uniform rules.

Thus, flexibility is equivocal. As one of the contributors to the reviewed book states, flexibility is a “ubiquitous device marked by contingency, ambiguity and disagreement which can serve quite different—even diametrically different—end games”. Anyone keen on further grasping the intricacies of flexibility in the EU context will therefore welcome Constitutional Change in the EU. The volume is a collection of essays first presented at a workshop organised in April 1999 at the European University Institute in Florence; the papers were then edited by two distinguished EU law scholars.

Starting from the assumption that flexibility represents “an apparent shift in the paradigm of European governance from one of uniformity and harmonisation to one of flexibility and differentiation”, the volume offers a comprehensive evaluation of the multi-layered concept and its significance from the point of view of the EU institutional functioning and policy making.

A first set of papers scrutinises, on a theoretical level, the complex nature of flexibility. Having underlined the absence of a thorough reflection on its conceptual foundations, Neil Walker exposes the plurality of terms embraced by flexibility. Far from being solely legal, flexibility also relates to a broader economic, cultural, political and technological reality; it constitutes a challenge to our frameworks of legal and political authority, particularly in the post-Wesphalian European context. Several other contributors echo this proposition. Filip Tuystschaever for instance considers that “increased differentiation … presents us with an angle from which to challenge the traditional unitarian constitutional image”.

How then can one approach such an ambivalent device and tackle its significance from the point of view of the EU system of governance? Walker suggests the new language of “metaconstitutionalism” to conceptualise the emergence of an inevitably more fragmented, multi-layered order of governance in Europe. Jo Shaw reconciles flexibility and constitutionalism, arguing that the latter can actually be defined, in the EU context, as the accommodation of difference and diversity, based on a permanent process of dialogue. Eric Philippart and Monika Sie Dhian Ho also examine, with the eyes of political scientists and in the light of past practice, how diversity can be managed and reconciled with the integration process. Assuming that diversity is not per se detrimental to integration, they suggest a number of solutions as to how best to handle it on the eve of enlargement.

Indeed, many contributions insist on the idea that elements of differentiated integration have always been present, under various forms and at various levels, in the life of the Community prior to the Amsterdam Treaty. Bruno de Witte’s paper argues that flexibility is even “old-fashioned”. He reminds the reader that Member States have always been and will remain able, considering the difficulty in establishing closer
cooperation, to conclude agreements among themselves in the form of “inter se agreements” under international law. “Old-fashioned flexibility” is also pointed out by Jacques Ziller in the way EU law has been implemented on Member States’ territories. There seems therefore to be continuity. Flexibility pre-dates closer co-operation. Gráinne de Búrca shows how differentiation has occurred at the very heart of the integration process, that is, by introducing exemptions in harmonisation directives which set up the internal market. She indicates however that such a legislative differentiation has been limited in time and in scope, at least in principle. Furthermore, it has always taken place in the framework of the Community and without prejudice to its fundamental objectives. From this practice, she induces the existence of a core of commitments that cannot be subjected to differentiation—an idea which seems to be reflected by the current accession negotiations with countries from Central and Eastern Europe.

De Búrca’s paper prefigures a second dimension of the book which looks at the practical implications of flexibility in several EU policy areas. The collection is very informative of the fact that flexibility has not only been present in Community life but it has even been intrinsic to several of its policies: social policy, economic and monetary union are the most illustrative and far-reaching examples. However, the contributions dealing with specific policies highlight that flexibility implies different meanings depending on the area concerned.

Marise Cremona emphasises the growing differentiation in the context of external commitments of the Community. EC external action is not uniform but rather differentiated according to the characteristics of the partner at stake. Geopolitical considerations, economic development and adherence to the Community’s principles are all elements convoked to forge the Community’s external relations. She also points out the level of flexibility, which she distinguishes from differentiation, in EC external relations. As a negotiator, the Community can actually take into account, at least to a certain extent, the preoccupations of its partners to design the level of mutual commitments.

The papers of Catherine Barnard and Miguel Rodríguez-Piñero Royo examine flexibility in social policy and labour law respectively. Rodríguez-Piñero Royo underlines the specific, often negative, meaning of flexibility for labour lawyers showing that the concept has different connotations depending on whether it is looked at from a constitutional or labour law viewpoint. Barnard points out that the Member States’ respective bodies of social legislation and system of industrial relations have made uniform governance impossible, implying the development of “innovative, ‘softer’, flexible” solutions, particularly in choosing and implementing legislative instruments and in the choice of actors involved. In other words, the Community has been forced “since its inception” to address the question of flexibility.

