BOOK REVIEWS


Jules Coleman's impressive, thought-provoking book is divided into three main parts, which are unified (somewhat loosely) by his reflections on the pragmatist ideas that inform his analyses. In the first part of the book, Coleman focuses on a number of methodological questions relating to his own philosophical theory of tort law and to the rival theories developed by proponents of the law-and-economics movement. Though some of his critical observations on law-and-economics are not novel, they are tellingly and perceptively articulated. Furthermore, his methodological ruminations on his own account of tort law—an account that explicates tort law as the embodiment or practice of the principle of corrective justice—are illuminating. It is in the first main part of the book that the subtleties of the volume's title become most evident.

Still, although the arguments by Coleman in Part One are generally powerful and well presented, they are not entirely invulnerable to criticism. Two points should be mentioned here in passing. First, it is unfortunate that he builds into his principle of corrective justice a specific mode of rectification. As he states, his principle holds “that those who are responsible for the wrongful losses imposed on others have a duty to repair those losses” (p. 22). This conception of corrective justice as an ideal effected specifically through compensatory payments by tortfeasors to their victims is regrettable partly because it saddles that ideal with a restriction that was never attached thereto by Aristotle, the great progenitor of the tradition of Western thought about corrective and distributive justice. In addition, that restriction is plainly in tension with some prominent aspects of English (and American) tort law, such as the rights of insurers to subrogation, and the recovery of social-security benefits through payments by tortfeasors to the state which result in commensurate deductions from the compensatory payments owed by the tortfeasors to their victims. In light of those features of English (and American) tort law, huge swathes of that law would lie largely or wholly outside the domain of corrective justice as Coleman defines it. On this particular point, then, the conception of corrective justice which he championed during the 1970s and 1980s—in which he left open the specific mode of rectification—was preferable to the conception which he has espoused since the early 1990s.

A second query worth raising here is connected with Coleman's rejoinders to libertarians such as Richard Epstein. Although the prime target of the strictures in Part One of The Practice of Principle is the law-and-economics movement, libertarianism—the key tenet of which is that “one owns the causal upshots of one's actions”, whether those upshots be beneficial or untoward (p. 47)—also undergoes some pummelling. Like Stephen Perry, Coleman complains that a principle of strict causal liability
leads to indeterminacy in virtually all cases. In any typical tort case, both some actions of the defendant and some actions of the plaintiff were but for causes of the mishap from which the plaintiff has suffered injury. Hence, Coleman argues, we cannot decide between the parties by recourse to the concept of causation; we cannot decide between them “independently of some normative standard of care” (p. 47). Now, although Coleman is correct in maintaining that the libertarians’ reliance on the sheer concept of causality is otiose, he moves too quickly to the conclusion that the only alternative for the libertarians is the invocation of some normative standard of care. They can instead adopt a more sophisticated understanding of causation and can advert to the property of causal salience as their touchstone for assigning liability. Causal salience is the importance of a cause as a cause, cashed out in probabilistic terms. What has to be measured is the extent to which the actions of each party increased the \textit{ex-ante} probability of the occurrence of a mishap like the one that ensued, against the background of the other circumstances present (crucially including the actions of the other party). If the defendant’s conduct raised the \textit{ex-ante} likelihood of such a mishap to a greater extent than did the plaintiff’s conduct, then the defendant is to be held liable under the modified libertarian test for liability. To be sure, evaluative judgments will be necessary in the course of ascertaining the relevant probabilities. However, just as the evaluative judgments necessary for a philosophical analysis of the concept of law can be theoretical-explanatory rather than moral-political—as Coleman rightly insists—much the same is true of the evaluative judgments needed for gauging the causal salience of the parties’ actions. It is not the case, then, that libertarians must perforce resort to morally fraught standards of care in order to operationalise their criterion for the assignment of liability.

Part Two is the longest of the three major sections of \textit{The Practice of Principle}. Coleman there focusses on the conventionality of law and on the role of moral principles in the law. In so doing, he defends the legal-positivist thesis that any legal authority and any tests for legal validity are products of conventions, and he considers at some length the nature of those conventions. He contends that the modelling of those conventions as solutions to game-theoretical coordination problems is unduly confining, and he looks to the work of the philosopher Michael Bratman for an alternative model. He draws upon Bratman’s account of shared cooperative activities, the innumerable undertakings in which people who share certain attitudes and objectives manage to coordinate their efforts by regularly evincing mutual responsiveness and supportiveness as they interact toward their common aims. Coleman argues that, when legal conventions are understood along the lines laid out by Bratman, a medley of objections to legal positivism can be overcome readily and systematically.

Though Coleman’s discussions of the nature of legal conventions are valuable, a few critical observations should be advanced briefly here. First, Coleman submits that H.L.A. Hart thought of legal conventions—most notably the Rule of Recognition, in accordance with which the officials of any legal system ascertain the existence and contents of the system’s norms—as solutions to game-theoretical coordination problems. His initial attribution of this position to Hart is quite tentative: “Arguably, Hart conceived the rule of recognition as what we would nowadays refer to as a ‘coordination convention,’ in the formal or game-theoretic sense” (p. 92).
Slightly later, however, Coleman declares more firmly that Hart “was wrong . . . to conclude that the rule of recognition represents, in effect, a Nash equilibrium solution to a game of partial conflict” (p. 97). Neither of these assertions is accompanied by any citations to Hart’s work. Whether any pertinent citations could have been adduced is dubious. Hart never referred to the game-theoretical literature, and he did not employ the vocabulary of game theory at all. The general tenor of his analyses of social rules and legal conventions is in fact well conveyed by what Coleman says about the application of Bratman’s theory to the workings of legal systems: “The practice of officials necessary to create and sustain law is a more general form of social coordination, a form that is otherwise familiar to us” (p. 97).

Second, at several junctures Coleman inadvisably broaches a certain limit on the range of motivations that can impel officials’ adherence to the Rule of Recognition that underlies their legal system. Although he is correct in thinking that such adherence consists in exhibiting the critical reflective attitude or internal viewpoint which Hart delineated, he is wrong in thinking that officials’ adoption of the critical reflective attitude must stem from punishment-independent considerations. Among his repeated statements of this erroneous view, the following passage is the lengthiest: “[T]he very possibility of a sanction attaching to some rules presupposes the existence of other rules that create the capacity or authority to sanction, and that identify to which rules the sanction applies. It would be viciously circular to explain the authority claimed by these ‘secondary’ rules in terms of the sanction. For any legal system, therefore, there must exist an important class of rules that officials regard as authorizing the subordinate rules promulgated under them, and whose capacity to guide conduct cannot be explained in terms of sanctions” (p. 71). As Coleman later declares: “To take the internal point of view toward rule-governed behavior is to take the rule—and not an external sanction—as the reason for one’s compliance” (p. 82). In proclaiming this limit on the range of motivations that can prompt the adoption of the internal viewpoint, Coleman has succumbed to a fallacy that was exposed by Gregory Kavka two decades ago in his extremely important discussion of “perfect tyranny” (presented afresh in his *Hobbesian Moral and Political Theory* [Princeton, 1986]). As Kavka demonstrated, a legal system can exist wherein every official in performing his role is motivated exclusively by fear of the punishments that will be inflicted on him by his fellow officials if he does not exhibit the critical reflective attitude toward the system’s norms. Although such a situation would not typically last for very long, it could quite coherently arise and continue. More likely and more stable would be a legal system in which the adherence of some officials to the Rule of Recognition is motivated by fear of the punishments that will be imposed on them if they do not perform their roles satisfactorily. In short, it is not the case that legal officials’ adoption of the critical reflective attitude toward the norms of their system must be based on punishment-independent reasons, and it is therefore not the case that the operations of a legal system must be based (wholly or partly) on the motivational force of such reasons. Fear is among the factors that can underpin officials’ steadfast implementation of the laws of their regime.

