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BOOK REVIEWS

Faces of Intention: Selected Essays on Intention and Agency. By MICHAEL E. BRATMAN. [Cambridge: Cambridge University Press. 1999. xiii, 288 and (Index) 10 pp. Paperback £14.95 net. ISBN 0–521–63727–9.]

INTENTION and agency are at the heart of the common law. Both in criminal and private law, our responsibilities are determined paradigmatically by reference to our intentional actions. Even though Michael Bratman's enquiry into these concepts is purely philosophical, this collection of his recent essays deserves to be read by legal theorists everywhere.

Bratman conceives of people as planning agents, whose intentions can be understood as components within loosely-structured plans for their present and future conduct. In his well-known earlier work, *Intention, Plans, and Practical Reason* (1987), Bratman argued that human agency is characteristically embedded in such plans; it is the planning context that makes sense of one's present intentions and actions. In *Faces of Intention*, he both elaborates aspects of that earlier account and extends it to problems of shared agency and of responsibility and identification.

The collection divides neatly into four parts. Part I discusses further aspects of individuals' intentions and plans, including the role of acceptance (related to, but not the same as, belief) in practical reasoning and how to understand instances of action under temptation within a model that regards future actions as (the) proper objects of choice and intention. Part IV contains some valuable critical studies of work by Davidson, Castañeda, Velleman, and Korsgaard. But Parts II (shared agency) and III (responsibility and identification) are perhaps the most interesting for legal theorists. In Part II, Bratman seeks to explain co-operative action through an analysis of shared future plans and intentions. His account offers a promising means with which to reconcile collective action with individual agency, evading appeal to a fictional collective superagent. The value of such an analysis will be immediately clear to those who grapple with the philosophical underpinnings of complicity in criminal law; less obviously, Jules Coleman has drawn upon it to help explain the social practice that constitutes the rule of recognition (*The Practice of Principle*: Oxford University Press, 2001, pp. 96ff). Part III offers new resources with which to address questions about when we are rightly held responsible for our intentional actions. Sometimes, as Frankfurt once put it, a person may be be violated by his own desires; he may be compelled to act for reasons with which he does not identify, like an unwilling drug addict who rejects his addiction. Criminal lawyers sometimes speak of an action that is "out of character", in that it does not manifest any character trait that is part of the defendant's ongoing stable personality. Bratman's analysis suggests a more fruitful approach, one beginning with an enquiry whether the immediate reasons behind a defendant's action integrate with her plans and future intentions. If human

beings are moral agents partially in virtue of their capacity to plan, an account of when moral responsibility for one's actions is negated might usefully investigate when the connexion between action and one's longer-range commitments is defective.

This is an excellent collection of essays. It is clearly written and presents complex arguments in an accessible and persuasive manner. Bratman's work has consistently been of the highest calibre: *Faces of Intention* is no exception.

A.P. SIMESTER

Criminal Responsibility and Partial Excuses. By GEORGE MOUSOURAKIS. [Aldershot: Ashgate Publishing. 1998. vi, 200, (Appendix) 5, (Bibliography) 6 and (Index) 4 pp. Hardback £35.00 net. ISBN 1–85521–943–3.]

ALTHOUGH this book purports more generally to examine the nature of criminal responsibility through an analysis of partial defences, it is primarily a book about provocation. We may better understand provocation, Mousourakis argues, if we analyse it in terms of the distinction between justifications and excuses. A rationale expressed in terms of excuse explains the provocation defence preferably to any account of provocation as justification, since a justification-based analysis is incompatible with the requirement that D must lose his self-control. Rather, D's criminal responsibility is attenuated because, owing to the provocation, his motivational system is understandably misaligned with his evaluational system—in effect, his actions manifest a form of *akrasia*.

This is a plausible analysis of provocation. It is, however, too much to claim that the investigation of provocation can lead us to an account of criminal responsibility. For one thing, it is doubtful whether one can give a positive account of a concept (*e.g.* criminal responsibility) by giving an account of a condition (such as provocation) that negatives it. Moreover, provocation is not representative of other excuses, let alone of defences in general. Indeed, given the complexity of the rationales underpinning criminal defences, it is unlikely they can be distilled in terms of justifications and excuses in the way the author contemplates when he asserts that "the distinction between justification and excuse offers a basic theoretical formula for understanding the way criminal law defences operate" (p. 23). In Chapter One, Mousourakis offers a fairly conventional account of the justification-excuse distinction, in which justified acts are regarded as permissible and excused actors as insufficiently responsible for having done wrong; tracking, it is claimed, the distinction between primary or prohibitory norms and norms of attribution. But not all excuses deny responsibility. Insanity does: duress does not (cf. Gardner, "The Gist of Excuses" (1997) 1 Buffalo Crim L.R. 575). Provocation is different again. Arguably (*contra* p. 34), automatism and mistake of fact are not excuses at all. If an *actus reus* occurs under duress, the judgment that it is excused can be made only with reference to the substance of the wrongdoing. Hence norms of prohibition and norms of attribution are not always independent and, rightly, excuses normally contain both objective and subjective elements. The same is true for justifications, which are personal

too. Hence Mousourakis errs when he claims of self-defence that one should "treat as justified only those cases of self-defence where the degree of defensive force employed was actually necessary" (p. 188). Permissible risk-taking need not be vindicated by the outcome.