Differentiation is also envisaged by Tuytschaever as an intrinsic element to the field of Economic and Monetary Union, presented as a case study to better understand differentiation in the broader context of the EU. As many other contributors, he underlines the fact that the European integration process under the Community method (“la méthode communautaire”) has not always been about unity, uniformity, integration and supranationality, but has rather been multi-faceted and much more
complex than it at first appears. With an optimistic tone, he considers that
differentiation provides for a means to maintain a momentum for
integration, particularly when the latter increasingly involves matters that
go to the heart of national sovereignty. Mentioning social policy and justice
and home affairs, he argues that differentiation constitutes a “phase of
transition”, a “stepping stone” towards further “communitarisation” for all
Member States. Hence the need to make the conditions to establish a
“closer cooperation” less restrictive than they are in their Amsterdam
device. This is also the suggestion of Stephen Weatherill who focusses on
the field of culture as a “candidate for breeding closer co-operation”. The
author suggests reading the provisions on closer cooperation generously in
order to encourage their use. He considers that flexibility is of critical
importance in the further design of the European integration project,
particularly in view of the coming Union’s expansion and also because it
may limit the damage implied by Member States using ad hoc systems to
accommodate “their thirst for flexibility within the scope of Union
competence”. He nevertheless emphasises the idea that “closer
cooperation” may bring about an increasing complexity of European
integration that in turn deepens its transparency deficit and sharpens the
question of legitimacy, as underlined by Philppart and Sie Dhian Ho.
Indeed, from a judicial point of view, such a complexity will not facilitate
the job of the European Court of Justice, as Carole Lyons points out in
her paper.

The examination of a number of other policy areas opens the way to
further institutional and constitutional questions. Joanne Scott and Karl-
Heinz Ladeur envisage how flexibility applies in the EC environmental
sphere. While Ladeur looks at the Environmental Impact Directive as a
laboratory for trans-national dialogue, Scott’s paper focusses on the
Directive on Integrated Pollution Prevention and Control, looking
particularly at the way it has been implemented and accommodated at the
local level. One essential message in Scott’s paper is that differentiation has
been accompanied by a concomitant “procedural prescriptiveness” of
Community environmental law. This would indicate an increasing role of
the Community in establishing procedural standards.

Thanks to a judicious choice of study angles, the reader gets a
sophisticated picture of flexibility, both as a legal concept, as a form of
governance and as a reality of the European integration process. The
collection is also a useful tool for assessing the opportunities opened by the
provisions on closer co-operation introduced by the Treaty of Amsterdam
and the risk they equally imply. Indeed, the book has already become an
indispensable reference for capturing the background of the reform
introduced by the Treaty of Nice which aims at making the mechanism
more likely to be used. Given the expanded role attributed to flexibility in
the future development of the European integration process, Constitutional
Change in the EU is also a valuable instrument for a broader analysis of
the evolving dynamics of EU governance.

Christophe Hillion

The inherent incoherence of a congeries of pieces only tenuously linked to a theme related to the dedicatee is one of the principal objections to the Festschrift phenomenon. In the present volume, compiled in honour of Erwin Deutsch on his reaching 70, the contributions are admittedly placed in two main groups. These reflect his major interests: his Habilitationsschrift on “Negligence and Requisite Care” was updated and republished in 1995, and his magisterial Medizinrecht is in its fourth edition. Even so, the pieces within each group—placed in alphabetical order of author—do not really cohere. Nor could they be expected to do so, given that none of the 64 contributors knew what any of the others was to say. In this respect a Festschrift is rather like a year’s issues of a law journal; the difference is that the Festschrift, being in book form, is thought to call for review, even though the reviewer can do no more than Jack Horner and pull out the plums.

Here there are plums aplenty. The piece by Canaris is of Carlsbad quality. He engages with the question whether, if one wishes to capture the profits of a magazine which publishes a wholly fictive interview it would not be better to use unjust enrichment law rather than the law of tort used by the Bundesgerichtshof when it awarded Princess Caroline damages far in excess of her loss, on the basis that such deterrence was necessary in order to protect the dignity of the individual as required by the Constitution. By an intricate and wholly convincing analysis of the codal provision, Canaris shows that the law of unjust enrichment could indeed be used, and to much better effect in every respect; he notes in particular that this would avoid the shocking result that victims of sexual abuse obtain less by way of tort damages for immaterial harm than plaintiffs complaining of mere indignity, such as Princess Caroline.