Third, while Coleman’s resort to Bratman’s account of shared cooperative activities is adept and fruitful, it is misleading in some respects.
For one thing, Bratman’s exposition is especially apt in application to small-scale activities. Notably, each of the examples of shared cooperative activities which Coleman mentions—“taking a walk together, building a house together, and singing a duet together” (p. 96)—is a collaborative undertaking on a very small scale indeed. In application to a national legal system that encompasses millions of judicial and administrative officials, Bratman’s analysis is less germane. In particular, the analysis (when so applied) understates the degree of explicitness and formality and hierarchy required for a workable level of coordination among those multititudinous officials; and it overstates the degree of cooperativeness or mutual supportiveness that must obtain among them. For Bratman, a characteristic feature of a shared cooperative activity is a commitment to mutual support (p. 96). In other words, he emphasises the obligingly helpful relations among the participants in such an activity. In application to a legal system, Hart’s emphasis on the preparedness of officials to monitor one another and to discountenance deviations by one another from the system’s norms is in some ways more illuminating. Although mutual supportiveness among officials is almost always present to a considerable extent in a healthy legal system, mutual vigilance and upbraiding are frequently even more important. When hundreds of thousands of officials have to interact reasonablyconcertedly in order to sustain the operativeness of a legal system, their inability to get to know one another will often lead them to deal with one another less trustfully and complaisantly and flexibly than would be true of people singing a duet or building a house together. In sum, without the critical reflective attitudes highlighted by Hart, the supportive reflective attitudes highlighted by Bratman would generally be insufficient to secure the regularity of a legal system’s workings.

The remainder of Part Two of The Practice of Principle is devoted to a defence of “Inclusive Legal Positivism” against “Exclusive Legal Positivism”. The latter school of thought, associated most conspicuously with Joseph Raz, contends that the criteria for the status of norms as legal norms in any regime of law cannot lay down moral tests. Inclusive Legal Positivism, as designated by Coleman, consists of two theses that are each at odds with the Exclusivist stance. First is the claim that the criteria for legal validity in any particular legal system can include, but need not include, a requirement of consistency with various moral values. In any legal system, that is, the consistency of norms with the demands of morality can be a necessary condition for their status as laws within the system. A second claim, which Coleman has heretofore labelled as “Incorporationism,” is that the correctness of a norm as a moral principle can be a sufficient condition for the status of the norm as a law within any legal system in which the officials treat such correctness as a hallmark of legal validity. Their adherence to a law-ascertaining criterion which establishes that hallmark as such is by no means inevitable, but it is perfectly possible. When the officials do abide by such a criterion, the principles endowed with legal validity thereunder are full-fledged laws. (I shall henceforth use the phrase “Inclusive Legal Positivism” for the first of the two theses which Coleman defends, and I shall use the term “Incorporationism” for the second of those theses.)

Much of what Coleman says in defence of Inclusive Legal Positivism and Incorporationism is highly admirable, as are his earlier defences of those doctrines. However, this portion of his book is vulnerable to several
objections, three of which will be outlined here. First are some points of personal privilege. Four pages of Coleman’s discussion launch an attack on some unnamed Inclusive Legal Positivists who are said to misunderstand the nature of the Exclusivist challenges to their position (pp. 111–114). Given that Coleman in those pages employs some terminology which I have employed in my own writings on Inclusive Legal Positivism and Incorporationism, and given that he cites an article of his which includes some criticism of me, he appears to have me in mind as the anonymous object of his strictures. In that event, his remarks are misguided. He suggests that I have mistakenly presumed that the Exclusivist Legal Positivists are preoccupied with the controversial character of moral principles. Such a suggestion misrepresents the purport of my arguments. I have focussed on the controversial character of moral principles not in order to combat Exclusive Legal Positivism, but in order to explain why Coleman’s version of Incorporationism is unilluminating. Hence, when Coleman repeatedly declares that “[c]ontroversy is not the issue for the exclusive legal positivist” (p. 114, emphasis in original) he is pointlessly correcting an error that has not been committed by anyone (save by Coleman himself in a 1996 essay). He also suggests that I defend only Inclusive Legal Positivism and that I reject Incorporationism. In fact I sustainedly champion Incorporationism, though I advocate a version quite different from his. He further implies that I have denied that a Rule of Recognition comprising only Incorporationist criteria is possible. In fact, I have repeatedly affirmed the possibility of such a situation. My point has never been that the idea of a thoroughly Incorporationist Rule of Recognition is incoherent. Rather, my point has always been that the tenability of such a Rule of Recognition in a society of any substantial size is overwhelmingly unlikely. A legal system wherein every official thinks that she performs the role of Hamlet by virtue of carrying out her responsibilities is certainly possible but is overwhelmingly unlikely; quite the same is true of a legal system with a thoroughly Incorporationist Rule of Recognition in a society much larger than a handful of families. Yet another misconceived accusation by Coleman is that I do not “answer Dworkin’s original objection” to legal positivism (pp. 113–114). In fact, my version of Incorporationism—which highlights the role of moral principles in hard cases—is much more finely tuned than Coleman’s version as a rejoinder to Dworkin, who focussed precisely on the role of moral principles in hard cases. Equally ill-advised is Coleman’s assertion that my position “confuses a conceptual argument with an empirical one” (p. 114). I have all along made clear that my wariness of his version of Incorporationism is based partly on empirical premises. Even stranger is the following footnote, which is clearly a response to my critique of his version of Incorporationism: “[T]his is not to say that there are no constraints on the criteria of legality. The criteria are expressed in a rule of recognition that is a social rule. Thus, the criteria must be capable of supporting convergent behavior among officials. This is a conceptual constraint, imposed not by any commitment of positivism but by the concept of a social rule” (p. 108, n. 11). Given that legal positivism is committed to the thesis that the criteria for legal validity in any system of law are profoundly conventional, Coleman’s claim that his conceptual constraint cannot be traced to “any commitment of positivism” is
mystifying. In sum, Coleman’s ripostes to me are baseless distortions that are unworthy of the rest of his commendable book.