Parts of this book are valuable as introductory reading for a postgraduate criminal law course. Chapter One provides a useful overview of traditional accounts of the justification-excuse distinction, while Chapter Two discusses character-based, deterrent-based and choice-based theories of criminal culpability. The citations are extensive, albeit mostly predating the last decade. Chapter Four, in which the rationale of provocation is set out, offers the bulk of the book's original content. As analysis of the defence under current law, the treatment has been overtaken somewhat by *Smith* [2000] 4 All E.R. 289. Nonetheless, Mousourakis's account has sufficient theoretical foundations to survive the vagaries of the law and still make a useful contribution to the continuing moral debate that provocation generates.

A.P. SIMESTER

Personal Property Law: Text, Cases and Materials. By SARAH WORTHINGTON. [Oxford: Hart Publishing. 2000. xl, 699 and (Index) 16 pp. Paperback £27.50. ISBN 1–901362–44–2.]

ANY writer who sets out to write a book on personal property has a difficult task. Since personal property is defined as a residual body of law—what is left of property law once real property is taken out—the range of material that the writer could include is potentially vast. The other difficulty arises from the way that the law curriculum in universities is generally arranged. Important topics in personal property are often dispersed among courses on commercial law, equity, tort and company law, so that students are unlikely to develop a principled or coherent view of how the entire subject fits together.

In producing her casebook, Dr. Worthington has responded well to these difficulties. Its greatest use is perhaps the thoughtful arrangement of sections into which she organises her material. The reader is not simply presented with a list of different kinds of personal property or property transaction (*e.g.*, negotiable instruments, bankruptcy or sales) but finds instead a principled arrangement of related topics. Dr. Worthington begins by defining the nature of property rights and personal property, then sets out the different kinds of property interests and the ways in which they are transferred, whether in a consensual transaction or by operation of law. She then explains how property rights persist through dealings in the asset to which they relate, and the legal remedies by which the person who holds the interest enforces them against third parties. This may not be the kind of arrangement that a lecturer with a distinct question in mind might expect in a book on personal property. But the book is not aimed mainly at that audience, rather at students, too many of whom are bad at thinking across the different subjects in their degree course. Dr. Worthington's approach would be helpful to a student who is looking to assemble a coherent view of topics that he or she might otherwise consign to the familiar pigeon-holes of equity, commercial law or land law.

In her preface, Dr. Worthington comments that the bulk of her book is devoted to elucidating the significant principles in the law of personal property, and that the extracts which she selects tend to be quite long. This is only right. Any useful critique of the law based on sociological theory or argument from commercial policy needs to be grounded in a thorough knowledge of the substantive principles concerned. Dr. Worthington includes some readings on property theory and the future boundaries of the law of property, but these are kept to the opening and closing sections of the book. Perhaps her questions for further thought might have done more to relate these materials to the substantive principles presented in the bulk of the book. The question, for instance, of how the views presented by theorists such as J.W. Harris or Jeremy Waldron might "influence the development of the law of personal property" might have been more specifically honed in order to lead a student into a serious discussion of the future of property law, rather than to encourage him or her—as happens all too easily—to recite some trite generalities.

Again, it is good that Dr. Worthington has chosen extracts from the cases and academic writings that are generally long. A good casebook should immerse students in the arguments and reasoning that lead to the decided result, as she explains in her preface. Her approach is far more satisfactory than that of some casebooks which content themselves with reciting a few lines of *ratio* statement, thereby encouraging the false impression in students' minds that the law consists in a series of legal propositions, nicely served up for rote-learning and unthinking regurgitation. Dr. Worthington has done well to avoid an approach that has become all too common.

Because of the width of personal property, a writer on the subject has to make hard choices about what topics to include in his or her book. Dr. Worthington has generally side-stepped much mainstream commercial law. She devotes relatively few pages, for instance, to discussing assignments of choses in action; there is almost nothing on negotiable instruments and she admits that her section on sales of goods is cursory. This can hardly be held against the book. It is justifiable to skim over these topics on the premise that they are covered with great care and detail in other casebooks specifically devoted to commercial law. Considered in the round, Dr. Worthington's book is not aimed at that part of the student market, whatever the blurb on the dust-jacket may say.