A classic article. Topical, too, for shortly after it was written this unequal treatment was challenged as unconstitutional by parents whose lives were ruined by the pathological shock of having all three of their children killed by a drunken driver speeding through a stop sign. Father and mother Müller were allowed only DM 70K and 40K respectively, as contrasted with the DM 180K with which Princess Caroline sauntered off. In repelling the argument that this was in breach of the constitutional requirement of equal treatment, the Bundesverfassungsgericht said that Princess Caroline’s damages were not really Schmerzensgeld at all, and emphasised the difference between commercial exploitation of a human personality and dangerous driving as justifying deterrence damages in the first case but not the second.

The court was also indifferent to the striking mismatch in the amounts of Schmerzensgeld awarded for physical as opposed to psychic harm—up to DM 400K for paraplegia, between DM 3K and 10K for serious psychological harm (the award in the Müller case was notably high in view of the gravity of the shock and its sequelae). This distinction between cases of physical and psychic harm is not drawn specifically in another article in the Festschrift, a review by Christian von Bar, one of the editors, of the amounts of damages awarded for pain and suffering in the various
countries of the EU. The figures he quotes—sometimes with considerable disapproval—do not wholly bear out the recent assertions of the Law Commission which induced our Court of Appeal to increase such damages substantially, especially in serious cases.

Another giant of contemporary private law in Germany, Dieter Medicus, shows that quality need not be compromised by the brevity which the editors must insist on if they are to pack 64 contributions into 1000 pages. He analyses the codal provision (§831 (2) BGB) which provides that a person who by contract assumes for an employer the latter’s functions as regards equipping the employee or supervising his performance is subject to the same liability as the employer himself, and concludes that it cannot properly be used to sidestep the liability of the employer himself, regrettably restricted by §831 (1) BGB. Hans Stoll does some fancy footwork on the question whether a contract induced by misrepresentation can be undone only if it involves an economic loss to the claimant, and is of opinion that liability for culpa in contrahendo may be getting out of hand. Shorter, but no less pointed, is the piece by Peter Schlechtriem attacking the view that a business which is brought to its knees by defects in goods supplied to it can avoid the restrictions of sales law by suing for the negligent invasion of the “right to an established and operative business”, a dubious invention by the Reichsgericht; this raises a general question of concurrence of claims, on which English law is now in disarray, though the author is too polite to say so.

These models of how to analyse codal texts in liability law are in methodological contrast with pieces on medical law by David Collins of Wellington (Deutsch spent considerable periods in New Zealand) and van Oosten of Pretoria. The former, dealing with the withdrawal of medical services needed to maintain “life”, or “medical futility”, considers seven judicial decisions from different jurisdictions, but no legislation, while the latter, on the defence of emergency, cites neither statute nor decision, but only doctrinal writings. This is appropriate enough, since for 24 years Erwin Deutsch sat as a judge in the Oberlandesgericht Celle, not too far from Göttingen where he produced his remarkable and very influential doctrinal writings.

The two pieces just mentioned are in English, as are seven others. The dedicatee, a graduate of Columbia University and fully fluent in English, may well not find these pieces quite the equal of those in his mother tongue, and Jack Horner would likely leave them in the pie, with perhaps one exception. The piece by Anthony Angelo asks which law of contract—UNIDROIT, Lando, Vienna Convention, McGregor, or the Australian Draft Code—should be adopted for the 1,500 inhabitants of the Tokelau archipelago; actually they seem to be doing quite well at present without any law of contract at all.

Tony Weir

In the last couple of decades, moral philosophy and jurisprudence have given a good deal of thought to the role and significance of luck. Thomas Nagel, Bernard Williams and Martha Nussbaum have considered the nature of “moral luck” and have reflected upon the attempts of philosophers to insulate our moral well-being from the effects of contingency. Lon Fuller suggested that tort liability (and law generally) was an attempt to “rescue man from the blind play of chance”; while Honoré has pointed out the extent to which such liability actually entrenches and enforces pure contingencies for which (in Honoré’s view) we are nevertheless rightly responsible. Libertarian defenders of the market, and enthusiasts for corrective justice, have emphasised the unavoidable role of luck in determining our rights and liabilities; while Rawlsian or Dworkinian theorists of distributive justice have urged the importance of attempting to compensate for the effects of arbitrariness in the natural distribution of talents, or “brute luck”.