A second weakness in Coleman’s discussions of Inclusive Legal Positivism and Incorporationism emerges during his efforts to refute Scott Shapiro’s contention that moral principles validated as laws under an Incorporationist Rule of Recognition cannot genuinely affect the practical reasoning of anyone for whom that Rule of Recognition itself provides reasons-for-action. Coleman concentrates on showing that the principles *qua* laws can provide epistemic guidance to everyone who is subject to them. His reasoning in support of that point is deftly resourceful; indeed, as is maintained by Wil Waluchow (in “In Pursuit of Pragmatic Legal Theory,” 15 Canadian Journal of Law & Jurisprudence 125, 148–149 [2002]), Coleman’s arguments are more sturdy than Coleman himself appears to recognise. However, those arguments are largely beside the point, since the truly formidable crux posed by Shapiro pertains not to epistemic guidance but to motivational guidance. That is, Shapiro maintains that anyone provided with reasons-for-action by the criteria in the Incorporationist Rule of Recognition cannot be provided with any further reasons-for-action by the principles that are validated as laws under those criteria. Coleman’s ingenious arguments relating to epistemic guidance do nothing to rebut Shapiro’s critique relating to motivational guidance.

Third, in replying to Shapiro’s critiques, Coleman opts for a tack that has previously been adopted by Waluchow, Kenneth Himma, and me. He writes: “Instead of abandoning the claim that law must be capable of making a practical difference, all we need give up is the claim that this is a conceptual constraint on *each* law. Surely it does not follow logically that because law must be capable of [providing motivational guidance], no norm can count as a law unless it is capable of [providing motivational guidance] in the requisite way” (p. 143, emphases in original). Effective though this retort may be against Shapiro, it is not really available to Coleman. After all, Coleman espouses a version of Incorporationism that not merely allows but highlights the possibility of a legal system in which the only criteria for legal validity are Incorporationist criteria. In other words, he highlights a situation in which *no* law within a legal system is capable of providing motivational guidance. By centring his position on such a situation, he largely deprives himself of the ability to fall back upon the retort quoted above.

Part Three of *The Practice of Principle* returns to methodological issues, with some detailed explorations of the status and entailments of the analyses undertaken by legal philosophers. A number of the points made in this final part of the book are not novel, but they are generally articulated skillfully and insightfully. Only one criticism need be raised here. Coleman inexplicably denigrates the legal-positivist insistence on the separability of law and morality. As I have emphasised in my *In Defense of Legal Positivism* (Oxford, 1999), that insistence consists in an array of theses stemming from different ways in which morality can be understood. Coleman singles out only one of those theses, the claim that “a legal system in which the substantive morality or value of a norm in no way bears on its legality is conceptually possible”. He submits that “[t]he truth of this claim seems so undeniable as to render it almost entirely without interest; the claim it makes so weak, no one really contests it” (p. 151). He
concludes: “We cannot usefully characterize legal positivism in terms of the separability thesis” (p. 152). Let us begin by noting that Coleman errs in declaring that no one contests the particular claim which he has singled out as the positivist affirmation of the separability of law and morality. Michael Moore, Deryck Beyeveld, Roger Brownsword, Michael Detmold, and others have contested that claim during the past couple of decades. More important, Coleman’s dismissal of the significance of the separability thesis is due entirely to his fixing upon the least controversial variant of that thesis to the exclusion of other variants. Especially during the past three or four decades, most of the interesting debates between legal positivists and their opponents have revolved around other renderings of that thesis, involving different senses or dimensions of morality. As Coleman himself later acknowledges (p. 193, n. 21), we shall find those debates largely unintelligible if we do not realise that they are centred on the separability of law and morality. When the positivist affirmation of that separability is grasped in its multi-faceted richness—rather than simply in its most pullid formulation—we can see that it indeed forms the heart of legal positivism. To slight that affirmation is to darken counsel by rendering opaque most of the disputes between legal positivists and their adversaries.

This review has had to skip over most of the details of Coleman’s arguments and analyses. Suffice it here to say that those arguments and analyses offer ample food for thought on the part of anyone interested in legal philosophy. Coleman has enabled his readers to deepen their contemplation of the issues which he addresses.

MATTHEW H. KRAMER


Entails were abolished in Scotland nearly a century ago, and recently English entails, at the bidding of the Law Commission, have come under the ban of the law. So it is perhaps timely to have a work which traces the origin and growth of this peculiar interest in freehold land, and its development into a perpetuities interest until made destructible by way of common recoveries. This monograph takes the reader through the span of the later middle ages; it is effectively a study of the dynamics of land and family law during this period. As anyone who has striven to follow the effect of De Donis (1285) and the later complexities of the common recovery can appreciate, the subject-matter presents difficulties, and additionally there has been a dearth of knowledge as to the theory and practice of entailing land. The author has been conscious of this, for there are helpful summaries both forward and backward looking, much as occasional oasis relieves a trying territory. It is not without interest to note that this work started over ten years ago (at the instance of Professor Sam Thorne) as a study of the common recovery and then extended beyond into entail, as so could be read backward if following the author’s own studies (almost as a series of essays), but it seems easier to begin at the beginning.
The first of the six chapters considers conditional fees before De Donis and the changes in the law and practice of maritigium. Since mort d'ancestor (1176) lords could no longer refuse admission to the heir of the tenant, and so grants developed restricting the line of qualified heirs and excluding collaterals. In this early period the author has been able to take advantage of the work of Milsom and Brand on early formedons. Perhaps his most significant observation is the different approach of the judges to succession to such qualified fees as contrasted with their treatment of alienations. Since Maitland’s time it has been generally thought that a grant to a donee and the heirs of his body was regarded as enabling alienation when there was such an heir to inherit the fee. The author takes a different view, presented in much detail and (at pp. 31–32) he produces a case of 1281 where a reversioner claimed where the donee of entail had had two sons who predeceased her, and which he believes “did much to motivate the enactment of De Donis in 1285”. Whether a single case in eyre could trigger such a sweeping response may be considered doubtful, unless the litigants were pre-eminent persons.

The second chapter moves on to De Donis and its aftermath, particularly the growth of the “perpetual” entail. The text of De Donis is subject to very close analysis; it is a text which is not a miracle of drafting, when one recalls the trouble that the ambiguous word “issue” has given rise to down the centuries in wills and conveyancing. The author then turns to a study of descender writs to trace the effect of the statutory restraint on alienation. “Legal historians”, he says “who have speculated about the duration of entails have not looked at the plea rolls”. Since the record gives writ and claim, and since the claimant had to claim as heir to the last ancestor dying seised, it is possible to see how many descents were relied on in such writs. This is an admirable account of the stages of growth in the enduring entail. The process involves adopting the hypothesis that Chancery controlled the reach of descender writs (in effect following Professor Robert Palmer on a kind of secondary legislation in Chancery). Four stages of extension are shown until in the first half of the fifteenth century the entail became inalienable; it is curious that the extensions seem to have occurred in the early years of new reigns 1310, 1330 and the 1420s. It is not easy to discern political motive, thought it may be recalled that Henry IV did ensure an entail of the crown by parliament, and this perhaps inspired early lancastrian chancellors. Perhaps it was a simpler notion that as generations passed, “the will of the donor” so cherished by De Donis needed extension.

Chapter three, “Living with Entails”, is about how entails were employed and is mainly concerned with family settlements. Maritigium, so influential in the early development of entails, gave way to jointure settlements on marriage, and entails also have a role in intergenerational transfers. The frequency and use of entails is illustrated from some elaborate analysis of final concords from a sample of counties over 180 years. Chapter four examines how the doctrine of assets by descent and collateral warranties might be used to bar entails before the invention of common recovery. The latter device was an arrangement for the collateral descent of a warranty given by an alienating tenant in tail upon the heir who was consequently barred. Effective when it worked, it was nevertheless far from satisfactory as a sovereign remedy against perpetuity. To have the
warranty and the title descend collaterally was not always possible, and where possible, precarious.