If there is a general theme connecting Dr. Worthington's choice of material, it seems to be commercial aspects of equity and the law of restitution as applied to personal property. Her emphasis follows closely the topics in her earlier monograph, *Proprietary Interests in Commercial Transactions* (Oxford: Oxford University Press, 1996). So in her section on the transfer of property interests, she devotes nearly 110 pages to presenting materials about resulting and constructive trusts arising out of situations such as flawed property transfers, or breaches of contract or fiduciary duty. In the chapter on the persistence of property interests, 95 pages, or about 80% of the material, is devoted to tracing misapplied property. In the following chapter on the protection of property interests, there is more than twice the material on unjust enrichment remedies as means of enforcing property rights as there is on the use of tort actions to enforce interests in tangible property. Maybe this weighting can be justified by the fact that most valuable personal property nowadays is intangible

and therefore not the subject of possessory rights. Nevertheless, a lecturer using the casebook for teaching would need to ensure that students did not repeat material that they had already covered in their equity course. There is probably enough other material in the book to prevent a student gaining a skewed impression about the relative importance of unjust enrichment to personal property law as a whole.

Casebooks are very rarely sufficient guides to a subject if used by themselves. A student needs, at the very least, to alternate between the casebook and a sound textbook which provides a full exposition of the detail of the subject. Dr. Worthington's casebook would lend itself to this approach. Some of the commentary connecting the extracts in the book certainly needs to be fleshed out by reference to more sophisticated sources. For instance, the introductory sections on the definition of personal property and the classification of interests in property are still no match for the deeply informed exposition of fundamental principles in Chapter One of J. Crossley Vaines, *Personal Property*, 5th ed. (London: Butterworths, 1972) or Chapter Two of Roy Goode, *Commercial Law*, 2nd ed. (London: Penguin, 1995), which cover similar ground. It might have been helpful if the commentary had been more fully footnoted so that reader would have direct references back to some of the materials which would support the propositions stated. This is particularly so when some of the assertions made in the commentary are contestable, as Dr. Worthington admits. For instance, the assertion that a mere equity must be a personal right, not a proprietary right is a little surprising, particularly given Dr. Worthington's general acceptance of the view that a proprietary right is one which is generally enforceable against the world at large, rather than only between specific individuals.

Occasionally, there can be misplacing of emphasis in the presentation of materials that creates a misleading impression. The significance of the common law principle exemplified in *The Winkfield* [1902] P. 42, allowing a bailee in possession of goods to sue a wrongdoer, has now been largely reversed by the Torts (Interference with Goods) Act 1977. It is now the norm that defendant in an action for interference with goods can plead a *jus tertii* of a party known to have a better title than the claimant, not the exception as it was at common law when the case was decided. Simply to say after a long extract from *The Winkfield* that the reader should "Also see [the] Torts (Interference with Goods) Act 1977 sections 7 and 8" does not bring home the force of the fundamental reform.

These, however, are only selected quibbles. They should not detract from the usefulness of the casebook, which fills a neglected gap in the market.

DAVID FOX

The Child and the European Convention on Human Rights. By URSULA KILKELLY. [Aldershot: Ashgate Publishing. 2000. xiv, 331, (Bibliography) 16, and (Index) 6 pp. Hardback £52.50 net. ISBN 1–84014–704–0.]

AS IS frequently pointed out, the European Convention on Human Rights was drafted with adults rather than children in mind. Yet it is also

abundantly clear that children are persons capable of possessing "Convention rights". Defining the content of these rights is a challenge which the English courts will increasingly face following the implementation of the Human Rights Act 1998. Academic commentaries on the Convention are a growth industry but Ursula Kilkelly's book appears to be the first which directly addresses the question of the Convention's application to children.

It is the author's overriding aim to provide a comprehensive and detailed analysis of the case law of the European Commission and Court and, in so doing, she considers some 750 cases in which children's rights or interests have been involved. Many of these resulted from petitions brought to vindicate the rights of *adults*, but in which issues concerning children's rights or interests arose, whether centrally or only incidentally. It is one of Kilkelly's achievements that she has painstakingly brought together in one place this extensive and disparate jurisprudence. A central feature of the book is Kilkelly's attempt to assess the potential of the European Convention for protecting children's rights against the benchmark of rights and standards set out in the United Nations Convention on the Rights of the Child. Unlike the European Convention, this latter Convention (which has been almost universally ratified) is of course exclusively aimed at protecting children's rights.

The early chapters consider the application of the European Convention to children and examine the definition and status of the child. The following chapters adopt a thematic approach, rather than an article by article assessment, and look in depth at specific aspects of the substantive rights of children. The areas considered include juvenile justice and detention; education; rights of identity; participation rights; life, health and health care; and abuse and neglect. Although the book is not divided into parts, the remaining five chapters, beginning with a chapter on the definition and treatment of the family under the European Convention, all focus on the child's position in the family. These chapters deal respectively with immigrant and refugee children; custody and contact; alternative care; and adoption. Each chapter ends with a section entitled "future challenges" in which Kilkelly speculates on the potential for the future development of children's rights in the light of the existing jurisprudence of the European institutions and the standards embodied in the United Nations Convention.