Meanwhile, a diverse group of scholars has puzzled over the adjudicative process. The background to the debate here lies not so much in a concern with the problematic role of luck, as an increasing awareness of what is often considered to be the indeterminacy of reason. The picture of judicial decisions as straightforwardly applying rules to neatly labelled facts has been abandoned in favour of alternative, and more complex, pictures that emphasise the irreducible role of practical wisdom, and the balancing of diverse considerations. If, however, the judicial application of law involves balancing competing reasons, why does the resulting judgment take its characteristically “winner-takes-all” form? The philosopher Jon Elster has examined the possibility and rationality of “solomonic” judgments; and legal scholars such as John Coons and Duxbury’s colleague Joseph Jaconelli have pointed out the disparity between the fine balance of reasons revealed in legal argument, and the clear-cut resolution to which they are expected to lead. Might a judgment not, on occasions, reflect reason more adequately by striking a compromise in line with the balance of competing reasons? Should the “winner-takes-all” judgment be regarded as an expression of substantive reason, or as a Procrustean enroachment upon what reason requires?

An excursion into armchair sociology can be instructive here, for it indicates the ambivalence of modernity’s attachment to substantive reason. In societies characterised by complex kinship structures, each social relationship is of an enduring nature, and is possessed of a number of different facets. When disputes occur in such a society, the important thing will be to seek to preserve the relationship by encouraging compromise. This may be done by an adjudicative process that treats each dispute as merely the tip of a much deeper iceberg: whereas developed legal systems would aim at defining the matter in dispute as narrowly as possible, courts of the type studied by anthropologists such as Max Gluckman try to unearth and resolve the deeper tensions and problems that generated the dispute. Alternatively, compromise might be encouraged by the opposite approach of a refusal to investigate the substance of the matter at all. If our dispute will ultimately be resolved by wager of law (for example), my
firm conviction that I am in the right may not translate into a firm conviction of ultimate victory (even my faith in God will be accompanied by a knowledge that his ways are a mystery, as consultation of The Book of Job would make clear). In such circumstances, compromise before judgment may seem highly desirable. At the same time, the knowledge that any dispute will result in either a compromise or a random result is bound to encourage predatory litigation ungrounded in any plausible justificatory claim.

The problem with societies that encourage compromise is that they leave little room for the prickly, assertive forms of individualism that require a firm demarcation of rights and rules. Individualistic societies tend to be characterised by temporally limited and object-specific social relations, where preservation of the individual relationship matters less than maintenance of the framework of rules that provides for the establishment of such relationships generally. A more individualistic society is therefore likely to put less emphasis upon amicable dispute resolution, and more emphasis upon the articulation and enforcement of clear rules and entitlements. This encourages a form of adjudication that articulates substantive reasons and yields a “winner-takes-all” judgment. But such adjudicative reasoning depends upon pervasive appeals to substantive values; and individualistic societies tend to render such values increasingly uncertain and contested. Hence, a purely formal mode of decision may begin to look very attractive.

Wisely avoiding unstructured speculations of the kind in which the reviewer has just indulged, Neil Duxbury has added a sharply focussed, but rich and informative, contribution to legal theoretical literature, by examining the history of legal decision-making by lot, and the arguments for and against such a mode of decision. Whereas the first set of debates, mentioned above, concerns the extent to which legal and moral conceptions seek to rectify or to endorse the effects of luck, the second set of debates is in part concerned with the deliberate introduction of luck into the adjudicative process. As Duxbury observes, “chance is inherent within the system: that is, in so far as it is there, it is there without design. Rarely do we set out specifically to introduce elements of chance into law.” (p. 12.) His opening chapter briefly but skilfully indicates the broader resonances of this theme, before he proceeds to an examination of lotteries in their historical and intellectual context. Along the way one learns a host of fascinating and unfamiliar facts, and is introduced to bodies of scholarship the existence of which one may never have suspected.