The two closing chapters describe, first, the origin and development of the common recovery and second, the common recovery in operation. The common recovery was of course much more than a disentailing device; it is one of the central features in the history of conveyancing. The machinery, or how it worked, has never caused much difficulty provided that one is prepared to follow the formalities of a real action. The theory, or why it worked, has cause more headache. The headache has been usually brought on by indigination with the idea that satisfaction could be obtained from the voucher, a penniless puppet. Less difficulty has been felt over the effect of collusive judgment in transferring title. The civilian analogue is cessio in iure, but this naturally was quite unknown to the inventors of the common recovery. The strength of this study is that the record evidence is related to the courtroom discussions and inns of court lectures. The record tells us what was done; the debates and discussions what the lawyers thought they were doing. “Sometimes it looks as if practice was ahead of theory. Other times it looks as if theory was ahead of practice” (pp. 261–262). A part of the difficulty mentioned above must be that the theory changed, as did the practice (though not synchronously). A writ of right led easily to a theory of preclusive effect of judgment, but after 1490 writs of entry were used instead. The change seems to have been associated with the rise of a theory of recompense, as is witnessed by Brudenell’s Inner Temple lectures in 1491. The final stages in the mechanism were to introduce double or multiple vouchers, a voucher being needed because simple default or concession by the tenant had been ruled out by the legislation of 1285.

With regard to the operation of the common recovery the author extracted over a thousand recoveries between 1440 and 1502, and in 334 of these it has been possible to provide from extraneous sources some context and indication of the purpose of the transaction. They are fully set out as an appendix at pp. 352–439, where they are categorised as sales of land, transfers into mortmain, dispute settlements, and resettlements. Of these the greater part by far are the first and last categories, that is, a near equal division between land market transactions and family arrangements. The final pages examine the degree of social acceptance of the common recovery which is essentially about its use in disinheriting heirs of entail. The well-known discussion in Doctor and Student may be typical of general attitudes to disinheritance, “but abstract principles do not decide concrete cases” (p. 348). And by 1540 parliament was prepared to allow a final concord to bar the heir of entail. Nevertheless the social acceptance up to 1502 can only be gathered from the actual use of the common recovery. It seems likely that the common recovery was invented when it was because entails had developed into perpetuities. And though it is outside the scope of this book it is instructive to compare this solution to the problem of shackling land with “fettered inheritances” (to use Coke’s phrase) for an indefinite future as contrasted with the solution found a couple of centuries later when executory interests and trusts had recreated perpetuities. Then it was thought that prevention was better than cure.

The whole study is founded on thorough research, and on an ability to handle some very technical doctrine. Indeed Professor Biancalana’s mastery of the materials is such that his explanations or interpretations seem to follow almost as matters of necessity. Nevertheless, there may remain some
places where one might expect further debate. For example, what the
yearbook lawyers said about the preamble to De Donis and the mischiefs
aimed at is not consistent with the author’s view of causes and events. But
then in modern times one can see bench and bar from time to time
inventing legal history “on the hoof” so to say; perhaps 700 years ago
their predecessors were doing just that. Certainly any further work in this
field will have to start from the information and interpretations of this
magisterial monograph.

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Fifteen years after the last substantial UK published work on State
immunity, Lady Fox’s treatise The Law of State Immunity constitutes a
timely and much needed addition to the literature. Indeed, due in large
part to the growing importance of human rights and peremptory norms,
the law of State immunity and international law in general have evolved
considerably since the monographs of Lewis (1984) and Schreuer (1988)
were published. The last five years have been particularly eventful, with
important pronouncements on immunity by the House of Lords in the
Pinochet (1999/2000) and Lampen-Woolfe (2000) cases, by the European
Court of Human Rights in Al-Adsani (2001) and by the International Court
of Justice in the Arrest Warrant case (2002). With the rise of transnational
human rights litigation in North America since the early 1980s and the
possible adoption of the ILC Draft Articles on Jurisdictional Immunities
in the near future, State immunity remains as one of the more controversial
issues in contemporary international law. Clearly, this book is on time and
on point.

State immunity is a doctrine of international law aimed at limiting the
judicative and enforcement jurisdiction of municipal courts in
proceedings involving foreign States or their representatives. While rooted
in principles of international law, State immunity also brings into play
highly technical questions of procedure at the municipal level, and this
duality has been at the core of the problem of achieving a satisfactory
synthesis. But there is a further duality: though State immunity is primarily
a legal matter, it is at the same time notoriously infused with concerns of
foreign relations and policy. As a result, the law of State immunity is
complex and, as evidenced by recent international legal developments, still
in a state of flux. Fortunately for readers (likely to be practitioners,
scholars and students of international law), The Law of State Immunity is
not only comprehensive and meticulously researched, but also very well
written. For its thoroughness and lucidity, Hazel Fox’s treatise is a
considerable scholarly achievement. The author’s expertise on the subject is
manifest: she has published authoritative articles on State immunity over
the last two decades and was involved in the Institut de droit
international’s resolutions on Immunities from Jurisdiction and Execution of
Heads of State and of Government in International Law (adopted at the
2001 Vancouver session of the Institut).
The book is presented in five parts and fourteen chapters. Part 1—Overview and General Principles; Part 2—The Sources of the Law of State Immunity; Part 3—The Current International Law; Part 4—International Immunities other than State Immunity; and Part 5—Current and Future Problems. It is not possible to discuss the detail of every chapter of the book in this review. Suffice it to say that The Law of State Immunity is a treatise that does everything a treatise should: it carefully introduces the reader to the relevant concepts and material, presents them in a logical and coherent fashion and provides thoughtful, balanced analysis. Hazel Fox quite appropriately adopts a layered approach to the subject matter, unravelling its historical and theoretical dimensions in the first few chapters, progressively easing into a thorough doctrinal and practical discussion, which represents the bulk of the tome, and, finally taking on a more analytical and cautiously extrapolative view in the last part of the book.

Part 5 of The Law of State Immunity will likely be the most interesting for those concerned with the future of international law. It consists of four chapters: “State Immunity as a Personal Plea, Distinguished from the Doctrines of Act of State and Non-justiciability”; “State Immunity from Criminal Jurisdiction: The Answerability of State Officials for the Commission of International Crimes”; “Immunity for Acts Unlawful in International Law: The Exhaustion of Local Remedies” and “Conclusions and Future Models”. Here, the author offers insightful analysis of the recent international jurisprudence, including the House of Lords’ recent Kuwait Airways (2002) decision on the justiciability of State acts contrary to public international law committed on the territory of a foreign State. Due consideration is also given to the principal catalysts of the current recessive trend of State immunity, namely human rights, peremptory norms (jus cogens), universal jurisdiction, and the growing importance of the individual in international law. In an a fitting concluding chapter, the author discusses the future of the doctrine of State immunity and queries, among other possible models, whether the doctrine should be abolished as proposed by Hersch Lauterpacht in the 1950s. But despite these developments, the author concludes: “the retention of the current law of State immunity must be the way forward.” (p. 555).