Since this book is essentially the product of a doctoral thesis on the European Convention, it is not surprising that there is no explicit discussion of the evolving impact of the Human Rights Act on English law relating to children. It will nonetheless prove invaluable to all those, whether practitioners, academics or students, who are endeavouring to get to grips with this question, though in the case of the latter it is a pity that the price will put the book beyond the reach of most of them. One general issue which, although touched upon, might have been better addressed concerns the relationship between the welfare principle (which occupies a central position in the laws of most European countries) and the distinctive notion of children's convention rights. Kilkelly deals skilfully enough with the way in which *adults*' convention rights may have to give way to a child's best interests as determined by domestic courts—a principle widely established by case law under the Convention. She perhaps deals less well with the possible conflict which there may be between the concept of a *child's own convention rights* as opposed to his or her best interests, the

definition of which will only emerge from a welfare determination. This is a small criticism when set aside the many merits of the book. It is a very significant achievement that Ursula Kilkelly was, as far as this reviewer is aware, the first academic commentator to attempt a comprehensive review of the position of children under the European Convention. This achievement is all the more noteworthy bearing in mind that the European Convention itself scarcely mentions them.

ANDREW BAINHAM

Company Law and the Human Rights Act 1998. By ALAN J. DIGNAM and DAVID ALLEN. [London, Edinburgh and Dublin: Butterworths. 2000. xlii, 308, (Appendices) 40 and (Index) 12 pp. Paperback £50. ISBN 0–406–93030–9.]

ALL LAWYERS are familiar with the distinction made in the books between an artificial person, typically a company, and a natural person—a human being. It would seem to follow reasonably enough that the Human Rights Act (and the European Convention on Human Rights and Freedoms which the Act incorporates into our domestic law) would have very little to say about the rights and freedoms of artificial persons, and certainly not enough to fill a book of over 300 pages. However, any reader of *Dignam and Allen* who begins with this assumption is soon persuaded to change his mind. It is clear that those involved in company affairs and their professional advisers have many reasons to take account of the Act and to be aware of its implications for the corporate sector.

In the first place, the use of the term "human rights" in the names of the Convention and the Act is misleading. Some of the rights and freedoms which these measures aim to protect do extend to artificial persons as well as human beings—even, in the case of the right to the enjoyment of property, by the express words of the Convention itself. Others, such as the right to a fair trial, have been held by the court in Strasbourg to apply to corporate bodies by implication; that is to say, a company may in its own right assert that it has been the victim of a contravention of this provision. Similarly, it is accepted that a company is entitled to protection in regard to the right to an effective remedy, the right to freedom of expression, and freedom from retrospective penal legislation. Of course, in the nature of things there are some rights which plainly could never be claimed by a company, such as protection from slavery and torture and freedom to marry. In between, somewhere along the continuum, fall rights which may or may not apply to companies or apply only to a limited extent: for instance, Article 8 (the right to respect for private and family life) can readily be held to protect the privacy of a company's correspondence and to prohibit telephone tapping and the covert filming of activities on its premises, but not to extend to the more personal and intimate aspects of family life. In areas like this, there is much scope for judicial interpretation.

Under the case-law of the European Court of Human Rights it has long been established that a company has standing to appear before the court to complain of an infringement of its rights. However, it has been held that this means its "own" rights: we are unlikely to find a company given standing (as in the Canadian case *R.* v. *Big M Drug Mart Ltd.*

(1985) 18 D.L.R. (4th) 321) to seek to uphold as a matter of principle a right or freedom which it cannot enjoy personally, such as freedom of worship. What may be a greater challenge for our courts will be to see whether they are as willing as the Strasbourg court has been to "lift the corporate veil" and give a remedy to a company's "stakeholders", such as its shareholders or its employees, whose rights are infringed indirectly by legislation or the action of a public authority that is directed primarily at the company itself. Such issues as these are explored in detail by the authors of this thoroughly researched and highly informative book.

Although this review has focussed so far on the company as "victim", the authors have dealt just as extensively with various other ways in which the Act will have impact on corporate activity. Many companies, and in particular suppliers of public utilities and services, come within the definition of public authorities whose acts and decisions are open to challenge as violations of the Convention (and, conversely, do not enjoy "victim" status). Again, bodies involved in the administration of company affairs, such as the Financial Services Authority, the Stock Exchange and the Take-over Panel, will now be obliged to ensure that their rules and procedures and decisions meet the requirements of the Act. There is also the question of the Convention's "horizontal" effect—a shorthand expression used to refer to the principle that, even when determining an issue between private parties, the courts are obliged to interpret legislation and to apply the common law in a manner which is compatible with Convention rights. Given all these additional ways in which the Act is capable of affecting corporate affairs, it is not at all surprising that Dignam and Allen have needed 300 pages and more to cover the subject.