Indeed, the range of material that has been drawn together in this book is quite breathtaking. One might experience some irritation at Duxbury’s whole-hearted adoption of the American law-review practice of extensive footnoting (footnotes form a substantial part of the book); but in this case the practice does serve to assemble a mass of material, drawn from disparate sources, bearing in one way or another upon the general theme. Occasionally the footnotes seem to embody misconceptions that probably indicate a rapid pace of work and a desire to fit everything in (e.g. the discussion of allocation by lot in Chapter 15 of Hobbes Leviathan should quite obviously not be read as equating primogeniture with the natural lottery of human abilities: p. 15 n. 3), but on the whole they testify to Duxbury’s voracious reading and formidable powers of assimilation. Nor should it be thought that Duxbury’s book is simply a “hoovering up” of
material drawn from other disciplines: for the selection and integration of such diverse material demands considerable intelligence and imagination. These qualities Duxbury displays in good measure.

To demonstrate the way in which lotteries have a significance that depends upon their context, Duxbury examines the use of lots to determine the divine will, and their use in the selection of political leaders and representatives. He concludes that the modern abandonment of such devices is to be explained by changes in the intellectual, social and political context, but that lotteries nevertheless retain certain virtues that could make their adoption in modern contexts a possibility worth considering. Other modern writers have made similar proposals, but it is the balanced and judicious quality of Duxbury’s position that makes his argument persuasive. A broader examination of the use of lotteries in adjudicative contexts then follows, and Duxbury reveals the quite powerful case that can be offered in support of such procedures, as well as the contestable and sometimes problematic theses that are standardly offered against.

In all of this, Duxbury emphasises the modesty of his central aim: merely “to encourage serious reflection on a counter-intuitive idea” (p. 139). Such modesty of aim is sensible. The idea may be not quite so counter-intuitive as the author imagines, but the issues that it raises are deep. When we ask ourselves why the notion of randomisation seems so at odds with our ideas of legality and adjudication, we are led to reflect upon some very fundamental questions concerning the nature and significance of law. In this way, Duxbury’s objective is intellectual rather than practical: it is by reflection upon social arrangements and systems of thought significantly different from our own that we are led to an awareness of our presuppositions, commitments and (perhaps) delusions. To this enterprise, Duxbury has made a most important contribution, of which he can feel justly proud.

N.E. Simmonds


The essays collected in this book arise out of a series of seminars exploring the relationship between law and faith, broadly defined, and investigate “the many varied links between law and faith”, particularly as those links relate to legal theory (p. 1). While the editors intended to demonstrate the diversity of ways in which the topic can be viewed, this very diversity causes some problems for the reader.

For example, although the book’s arrangement reflects three major themes—(1) “the extent to which faith should be involved in legal decision-making”; (2) the extent to which law respects the rights of members of minority religious groups; and (3) “questions of identity and difference” (p. 1)—there is little cohesion within or between the three sections. Because the individual submissions exist in isolation, the reader is left without an understanding of how the various arguments might fit together, thus undermining the excellence of several of the contributions. Some sense of continuity arises from the discussion by several contributors of the dilemma
faced by Abraham when he was ordered by God to sacrifice his son, Isaac, but this device is only intermittently used, despite the fact that the various ways in which the individual authors analysed this event gave great insight to the different arguments being made. In a wide-ranging collection such as this, more of these common touchstones would have been helpful in tying the articles together into a unified whole.

The first section addresses the link between faith and legal decision-making, and it is surprising that none of the three contributors even mentions John Rawls’s concept of public reason, despite its relevance to this particular debate. This deficiency, if it is indeed a deficiency, may be due to this section being more theological than legal. John Gardner’s is the most “lawyerly” of the three articles and relies on Kelsen’s theory of the Grundnorm to argue that faith in God can be analogised to faith in law. Masterfully invoking Socrates, Kierkegaard, and Kelsen, Gardner provides an excellent rebuttal to those who claim that religious beliefs should be excluded from legal decision-making because they are founded on faith.

The following two contributions, one by Zenon Bankowski and Claire Davis and the other by Adam Gearey, have perhaps more of an appeal to theologians than to lawyers. The first addresses the supposed dichotomy between the New Testament’s edict to love and the Old Testament’s harsh legalism, concluding that there is less of a contradiction between the two than there initially appears to be, while the second constitutes a “reworking of political theology [particularly that of Augustine] from the perspective of postmodernity” (p. 54, n. 5).