Because the “book is primarily written for English lawyers” (p. 67), The Law of State Immunity focusses understandably on UK and US law. Other Commonwealth jurisdictions receive only incidental treatment. This is not as much a criticism of the book as a caveat to potential readers. There is a distracting number of misprints (the French language quotes suffer especially). Nonetheless, The Law of State Immunity can confidently be regarded as the new classic book on State immunity that we have needed, and will likely remain so for many years to come. The author is to be congratulated for this timely and important contribution.

FRANÇOIS LAROCQUE
In 2002, the *Yearbook of International Organisations* reported the existence of 241 international organisations. With the UN currently having 191 member states—now including East Timor and Switzerland—it is remarkable that there are more international organisations than states in the international community. Admittedly, “international organisation” may be defined in many ways: the *Yearbook* defines it rather broadly as an organisation “which is established by signature of an agreement engendering obligations between governments”. Yet despite the number of international organisations and the recognition that they may have legal personality, they remain excluded from most international dispute settlement processes. Two recent events have highlighted the issue. In 1999, the NATO bombing campaign on Yugoslavia resulted in that state commencing proceedings before the International Court of Justice. NATO, being an international organisation, has no standing before the ICJ; thus, separate actions were brought against each of NATO’s ten member states. The following year, the European Court of Human Rights was the setting for a similar incident: a German shipping company, Senator Limes, aggrieved by a decision of the European Commission, initiated separate proceedings before the ECHR against each of the EU’s 15 members. So although the claimants in each of these cases were able to identify an international organisation as the author of the alleged wrongdoing, those organisations could not be brought before the relevant international court.

A book which considers this incongruity is a collection of papers edited by Laurence Boisson de Chazournes, Cesare Romano and Ruth Mackenzie, titled *International Organizations and International Dispute Settlement: Trends and Prospects*. All three editors are established scholars in the field of international organisations, and the book is made up largely of contributions to a conference held in February 2001 organised by the University of Geneva and the Project on International Courts and Tribunals. The aim of the book is “to analyse the interplay between the multiplication of international organisations on one hand, and of international dispute settlement bodies on the other”, and, in particular, “the issue of the participation of international organisations in international dispute settlement proceedings” (p. xviii). This question is not a new one; it was addressed in 1945 by the UN Committee of Jurists, and again in 1955 in Judge Sir Hersch Lauterpacht’s Provisional Report on the Revision of the ICJ Statute. Nonetheless, the ongoing multiplication of international organisations, and the increased frequency with which disputes are being referred to international courts and tribunals combine to make a reconsideration of this issue timely and relevant.

The book has four main parts. Romano’s overview piece introduces in detail the exclusion of international organisations from most international dispute settlement bodies. He recognises that some international organisations have standing in certain contentious cases before the International Tribunal for the Law of the Sea and the World Trade Organisation, but he notes that only the EC has thus far made use of these
provisions. The EC’s role in contentious cases forms the subject-matter of the book’s first theme. Allan Rosas’ contribution reviews extensively the participation of the EC before the ITLOS, the WTO and other international dispute settlement bodies, and Andrew Clapham’s essay considers the position of the EU before the ECHR.

The second theme concerns international organisations before the ICJ. Of course, as far as the ICJ’s contentious jurisdiction is concerned, the cardinal rule is provided in Article 34(1) of its Statute: “only states may be parties in cases before the Court”. The route for participation by international organisations is more often found in Article 65(1), under which authorised agencies of the UN may request an advisory opinion. Christian Dominé ponders whether a dispute between a UN agency and a state might be resolved by advisory opinion, as they might agree in advance to accept it as binding. A particular problem is identified, being that in such a dispute, only the specialised agency has the power to request an advisory opinion of the Court, thus undermining the principle of equality of arms (and access) (p. 101). Laurence Boisson de Chazournes’ critical essay sees a role for the advisory function of the ICJ in “furthering the common interest of humankind”. She suggests, inter alia, that advisory opinions could play a role in preserving the unity of international law in light of the proliferation of dispute settlement bodies, in that these bodies could request the ICJ’s guidance on questions of international law (pp. 112–113). As appealing as such a reference procedure may be, such processes are unlikely to materialise, but the message is clear: more imaginative use might be made of the ICJ’s advisory function without the need for amendment of the ICJ Statute.

The third part of the book looks at the potential role to be played by international organisations in the submission of amicus curiae briefs. Christine Chinkin and Ruth Mackenzie note at the outset of their chapter that this topic is rather “speculative”, as in the past, it is non-governmental organisations which have been more active in making non-party submissions. Chinkin and Mackenzie draw attention to a rarely-utilised provision of the ICJ Statute, which stipulates in Article 34(2) that the Court “may request of public international organisations information relevant to cases before it, and shall receive such information presented by such organisations on their own initiative”. In addition, the ICJ may also request and receive submissions from international organisations in the context of its advisory jurisdiction. Chinkin and Mackenzie note that international organisations have been more active in making submissions in advisory rather than contentious cases (p. 143). With respect to other courts and tribunals, the statutes of international criminal and human rights courts sometimes explicitly provide for the submission of amicus briefs, and these provisions have, to date, been invoked almost exclusively by NGOs (pp. 145–149).

The question of the legitimacy of amicus briefs in the WTO dispute settlement system was highlighted by the Appellate Body’s promulgation of guidelines for the submission of such briefs in the Asbestos case, and the WTO General Council’s subsequent advice to the Appellate Body to proceed with “extreme caution” on the issue. Chinkin and Mackenzie refer to this episode, which segues nicely into the book’s fourth theme, on the independence of the independence of the judicial bodies from the organisations of which they are organs. The chapter by Steve Charnowitz
concludes that the amicus issue demonstrated “imperfections” in the independence of WTO panels and the Appellate Body (p. 239).

This volume makes a significant contribution to an area of increasing relevance. While the issue itself is not novel, the editors (and authors, not all of whom have been mentioned in this review) have more than exceeded their aims in teasing out the new questions being raised by the process of proliferation of international organisations and international dispute settlement bodies. It is not always easy to discern a central and consistent thesis in such collections, but here, the clear message is this: international organisations are significant players in the international legal order, and it is about time that they are treated as such.

CHESTER BROWN


Mark Bell’s Anti-Discrimination Law and the European Union, the most recent publication in the Oxford Studies in European Law series, provides a cogent overview of EU anti-discrimination law. While raising some interesting issues in the context of examining discrimination on the grounds of race and sexual orientation, it is mostly descriptive in nature, and thus mainly succeeds as an inductive doctrinal text to the area.

Following an introduction laying out the book’s structure are seven thematically organised chapters. Chapter one (“European Social Policy: Between Market Integration and Social Citizenship”) sets forth the two prevailing and inverse frameworks of European social policy, that of market integration and social citizenship. The former model seeks EU integration by increasing economic growth and employment; the latter envisions the EU as ensuring human and social rights. Chapter two (“Emerging Rights of Social Citizenship? Discrimination on Grounds of Nationality and Gender”) focusses on prohibitions against nationality and gender-based prejudices. These are the two most instantiated areas of the EU anti-discrimination cannon due, in some measure, to their confluence with both social policy models.