As the authors say, practitioners in the fields of private law can now no longer assume that their work will be unaffected by public law considerations. It is for this readership primarily that the book has been designed, and such users will not be disappointed. But it is far from being a narrowly focussed, black-letter account of the new legislation. From the historical survey in Chapter One to the list of comparative sources of case law and materials in the final chapter, the authors show the breadth of their interest in the subject and, aided by the clear and readable style in which the book is written, manage very successfully to share that interest with the reader.

L.S. Sealy

State Responsibility for Transboundary Air Pollution in International Law. By Phoebe Okowa. [Oxford: Oxford University Press. 2000. xxxi, 267, (Bibliography) 10 and (Index) 7 pp. Hardback £65 net. ISBN 0–19–826097–0].

This book, in the Oxford Monographs in International Law series, considers the question to what extent international law, treaty and customary, deals with responsibility for transboundary air pollution which originates in the territory of one State and has effect in the territory of a neighbouring State or further afield. The first chapter identifies the relevant pollutants to be oxides of sulphur and nitrogen produced by the burning of fossil fuels, smelting processes and fuel combustion. The main polluting

effects are identified as acidification of watercourses and damage to forests. The chapter also considers radioactivity caused by weapon testing and by accidental emissions, in particular the Chernobyl accident. Whether the transmission of diseases by this method is such a risk is a question not covered in the book, published as it was before the current foot and mouth outbreak.

The second chapter covers in detail relevant treaty regimes, particularly the 1979 ECE Convention on Long-range Transboundary Air Pollution and its associated Protocols which predominantly concern the prevention of pollution rather than responsibility for its effects. Furthermore, the author considers that general customary norms and even *erga omnes* obligations have a considerable significance. After a discussion of international jurisprudence and State practice, mentioning in particular the *Trail Smelter* Arbitration and Principle 21 of the Stockholm Conference, the author concludes that States are already under a customary duty to use due diligence to ensure that activities in their territory do not cause transboundary harm, though the evidence for a stricter regime for radioactive pollution is not at present conclusive.

The author then investigates what procedural obligations might be binding on States by virtue of treaties and customary law, in particular whether there is a legal requirement to make an environmental impact assessment, to notify potentially affected States, to exchange information and to consult in advance. She concludes that apart from a duty to warn in emergency situations no rules of customary law in these respects have yet clearly crystallised.

Turning to the question of the determination of responsibility, having considered whether tangible damage is a requirement or whether it is enough to show a detrimental alteration of environmental quality, the author examines the important question of causation, including proof and joint and several liability. In the next chapter, which deals with judicial remedies, the author tackles in particular the topical issue of the locus standi of States to enforce the observance of multilateral treaties and *erga omnes* norms where it cannot be shown that they have an express right to bring an action. The exhaustion of local remedies and the loss through delay of a right to claim are also discussed. A final chapter considers non-judicial methods of supervision and enforcement including treaty-based measures such as those under the ECE Convention and its Protocols and the extent to which counter-measures and self-help might be possible.

This is a stimulating, well-researched and cogently argued book.

GEOFFREY MARSTON

A History of Private Law in Scotland. Edited by KENNETH REID and REINHARD ZIMMERMANN. [Oxford: Oxford University Press. 2000. Volume I, *Introduction and Property*, 1xi, 517 and (Index) 34 pp. Volume II, *Obligations*, 1xxxviii, 707 and (Index) 40 pp. Hardback £125.00 for both volumes. ISBN 0–19–826778–9 and 0–19–829928–1.]

WHAT might reasonably be expected of *A History of Private Law in Scotland*? The use of the phrase "in Scotland" might have been taken to indicate that these two volumes were intended to contain another

exploration of the civil law tradition as it manifested itself in one northern jurisdiction. Certainly, they were conceived in parallel with R. Zimmermann and D. Visser (eds.), *Southern Cross: Civil Law and Common Law in South Africa* (Oxford, 1996), the idea being that Scotland and South Africa both have civil law systems mixed with English common law and that their pasts ought therefore to be particularly interesting to lawyers concerned with the integration of European law. This in turn suggests that the aim might have been to examine the current law of Scotland in historical perspective, tracing its distinct origins in the civil and common law traditions with a view to directing its future development. In fact, the two editors strenuously deny that they had any such intention and insist that their aim was simply to recount the history of private law in Scotland as it happened, free from ideological preconceptions. They modestly concede that their aim may not have been fulfilled as fully as they would have wished, pointing out that no historian can be entirely free of preconceptions and adding that their contributors were at least aware of the difficulties they faced. But is awareness enough when library shelves groan under the weight of a sophisticated literature on historical methodology? Far from taking advantage of this literature, the editors increased the difficulties faced by their contributors—few of whom can be said to have spent much time immersed in the study of Scottish history—by inviting them to trace the emergence through several centuries of doctrines and institutions found in the modern law.