The second section constitutes familiar ground for jurists in this field and focusses on religious liberty and the implementation of religious rights in pluralist states. Timothy Macklem investigates how the definition of religion affects whether and to what extent law will protect religious belief and practice. He “describe[s] the contours of a value-pluralist account of religion, and … suggest[s] that, unlike the conventional and psychological approaches to freedom of religion, a faith-based approach to the freedom, like value-pluralism itself, is at once sufficiently flexible to accommodate the well-being of every human being … and sufficiently substantial to offer other human beings reason to respect and to sustain the quest for well-being on the part of each of their fellows” (p. 87). Macklem’s article is particularly valuable in that it analyses two controversial issues—what is religion and why should it be given special protection in a secular state—from both religious and secularist perspectives.

Next, Anthony Bradney discusses the problem of the “obdurate believer”, meaning those “rare individuals who do not see their religion as being private or peripheral” (p. 90). According to Bradney, the law’s current approach to obdurate believers fails not only to contextualise religious practices but also to understand the religious worldview of the believer, even going so far as to demand that believers change their behaviour to conform with broader social norms. Bradney argues convincingly that as long as believers do not infringe on the “value choices” of others, they should be permitted to live as they wish (p. 104).

The final section of the book deals with questions of identity. Victor Tadros analyses the ability of the individual to create his or her own sense of self and the assumption that rights-based theories will assist in that endeavour. Foucault’s work features heavily in Tadros’s discussion, with Jacques Derrida and Drucilla Cornell also figuring prominently. The major
problem with Tadros’s piece is the absence of any link to the particular problems associated with religion, religious faith, or religious believers. While the editors do say that faith is broadly defined, this article does not seem to be particularly within the mandate of the book, valuable as its discussion may be to the larger debate over rights.

Maleiha Malik focuses on how “identity politics” relate to the recurrent problem of authority. Because people of faith perceive themselves as subject not only to state authority but also to religious authority, there will be times when the religious individual is faced with conflicting duties. Malik argues that any system that disregards the role of faith in the lives of believers does so at its own peril. Malik specifically takes issue with Rawls’s attempt to “contain” “unreasonable and irrational” religious beliefs, since to do so will likely “fail in exactly those situations where there is the most urgent need to make faith-based practices intelligible” (p. 147).

As the above demonstrates, this is an extremely diverse collection of articles, and some readers will enjoy the book for precisely that reason. Others will wish the editors had included more of one type of essay than another. In compiling a collection such as this, one cannot hope to please all people. However, one may hope that, by illustrating the many connections between law, religion, and legal theory, this book will inspire increased scholarship in this area of law.

S.I. Strong


It is one of the pleasures of being book review editor that one can choose the texts to review oneself. It is rare that there is such a delight as finding new editions of both of the most venerable books in the subject of conflict of laws or private international law published within a couple of months. The esteemed Dicey and Morris, now in its thirteenth edition since 1896, has been passed carefully from the hands of Dicey himself, through Berriedale Keith and John Morris to Lawrence Collins and his team. Cheshire and North, also in its thirteenth edition, is the upstart first published in 1935. It is now in the safe custody of Professor James Fawcett and Sir Peter North.

This reviewer has found writing a review of these two masterly texts the most daunting prospect. Both are very long and neither one is written to be read straight through. It may be unorthodox to admit, but this reviewer cannot claim to have read every word. Nevertheless, the great majority of each book has been investigated. Each book has a hallowed and certain place on the shelves of anyone interested in the subject: academic, practitioner, or even wealthy and diligent students. So why might a review be appropriate? First, there comes a time in any work’s life when a certain
reassessment of its style and content is required. This is particularly marked when the subject covered has moved dramatically. A guide through the dismal swamps of the past to the sunlit uplands of the future of conflict of laws has never been more necessary. Secondly, what audience do they now address? Thirdly, do the texts still merit their respective reputations? There must be a resounding affirmation of the latter: both are extremely carefully researched and written. There are no real competitors for breadth of coverage for all areas of the subject. Nevertheless, there are other excellent specialist works on particular areas. For example, this reviewer tends to reach for O’Malley & Layton’s European Civil Procedure (now sadly rather out of date) or Briggs & Rees’ Civil Jurisdiction and Judgments as often as Dicey & Morris or Cheshire & North when worrying about jurisdictional questions, particularly of the Brussels Convention. That leaves the first two questions to be answered.