By contrast, the prohibitions against discrimination on the basis of race and sexual orientation that are covered in the subsequent two chapters, have met with less acceptance. These chapters describe, chronologically, the respective developments in each field. Chapter three (“Racial Discrimination”) illustrates the development of anti-racism provisions culminating with those of EC Treaty Article 13, as well as the Racial Equality Directive designed to implement them. Chapter four (“Sexual Orientation Discrimination”) describes how prohibitions against discrimination on the grounds of sexual orientation came to also be included in Article 13 despite resistance from powerful groups, including the Vatican.

Chapter five (“Exploring Article 13 EC”) provides an exegesis of EU anti-discrimination law subsequent to passage of Article 13. Although clearly evincing a rights-based approach, Article 13 is nonetheless a
framework of principles rather than a legislative scheme, and is therefore limited in its direct effect. Chapter six (“Reconciling Diverse Legal traditions: Anti-Discrimination Law in the Member States”) surveys national laws prohibiting racial and sexual orientation discrimination as a means of understanding, contextually, the role of the EU in fostering anti-discrimination laws. Member states’ legal provisions are catalogued into three levels of protection: equality laws, anti-discrimination laws, and regimes without specific legal provisions. Chapter seven (“The Transformation of EU Anti-Discrimination Law”) analyses Article 13 within the prevailing social policy models presented in the first chapter. It concludes that while Article 13 Directives have moved the EU somewhat in the direction of the social citizenship model, the market integration approach remains a strong presence. The chapter ends with a paragraph of “Concluding remarks” that favour the EU attaining a “careful balance.”

Anti-Discrimination Law and the European Union covers a remarkably rich field in a very short time. As such, it is a useful primer on EU anti-discrimination law. At the same time, many questions remain unbroached. What should be made, for instance, from individual member states’ approbation or resistance to particular areas of anti-discrimination coverage? Or, more broadly, what is the significance of the EU, as a whole, extending anti-discrimination protection to sexual orientation but not (yet) to disability?

M.A. STEIN


Financial globalisation is bringing deep changes to Europe’s capital markets. Yet EC securities regulation is still an immature body of law with its underlying principles imprecisely articulated, if not sometimes ill defined. Niamh Moloney’s book now provides the first comprehensive study of EC securities regulation that both introduces its regulatory content and, in a more analytical approach, tries to distil its underlying principles from the patchwork of sources, to allow systematisation and critical evaluation. The book is timely, as the amount of legislation produced by European institutions makes an attempt at consolidation and analytical penetration ever more indispensable.

The book consists of seven parts, which, after an introductory part one, deal with substantive EC securities regulation in parts two through six, while a final part seven covers its institutional structure.

Part one introduces the highly complex subject matter by placing EC securities regulation into the overall context of EC law, recapitulating Treaty objectives, Treaty bases, forms of and limitations to EC-level securities regulation. A historical overview lucidly highlights three main phases with evolving thematic focal points and methods of integration. These move from a first phase focussing on investment products and attempting maximum harmonisation, via a second phase concentrating on investment services and favouring minimum harmonisation-cum-mutual recognition, to the currently emerging third phase with a more
comprehensive thematic scope and a certain backlash towards stronger harmonisation at EC-level. EC securities regulation is also briefly discussed in the light of general market failure based regulatory theory and the harmonisation vs. regulatory competition debate.

Against this background, the main body of the book deals with substantive EC securities regulation, each part covering a particular regime. Analysis in each part roughly follows a four-step methodology. First, the rationales for and development of EC-level regulation in the particular field are explored. The second step brings an exposition of the relevant directives, which are then in a third step critically analysed in the light of their rationales. In a final step, the changes to come with the Financial Services Action Plan (FSAP) are described and analysed.

Part two thus deals with the EC investment products regime, governing securities and units of collective investment schemes. Lying at the outset of EC securities regulation, this regime constitutes a first attempt at capital market integration by facilitating cross-border issuer access to investors via harmonisation of official listing and issuer disclosure. The critical analysis of this regime traces the dire need of modernisation not only to a failed attempt at maximum harmonisation, but also to an obsolete notion of official listing.

The investment services regime, centrepiece of the second phase, is then covered in part three. This part provides an in-depth analysis of the market stability and investor protection rationales, which, as cross-sector topics, are relevant to all fields of EC securities regulation, if to varying degrees. Detailed discussions of the investment services passport, prudential and protective regulation then expound the difficult coexistence of home and host Member State-control, one of the main shortcomings to be remedied in the reform of the Investment Services Directive (ISD).

Subsequently, part four deals with securities trading markets, focussing on the regulated markets concept of the ISD and its imminent radical reform, reflecting profound industry changes such as exchange competition and the emergence of alternative trading systems. Part five deals with the new market abuse regime, extending beyond insider dealing to all forms of secondary market price manipulation. Finally, part six covers the currently defunct takeover regime.

Throughout these parts, and reflecting the author’s aim at systematisation rather than detailed interpretation of particular directive provision, the exposition of existing directives with their many vague terms remains sometimes rather descriptive. As against this, the overall structural and conceptual analysis is very detailed, and lucidly reveals common features of substantive EC securities regulation. Thus, regulation to date is shown to have served primarily as an integration tool, tearing down obstacles to cross-border market access, whereas substantive re-regulation by harmonised standards has been marked by “philosophical bankruptcy”—i.e., the absence of clearly defined and consistently pursued regulatory objectives. Current FSAP reforms are interpreted as indicators of a fundamentally new approach, with focus shifting towards substantive re-regulation, underpinned by an emerging coherent regulatory philosophy. Although welcome for its promise of more stringent legislation at EC level, this development is nevertheless questionable from the perspective of Treaty conformity, especially in view of the ECJ Tobacco Advertising decision.
(Case C-376/98, ECR I-8419) and the principle of subsidiarity. This tension is clearly revealed throughout.

Complementing this analysis of substantive EC securities regulation, part seven deals with its institutional structure and, above all, its changeover to the “Lamfalussy Model” of regulation, based on comitology. Being the procedural counterpart to the FSAP, this development shares the same fundamental problem: it is desirable as it promises greater regulatory coherence, but its shift of competences from Parliament towards the Commission is problematic from the viewpoint of European institutional balance. The analysis is rounded off with an equally lucid and critical discussion of supervisory structure, between the alternatives of decentralisation-cum-cooperation and a European version of the Securities and Exchange Commission.

Two critical observations may be made of the work. The first concerns its approach, which presupposes a rather high level of economic and industry knowledge. A short introductory exposition might help the non-specialist reader understand the paramount importance of investor protection, as well as its difficult interaction and potential trade-offs with systemic stability and allocative efficiency, which form together the trinity of regulatory objectives emerging beyond market integration. Secondly, it might be regretted that the question of appropriate allocation of regulatory jurisdiction is, despite the reference to the harmonisation vs. regulatory competition debate in the introduction, not pursued in greater detail. As the author points out in her discussion of FSAP regulatory changes, this question might soon be a pressing one to answer.

These minor desiderata aside, the book is an excellent analysis of existing regulation and an invaluable guide to the emerging regime.