It is unfortunate that the other contributors do not appear to have had a chance to read the "Historical Introduction" by John Cairns, for they would then have had a better idea of how the discipline of Scottish legal history has been developing over the past few decades. Although in a survey covering the best part of a thousand years not everything the author writes can be expected to convince every reader, this essay is as thorough and reliable an overview as may be looked for at this stage. The author has a personal view to present—somewhere between the old thesis about a series of false starts and the new emphasis on continuity—but his intelligent and richly supported argument serves only to stimulate thought. It may soon be the case that the best way to break into this subject will be by reading the extended version of this essay, due to appear shortly as a separate book, in comparison with the book by David Sellar that is also due out this year. By contrast, the reading of many of the essays in this collection will serve less to introduce the work of legal historians than to illustrate the use made by modern lawyers of old texts. In many essays the doctrinal development of the law is reconstructed from treatises and case reports as if these sources, regardless of when or why they were produced, can be read in the same way. Much is made of the works of the "institutional writers", sometimes cited alongside modern textbooks, sometimes in conjunction with modern cases. Either way, the assumptions made are shockingly anachronistic, though what would astonish the pre-union lawyer most is the paucity of reference to the acts of the Scottish parliaments.

Among the more historically sensitive contributions in the first volume, there is a useful account of "Rights in Security over Moveables" by Andrew Steven. While more could have been done by investigating court and business records, and by paying greater attention to social and economic influences, any student contemplating a thesis-length study of

pledge, hypothec or lien would do well to begin here. In an essay on "Leases", Martin Hogg refers to a diverse literature and offers perceptive readings of examples drawn from a wealth of evidence that remains in need of study. The essays on "Water Law Regimes" by Niall Whitty and on "Trusts" by George Gretton provide even better indications of how the history of the law can be written with a due regard to the settings in which the primary sources originated. The latter essay first appeared in R. Helmholz and R. Zimmermann (eds.), *Itinera Fiduciae* (Berlin, 1998), reviewed by Peter Stein in the last volume of this journal, and the essay on "Negligence" in the second of the two volumes reviewed here is due to appear in another book in the same series. The writers, Hector MacQueen and David Sellar, also contribute related essays on "Third Party Rights in Contract" and "Promise", which need to be read along with Gerhard Lubbe's discussion of the "Formation of Contract". Some contributors to the second volume, like David Johnston on "Breach of Contract", are able to concentrate more convincingly on a shorter period; while others, like Bill Gordon on "Sale", make life easier by focusing on particular topics. Angelo Forte's account of "Insurance" is by any standards a significant contribution to the legal history of Scotland, based on prolonged research in the area, though pride of place in this volume must go to John Blackie's essay on "Defamation". Wide ranging in the sources it uses, imaginative in the questions it asks, and illuminating in the conclusions it reaches, this essay is a fine example of what might have been done in pursuit of the stated aims of the editors.

It may well be that the other contributors did not share the editors' ambitions. Readers with less interest in recovering the past than in understanding the present will find much of interest in this collection, for the standard of writing is invariably high and the research, even when not genuinely historical, has been carefully conducted. Furthermore, if the challenge for the legal historian is to avoid both anachronism and antiquarianism then these essays should provide helpful guidance away from the latter pitfall. Nevertheless, despite over a thousand well produced pages (marred by very few misprints), the history of private law in Scotland has still scarcely started to be written.

J.D. FORD

Fifty Years of the Supreme Court of India: Its Grasp and Reach. Edited by S.K. VERMA and KUSUM. [India: Oxford University Press. xviii, 760 and (Index) 72 pp. Hardback £33.99 net. ISBN 0–19–565378–5.]

ON 26th January 2000 the Supreme Court of India marked its fiftieth anniversary. As the highest court of the world's largest democracy, it is, as the present Chief Justice Dr. A.S. Anand claims in his foreword to the volume, "the defender of the Constitution, and the principles enshrined therein, guardian of human rights, and the promoter of peace, cordiality, and balance between different organs of the government".

This book is a commemorative volume edited by S.K. Verma and Kusum and put out by the Indian Law Institute to mark this Golden Jubilee. It provides an overview of the role played by the Supreme Court of India in building up a considerable body of law and legal principles,

over the past fifty years. Judicial law-making does not take place in a vacuum but is necessarily influenced by a range of social, political and economic factors. In a country as diverse as India these factors are extremely complex, and the Court has to maintain a delicate balance in resolving conflicts, both between citizen and citizen as well as between citizen and State. This book is, in essence, a comprehensive documentation of that role.