Dicey & Morris is still pre-eminent as the practitioner’s work. It has retained the same format of rule, exception, comment and illustrations and there would be loud indignation at any change to this successful formula. The work has been referred to in at least 480 reported judgments, usually favourably. This reviewer therefore be idiosyncratic but finds the format beginning to creak. For a busy practitioner or judge, a rule is a godsend: something certain that can be pulled down and applied with little concern for details such as a lack of truly binding authority. Nevertheless, law is not really like that and the eminent writers of Dicey & Morris know it. The rules are so flexibly drafted in some areas (restitution, for example) that they can be interpreted in a number of ways. In others, the rule and exceptions are very long, amounting to little more than an amalgamation of the decided cases. Nevertheless, there is a temptation to rely on the words as almost statutory, with the risk of some sloppy thinking. Careful reading of the commentary is needed for a full appreciation of the complexity of much of the subject. Going back to check the primary sources is also necessary. To an academic, Dicey & Morris’ great strength used to be that it was the most comprehensive source of all cases, English and commonwealth, as well as periodical literature on any area in the conflict of laws. However, it is this reviewer’s impression that the footnotes have been culled somewhat in the present edition. In future one will have to rely on a myriad of other sources (particularly the electronic ones) to locate all the relevant material.

Cheshire & North has also suffered cuts, but of a more fundamental nature. The authors, rightly in this reviewer’s view, wanted to keep it at a manageable size while including important new areas such as restitution. Therefore, corporations and bankruptcy have been omitted, along with some of the early history of the subject. These cuts, though regrettable, are a better solution than less coverage of all subjects. The book is an excellent alternative to Dicey & Morris, dealing with the subject in a more critical and discursive manner. Cheshire & North is still sufficiently grounded in practicalities, however, to be of use to a practitioner. It has been referred to in at least 170 reported cases. For able students, in particular, it is unrivalled. Cheshire & North is probably too dense and detailed for those with less time (on modular courses, perhaps) or aptitude. Such students are already well supplied with alternatives, such as Collier’s The Conflict of Laws (when the new edition arrives) or Clarkson and Hill’s Jaffey’s Conflict of Laws. There are occasions when the text rambles and becomes
convoluted. This is often because the writers want to make a number of interesting points but one does have to concentrate hard to follow the main line of argument. Also, the publishers could lay out the work so as to make headings and subheadings stand out more. Cramming as many words onto a page so as to cut down the total number of pages leaves too little of that all-important white space around the words. Sections then rush on one after the other and there is no possibility of a micro-second’s reflective consideration. Dicey & Morris suffers similarly though at least the rule approach plus paragraph numbering neatly delineates the areas under discussion.

As with all law books at present, the Woolf Reforms have made for complicated references to claimants and plaintiffs, writes and claim forms depending on the context. These are inevitable but make for unattractive language. More problematic are the changes to Part 6 CPR. These replace Order 11 and make both these great works out of date already. One might say that there is little difference in substance but the wording has certainly changed and we have yet to see whether this has an effect on the rules. Cases have a nasty habit of changing the law too, especially in such a fast-developing area. Universal General Insurance v. Group Josi Reinsurance SA [2001] Q.B. 68 was decided too late for either work and may sound the beginnings of the deathknell for the beloved doctrine of forum non conveniens in cases where a defendant is domiciled in England. In addition, that doctrine has been recently interpreted in two House of Lords decisions in Lubbe v. Cape Plc [2000] 1 W.L.R. 1545 and Berezovsky v. Michaels [2000] 1 W.L.R. 1004. The ECJ’s decision in Krombach v. Bamberski (2000) The Times, 30 March, is important for its interpretation of Article 27(1) of the Brussels Convention. Also, there have been many cases on jurisdiction agreements (such as Donohue v. Armco Inc. [2000] 1 L.I.R. 579) since the publication of these works.

In conclusion, everyone with any interest in conflict of laws still has to have both these admirable books on their shelves. They amply deserve their place there. Nevertheless, it would do neither the law nor the subject any good if the adoration of these great works leads to unreflective acceptance of the writing therein as the equivalent to the opinion of an undivided House of Lords. Also, one cannot rely on either as comprehensive or up-to-date. Time-pressed or indolent lawyers, beware!