BERNADETTE SEEHAFER

**Corporate Governance in Australia and New Zealand. By JOHN FARRAR.**


The title chosen for this book may suggest that it is a work written for an antipodean audience and not likely to be of any great interest to readers outside those two countries. Nothing could be further from the truth. Particular reference is, indeed, made to the law and commercial practice in Australia and New Zealand and the author’s comments largely have their focus there; but this is an undertaking which can be described without exaggeration as global both in its conception and its scope. For the English reader, in particular, there is as full and interesting an account of developments in corporate governance in his own jurisdiction as is likely to be found in any other book on the topic; and there is also extensive reference to American and Canadian materials and practice and to the position in the countries of continental Europe, Japan and China.

No-one but John Farrar could have written this book. He has put into it much of the experience of of a lifetime—or at least of the very full life which he has lived to date—spent as a legal practitioner, teacher and leading author in England and Wales, New Zealand and Australia and one who has served on law reform bodies in all of them. He has travelled
widely and worked abroad and developed many international contacts. He is a voracious reader, not just in the law itself but in economics and other associated areas, and has at his disposal a mine of empirical data, some based on the work of others and some on his own. The reader has the benefit of all of this: it is not unusual to see among the footnotes on a single page references to books, articles, public speeches and official documents published in as many as six or eight jurisdictions. But, in addition, we have the author’s own views and conclusions, invariably independent and thought-provoking, and with no punches pulled: in the Australian uniform companies legislation of 1961 the statutory statement of directors’ duties “was foolishly made the subject of criminal penalties” (p. 15); the Corporations Act 2001 “stands as an obese monument to complexity and confused thinking about modernisation”; the Simplification Task Force “succeeded in further complicating the law” (p. 16); and finally, with reference to the “distinctive culture” from which Australia has approached the subject of corporate governance, “one sometimes has the impression that this lies somewhat uneasily between the culture of the outlaw Ned Kelly and that of his jailer” (p. 431).

It might be inferred from the fact that the book deals jointly with the position in Australia and New Zealand that the law and business practice is much the same in the two. But, particularly as regards the law, this is not so. In contrast with the bulk and complexity of the Australian legislation, New Zealand has a relatively modern and streamlined Act, based primarily on the needs of the small business. Australia has a statutory “business judgment” rule; New Zealand has rejected the idea. New Zealand, unlike Australia, gives minority shareholders automatic buy-out rights in certain circumstances. The rules on insolvent trading and on group insolencies differ. Such disparities allow the author many opportunities to make interesting critical evaluations.

The book extends to thirty-five chapters, about a half of which set out the black-letter rules of law as found in the legislation and the cases, with the author’s own commentary and also, often, with the corresponding provisions from the UK or some other jurisdiction set out for comparison. The treatment in these chapters is amply sufficient to serve as a work of reference for most business and professional readers. In the remainder of the book the subject of corporate governance is tackled from a wide range of aspects, including “A brief thematic history” (Chapter 2), “The concept of the corporation” (with a succinct but comprehensive account of the writings of the law-and-economics school) (Chapters 3, 4), “Key relationships: chairperson, managing director/CEO, company secretary and the board” (Chapter 24), “Systems of self-regulation” (Chapter 27), “Business ethics” (Chapter 32), “Comparative corporate governance systems” (Chapter 33) and “Globalisation, the new financial architecture and corporate governance” (Chapter 34). The book is illustrated with a number of Tables and Figures, and includes as Appendices the full text of five sets of codes, guidelines and principles of corporate conduct published by various antipodean and international bodies. In addition, there are references to (and often quotations verbatim from) overseas codes of practice such as the Cadbury Code of this country.

Space does not allow mention of more than a couple of examples of the author’s own views and his special approach to the subject. First, he challenges the “assumptions of homogeneity” made by writers, legislators
and others in dealing with matters of corporate governance—which may perhaps be appropriate, at least in part, in a United States context but are quite wrongly taken for granted in others. We neglect “the innate diversity of business enterprise” (p. 123). To put this view into practice, he himself deals in separate chapters with corporate governance issues in listed public companies, in small and medium-sized enterprises (and more particularly family-owned businesses), in not-for-profit organisations and in publicly-owned, corporatised and privatised public utilities. Secondly, he is critical of the way in which the duties of different categories of company officers (executive and non-executive directors, members of audit and other committees, senior and middle management, the auditors, and so on) seem generally to be dealt with by judges, scholars and lawmakers in isolation, rather than with reference to the correlative roles and duties of the others. To how many English lawyers, I wonder, would the thought occur that “what we do not need are boards that meddle in matters better left to management, while neglecting the important things that directors alone can do” (p. 308); or “what is required is not so much a skilful director as a skilful board” (p. 126)?

I commend this book to lawyers and non-lawyers alike, and to those in London, Belfast or Edinburgh as much as those in Canberra, Ballarat or Dunedin.

L.S. Sealy


Sue Arrowsmith has done more than anyone to establish public procurement as a legal discipline in the UK. She was a moving spirit behind the inauguration of the UK Association for Regulated Procurement in 1994 and has published much in the subject. Her co-editor, Keith Hartley, is an economics professor and together they have edited this collection of articles by various authors, previously published between 1961 and 2000. The articles appear in their original formatting and preserve their original pagination, as well as having pagination, which runs through the new collection.

The credentials of the editors mark out this large collection as an authoritative survey for anyone wishing to get an overview of the state of academic discussion about public procurement at national, EU and international levels, whether central, local government, health service or defence procurement. For anyone who wants to plunge more deeply into EC public procurement law, the rest of Professor Arrowsmith’s work is a good place to start.

The collection is divided into ten parts—four in Volume I and six in Volume II. These are: Outsourcing versus internal provision; the approach to procurement in the public sector—competition and transparency; corruption; public procurement as a tool of industrial, social and environmental policies; public procurement as a barrier to trade and its regulation under international trade agreements; enforcing public procurement rules; defence procurement; contracting (in the defence related
sector); defence industry methods; and liberalisation of defence markets in Europe. The headings to each part give a good indication of the articles included and demonstrate the breadth of the editors’ approach and the scope and relevance of public procurement as a field for lawyers and economists to study—and also for political scientists, though this is less stressed in the collection than it might be. As the headings also indicate, the two volumes include much material on defence procurement, both in the EU and in the US. A public purchasing practitioner who does not operate in the defence sector will be interested in seeing what techniques have been tried, and with what success, in that heavily regulated and somewhat uncompetitive environment.

The collection opens with a good summary of both parts and gives a useful overview of the main themes of the collection, which enables the reader to dip in and out effectively. It also gives in its first paragraph a fine justification for the entire undertaking, noting that “government purchasing accounted for about 14 per cent. of gross domestic product (GDP) across the European Community”. It is indeed surprising, given the economic and political importance of the subject, that few universities include public procurement in their courses. Over the last five years every major commercial law firm, whose clients are, or who sell to, government, has developed a public sector unit able to handle public procurement matters. Whilst commercial significance is not in itself a reason for taking an academic interest in an area of law, the intellectual value of the study of public procurement should not be overlooked: first because the nature of the activity regulated has itself become more sophisticated and interesting, and more difficult to regulate; and secondly because of the light the regulation casts on underlying political policy objectives at a national and supra-national level.