In the past twenty years or so the Indian Supreme Court has become renowned for its willingness to carry its exercise of judicial power under the Constitution to unprecedented lengths in order to curb the excesses of executive authority and ensure that the rule of law prevails. In the process of doing so it has produced ground breaking decisions in fields of public law such as constitutional and administrative law and human rights. However, this volume is not confined to an appraisal of these issues alone and provides an overview of the growth of all areas of law in India in the light of the Court's decisions over the past five decades. It contains 22 chapters by different authors on legal developments in the major areas of public and private law ranging from constitutional and administrative law, human rights, indigenous systems of law, commercial, criminal, public and private international law, contracts, torts, land, election, rent and tax laws, and also areas such as environmental law, consumer protection law and gender justice.

The Court has earned the label of an "activist court"; as a result of its sometimes radical interpretations of the fundamental rights provisions in the Constitution. It is inevitable therefore that many chapters of the book would focus on this topic and the volume begins with a lengthy discussion of it, followed by another on the evolving administrative law regime. The analysis traces the history of the Court's constitutional position as the guardian of human rights and highlights many of the significant features of its efforts to carry out this role. These include its powers of judicial review under Article 13 of the Constitution which empowers it to strike down legislation deemed to infringe upon those rights, and its role under Article 32 of upholding the rights by way of issuing orders, directions and writs as it deems appropriate. Its decisions in this context resulted in several innovative interpretations of the fundamental rights provisions, including the wide ambit given to the right to life under Article 21. Further, its activism has not been confined to developing the substantive law in these areas only, and it has also radically changed the processes by which litigation is initiated and conducted. It is particularly identified with the evolution of the concept of public interest litigation (or social action litigation as it is also called), which radically transformed the procedures by which legal proceedings are initiated and conducted.

Upendra Baxi's chapter entitled "The Avatars of Indian Judicial Activism: Explorations in the Geographies of [In]justice" serves as a good sequel to the chapters on the constitutional provisions. He points out that the present developments in the exercise of judicial power and processes were wholly unanticipated by the makers of the Constitution. He does not however, wax lyrical about these developments and highlights both their negative and positive aspects. The initial euphoria which heralded the onset of public interest litigation also resulted in high expectations of the Court as a formidable force in furthering social justice. As Baxi observes, the

Court often failed to, or was unable to meet these expectations, thus causing, in turn, equally high levels of disillusionment.

The focus on fundamental rights litigation should not detract from judicial developments in other areas of law, many of which are also relevant to other countries facing similar political, social and economic problems. While it is not possible to discuss them all, some are of particular interest given the socio-political issues they raise. One such area is that of gender justice and women's rights. The chapter specifically entitled "Gender Justice"; deals with a range of issues which have a direct impact on the status of women in India, from that of bigamy, restitution of conjugal rights, women's rights of succession and ownership over property and violence against women and children. The same or similar issues are also discussed in chapters on Muslim law and matrimonial adjudication under Hindu Law, giving interesting comparative perspectives on them. While the Court has often taken a forward looking and liberal stand on questions of gender, its decisions in areas such as bigamy and restitution of conjugal rights appear to be quite retrogressive.

Topics such as environmental law and consumer protection dealt with in this book are also of particular interest, as the judicial decisions in these fields reflect certain interesting features of the Court. To begin with, it has not hesitated to come to grips with the environment/development debate or the question of consumer protection, both of which pit the citizen/consumer in opposition to the State/commercial sector. The chapter entitled "The Directions of Environmental Justice" traces the history of the judicial environmental movement, beginning with the Bhopal gas leak disaster. It provides an overview of the case law dealing with various environmental problems, giving the reader a sense of the dilemmas faced by judges in attempting to maintain a balance within this conflict. A similar analysis is provided in the chapter on consumer protection law. While the decisions are often controversial and highly criticised, what is significant is the fact that the Court has been willing to formulate new legal principles and interpret statutory provisions broadly in order to deal with the issues.

An interesting feature of the Court is its willingness to draw upon external influences in formulating new legal principles and it has particularly drawn upon concepts of international law. As observed in the chapter on "International Law", the rules of international law have come under the court's scrutiny in matters of State territory, State jurisdiction, sovereign immunity, extradition, human rights and international treaties, besides clarifying the relationship between international law and municipal law in India. The cases decided by the courts have helped in widening the corpus of national law by incorporating the rules of international law, particularly in the area of human rights (pp. 622–623).

Similarly it has looked to ancient principles of the English common law to hold that the doctrine of the public trust was a part of the law of India. It has formulated novel concepts, such as that of absolute liability to deal with mass environmental disasters and shown itself willing to interpret consumer protection laws to even include issues of medical negligence.