Pippa Rogerson


To be writing a textbook on the law of evidence just now is something of a bed of nails. Few subjects can rival the rapidity of change with which lawyers in this field lately have had to come to terms. This fifteenth edition of Phipson’s classic work on evidence, a book that was first published in 1892, appears a full decade after its predecessor. Two things will strike the reader. On the one hand, the fifteenth edition has had to take account of an enormous amount of new law. In the criminal domain, the hearsay rule
has developed fresh impetus, notably in consequence of the House of Lords’ curious decision in *Kearley* [1992] 2 A.C. 228 confirming that the rule applies to both express and implied assertions—the editor acknowledges in his preface that Lord Hoffmann “tried once again to save us from error in relation to the hearsay rule” but leaves the reader to guess what form these wise counsels may have taken; the suspect’s and the accused’s right of silence has become an attenuated thing of fearful complexity, thanks to ss. 34–38 of the Criminal Justice and Public Order Act 1994 and the fecund case law it has spawned both in domestic courts and in the European Court of Human Rights; the Criminal Procedure and Investigations Act 1996 has introduced a new and not entirely successful regime of pre-trial disclosure; the old corroboration requirements have been abrogated; mildly perplexing rules which alter the way in which the trial judge must now treat any accused of previous good (or relatively good) character (*Vye* (1993) 97 Cr.App.R. 134 (C.A.) and *Aziz* [1996] A.C. 41 (H.L.)) have emerged virtually out of thin air; the Youth Justice and Criminal Evidence Act 1999 has introduced obsessively detailed, if well-meaning provisions designed to protect vulnerable witnesses when they testify; and so on. Meanwhile, in the area of civil evidence fresh legislation has been introduced, in the guise of the Civil Evidence Act 1995 and the Civil Procedure Rules, freeing civil proceedings of most of their remaining evidential shackles.

Whilst being struck by the quantity of new material in the fifteenth edition, the informed reader will also be aware that even in the few months that have elapsed since this text was delivered to the publishers an immense amount has happened. This is not merely the predictable consequence of the entry into force of the Human Rights Act 1998 but, one suspects, is also the deliberate handiwork of a judiciary that has grown a trifle impatient of the traditional anfractuosities of the law of criminal evidence. The House of Lords does seem to have pronounced judgment in an uncharacteristically large number of recent evidence cases. In the realm of other misconduct evidence, for example, in *R. v. Z.* [2000] 2 A.C. 483, contrary to previous received wisdom, it decided that evidence of a defendant’s previous acquittals may be admissible under the similar fact principle; in *Morgans v. D.P.P.* [2000] 2 W.L.R. 386 the House delivered a further important decision on the evidential effect of the provisions of the shortly-to-be-replaced Interception of Communications Act 1985; in *Attorney General’s Reference No. 3 of 1999* [2001] 2 W.L.R. 56 the Law Lords handed down judgments reversing the Court of Appeal’s earlier interpretation of s. 64(3A) of PACE, construing that provision in such a way as to permit the adduction of evidence deriving from the use of a DNA sample which the police ought to have destroyed under the Act following the accused’s earlier acquittal; in *Forbes* [2001] 2 W.L.R. 1 the House of Lords delivered itself of an important ruling, overturning the Court of Appeal’s decision in *Popat* [1998] 2 Cr.App.R. 208 and settling when an identification parade must be held according to the mandatory terms of PACE Code D:2:3. The Court of Appeal, too, has been busy, notably in the wake of the Human Rights Act. To take just one cluster of cases, the Court has now handed down significant rulings on more than one occasion dealing with the presumption of innocence, guaranteed under art. 6(2) of the ECHR, and criminal statutes that place a burden of proof on the accused—notably, in *Lambert* [2001] 2 W.L.R. 211 and *Benjafield*

How does *Phipson* afford these twin challenges? First, to take account of the quantity of new developments the editorial team has increased from three members to seven, the team even being afforded for the first time by an academic component. The chapters, too, have been re-organised to some extent to take account of new major topics within the subject, such as the silence provisions in the Criminal Justice and Public Order Act 1994, which have a chapter to themselves. The book as a whole has of course been updated, wherever necessary—although the general presentation is unchanged. *Phipson*, however, has gained a 171-page appendix of “Miscellaneous Statutes and Orders”, which seems to add little of value to the work. Secondly, to cope with continuing changes in the law, cumulative supplements are now promised. *Phipson* remains without question the leading practitioner work of reference on the law of evidence. Its coverage, as ever, is comprehensive, and the editors have done sterling work in this latest edition. The practising lawyer in search of a rule or an authority can continue to turn to the pages of this book with confidence.

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