Public purchasing has changed radically over the last few years. No longer is this a Cinderella activity, for lowly clerks buying pens, shovels, vehicles and the like. Public purchasing needs have become much more complex, leading to the development of sophisticated techniques, in order effectively to buy complex services, sometimes for 25 year contract periods, often in conjunction with privatisation, and more frequently than was the case in the past, with the assistance of private rather than public finance. The scale of this activity gives it a political aspect. But quite apart from its political and constitutional importance, the legal regulation of public procurement, for example by the EU, is interesting because the regulators are trying to regulate an activity, which is radically in flux. Inevitably the early regulation in the EU, which is currently expressed in the Public Sector and Utilities Directives and is now transposed into national legislation in all member states, is detailed and prescriptive and does not cope well, for example, with complex IT procurement (which Professor Arrowsmith touches upon in the eighth essay in Volume II). In 1996 the European Commission published a Green Paper on public procurement in which the Commission tried to blame the relatively minor economic impact of the rules on bad behaviour by member states (certainly a factor) and suggested that the main need was for consolidation of the rules and better enforcement. However the Commission had to take note of the 300 responses, many of which were less than enthusiastic and urged the Commission to simplify and modernise the rules. At a technical level it is hard to get the regulation of public procurement right when the methods
of purchasing are still developing. The effectiveness of periodic competition as against longer-term partnerships is also not at all clear—not whether the two concepts can be integrated. (In the 10th essay in Volume I David Parker and Keith Hartley provide a critique of “The Economics of Partnership Sourcing versus Adversarial Competition” and conclude that the case for preferring the first is not clear cut. However it remains of considerable interest in the current UK procurement scene.) Of course acceptance by the Commission that a problem exists and agreed legislation are two different things, so the rules probably will have to creak along for a few years yet, even the Commission’s web site expresses the hope that implementation will happen in 2002. It is interesting that in the essay “Towards a Multilateral Agreement on Transparency in Government Procurement” in Volume I, Professor Arrowsmith suggests that the best way forward to develop and secure support for a WTO transparency agreement would be to push for a simple and flexible agreementand argues that a WTO Transparency Agreement should contain binding and mandatory provisions, which focus on publicity, transparency and monitoring, with more detailed implementation following at a national level, but that any WTO agreement should not seek to define the national rules in any detail.

Although the regulation of procurement is usually justified as promoting value for money, the underlying political and policy questions are far more interesting. At a national level, in the UK, for example, rules for compulsory competitive tendering have reshaped the public-private divide, transferring services into the private sector and thereby bringing large swathes of the private sector under government control (as paymaster). It has also been effective in introducing insecurity into public employment and destroying the power of local council “barons”, as they once used to be called, whose power was thought to rest on the employment of large in-house “direct labour organisations”. Meanwhile, the EU has required cross border advertisement of public contracts, in order to stimulate cross border trade on a scale of the activity which could make the internal market a reality. Moreover economic integration may be expected to stimulate political integration, since ultimately, to a greater or lesser extent, economic forces and interactions need to be guided or controlled politically. At an international level, the WTO is the battle ground on which poorer countries try to gain access for their low labour cost manufacturing to the rich markets of the industrialised countries, who, in turn, seek to protect their high labour cost commercial base, by extracting commitment to the international protection of intellectual property. Professor Arrowsmith has an interesting analysis of the relatively low rate of adherence to the Global Procurement Agreement, particularly by less developed countries, in her essay.

Public procurement has also served to show up some of the cracks in Europe’s internal market legislation, of which the public procurement directives form part. The ECJ has been asked repeatedly to take an interest in the impact of competitive tendering on the employment of private and public sector workers and the extent to which the Acquired Rights Directive 1977 (transposed as the Transfer of Undertakings Regulations 1981 as amended) applies to change of service contractors. The case-law has swung all over the place on this issue at EU and UK level since the early 1990s, because there has been no political discussion and agreement
about the balance to be struck between the free movement principles and the employment protection measures in the EC Treaty. These two policy objectives are in tension.

Given the importance of the development and enlargement of the EU and of the WTO and the General Procurement Agreement, it is time a few more lawyers, economists and political scientists took an interest in this field. Professor Arrowsmith and Hartley’s pioneering collection deserves a wide audience.

Nevertheless, it is disappointing that the coverage of the volumes only goes up to 2000. There are no articles which give an idea of the rapid developments in purchasing in the UK in the last two years. These include two major reviews of government procurement (the Gershon report into central government purchasing, which led to the creation of the Office of Government Commerce in the Treasury, and the Byatt Report on local government purchasing), as well as much argument about the wisdom of the Private Finance Initiative. In addition, government policy has encouraged a rapid increase in outsourcing (private sector supply, rather than public sector provision) and placed strong emphasis on establishing “partnerships” (in a non-legal sense) with suppliers and between public sector agencies. Meanwhile e-procurement has begun to take hold. This has the capacity to radicalise the buying power of government as this might make government a dominant purchaser, able to exploit and abuse its market position.—The methods of procurement may also be subject to violent change, which, without care, could lead to purchasing becoming less transparent, less controlled and less auditable. E-purchasing and increased outsourcing together, if done badly, could simply led to quicker bad buys.

Various essays seek to analyse the effect of outsourcing under the Conservative government. However, as George Boyne notes in his essay much of the analysis was partisan, coming either from the proponents or the detractors of the policy. He concludes that “the evidence... is sparse and methodologically flawed... More comprehensive and more accurate evidence... is clearly required”. The two volumes contain no assessment of the impact of PFI. The only assessment of outsourcing relates to blue-collar service outsourcing (and only up until 1997/8), which resulted from rules prescribed by a Conservative-controlled central government and largely applied only reluctantly by local government, which was not controlled by Conservative politicians. PFI and the current trend towards outsourcing across the whole range of public services, including professional services, are now strong features of UK public purchasing and they are accepted and endorsed by central and local government. Both will have long-term effects. Up-to date, comprehensive, accurate, methodologically sound and impartial assessment is needed.

No articles chart the deficiencies of the EU public procurement regime and the current, somewhat flawed but better-than-nothing, proposals to improve them, apart from a brief discussion of the problems arising from the lack of clarity in the European rules in the fifth essay in Volume I. This is disappointing. First, it is important to get these rules into better shape, particularly since, as the essay notes, the WTO rules broadly follow the approach of the European rules. Secondly, as the essay also notes, “the European Union regime on procurement represents the most longstanding and rigorous attempt to open up competition in public markets.” There is now a decade of experience of trying to work with and enforce those
rules—they are a test bed for what can and what cannot usefully be regulated, across a broad range of increasingly complex procurement needs. All member states are required to put significant procurement out to EC tender. The UK has been more assiduous than many other member states in doing this and the UK has also been at the forefront of experiments in outsourcing and the use of private finance to fund public projects. Thus UK practitioners have had to work out how to make complex purchases within a regulated framework in an effective way.

These are minor quibbles and it is perhaps unfair to expect such a huge assemblage of articles to be completely up-to-date. This reviewer agrees with the editors opinion “[t]here remains extensive scope for more theoretical, empirical and critical evaluation, especially based on interdisciplinary work involving economists and lawyers.” This work is a great start. Its price may appear a bit steep but every university law faculty should have a copy which should be read enthusiastically.

Rosemary Boyle