In conclusion it must be said that this book is an interesting historical record of the evolution of a legal system in its social and political context. It is also a useful reference point for the most recent developments in Indian law. There are certain overlaps and omissions, perhaps inevitable in a volume of this nature. For example, sexual harassment is not discussed

in the chapter on Gender Justice but is referred to in other chapters on "Fundamental Rights", "Industrial Jurisprudence", "Torts", "International Law" and Baxi's chapter on the "Explorations in the Geographies of [In]justice". Further, some references may not be always clear to non-Indian readers. But these shortcomings should not detract from its ultimate usefulness.

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Taking the State to Court—Public Interest Litigation and the Public Sphere in Metropolitan India. By HANS DEMBOWSKI. [Oxford: Oxford University Press. 2001. xii, 215, (Appendices) 25 and (Index) 10 pp. Hardback £19.99. ISBN 0–19–565309–2.]

PUBLIC interest litigation (PIL) as it evolved in India in the past two decades, is probably one of the most innovative legal developments in recent times. It essentially concerns the interaction between the various organs of the State and citizens, and comes about when the latter resort to the judiciary to resolve a conflict which they may have with the executive over a matter of public policy or action. The concept evolved on the premise that the fundamental rights guaranteed by the Indian Constitution are futile to the vast majority of the people who, because of their social and economic disempowerment, are unable to effectively resist executive policies and actions which may violate their rights. In circumstances where the action is considered to be in the public interest, the Indian judiciary has adapted the procedural rules of litigation in order to facilitate the filing and disposal of such matters before the courts. It has done so primarily by relaxing the rule of locus standi to allow organisations and individuals, though unaffected themselves, to bring actions on behalf of people who do not have the capacity to do so. PIL actions are also brought on wider issues of public interest, notably environmental problems, which may not necessarily have identifiable victims.

There is a great deal of literature on PIL in India, most of which analyses the developments of procedural and substantive law in its context. This book by Hans Dembowski, a sociologist, is different as it does not deal with the law per se. It is rather an analysis of governance and the balance of power among the executive, the judiciary and civil society brought about by the process of PIL.

The author's arguments revolve around the concept of the "public sphere". In analysing the relationship between State and society in India, he draws a distinction between "civil society" and "public sphere". "Civil society" constitutes an entity distinct and separate from the State with diverse interactions both within itself and with the latter. "Public sphere" is the arena in which members of civil society and the agencies of the State interact with each other in a public discourse on matters of democratic governance. The author contends that in countries with a strong democratic tradition the two concepts are largely blurred, but this is not necessarily the case in countries like India.

In the process of PIL the public discourse takes place in the courts and the book focusses, in some detail, on the role of the judiciary in enhancing the public sphere and in enforcing good governance in this setting.

Dembowski does not share the enthusiastic response to judicial activism in PIL which is generally found in literature on the subject. He claims that the public attitude towards the judiciary is ambivalent and that it is perceived as sharing, to a large extent, the shortcomings of the executive, including corruption and inefficiency. While judicial activism is seen as a sign of hope that executive abuses can be contained, this is also tempered with scepticsm as to how effective it is in reality.

Preceded by a brief history of environmental laws and policies in India, the analysis of the public sphere is placed in the context of two case studies on environmental campaigns and litigation in Calcutta. One deals with the dispute over the development of the East Calcutta wetlands and the other concerns the environmental degradation of Howrah, the oldest industrial town in India. Within the framework of each study the author analyses the role of the various actors in the legal process—public interest organisations, individuals, state bureaucrats, politicians, the general public and the judiciary. His hands-on assessment brings into focus diverse issues including the conflicting interests and aims of the various non-state actors and stakeholders, the development debate, public attempts to enforce governmental accountability and the realities of judicial proceedings.

The author makes several points about the judiciary and the environmental network. He expresses doubts about the effectiveness of the judicial process in the light of his observations, referring to the disorganised nature of court proceedings, the lack of technical competence among the judges to deal with the complex issues before them, and their levels of professionalism. In the case of the environmental network, he highlights the disunity and distrust among the various organisations which must necessarily be an obstacle for co-ordinated action. However, he concludes on an optimistic note being of the view that PIL and judicial activism has had positive impacts on governance in India and will continue to do so.

This book provides interesting insights to the realities of PIL and its dynamics in India and complements the body of legal literature on this subject. The author says that his aim was to discover how the polity of an Indian mega-city deals with conflicting interests in pursuit of the "common good". In the process of doing so he has produced a readable and enlightening book. Its interest lies in the fact that many of his observations are probably applicable in varying degrees to many other countries of the region faced with similar issues of democratic governance and lack of "public sphere". This book should prove useful to those working on these issues including public interest activists, legal practitioners and researchers.

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