

only to liability but to questions of duties and responsibility. Here, the author concentrates to some degree on private law remedies, referred to as a 'disciplining technique', thus staying with the theme of investor protection. There is also a comparison with the Australian judicial approach. The detailed navigation of the, often complex, issues that arise is helpful for those readers less familiar with common law and equitable doctrines of estoppel. Whilst the case law around claims in economic loss, and assumption of responsibility in establishing a duty of care in negligence, may be familiar territory for the tort lawyer, for others it may be more difficult to follow. The author guides the reader through, the sometimes controversial, case law, and how these cases influence the possibility of finding a duty of care vis-à-vis CRAs. The exploration of the complicated nexus between common law and that enshrined in regulation and statute is a good one, and the analysis of how the lack of a harmonised liability under EU law and the conclusion (240) that this is a 'missed opportunity' provides a nice juxtaposition. Separately the author addresses recognised arguments for and against around the approach of simply regarding CRAs as 'journalists'. This puts a spotlight on the appropriateness of freedom of speech protection provided by the First Amendment of the US constitution, the author asking whether CRAs really are something more akin to professional intermediaries. Yet, whilst the Dodd Frank Act introduced professional liability for CRAs, the author provides a sound argument for why this measure is not as effective as it could be.

This book provides a fascinating insight into the world of the CRA and the wider impact of the CRA on markets, investors and the economy. It demonstrates the importance of good governance and regulatory structures and provides some potential answers to the important issues that dominate, through its detailed exposition and analysis. It would be of particular interest to those wishing to gain more detailed knowledge about CRAs, their regulation and governance, whether for research or wider reference.

SARAH BROWN\*

*Judicial Law-Making in English and German Courts* by MARTIN BRENNCKE [Intersentia, Cambridge, 2018, 438pp, ISBN 978780682693, £119 (h/bk)]

Dr Brenncke has set himself a difficult task. Producing a full-bodied account of statutory interpretation and judicial law-making across two (ostensibly quite different) legal jurisdictions is no easy feat. In the opinion of this reviewer, however, he has largely succeeded. This is not an abstract philosophical discussion of the properness of judicial activism, but rather a finely detailed and occasionally rather complex work uncovering the empirical reality of modes statutory interpretation in practice. Despite the ambiguity his topic might invite, Brenncke shows a real talent for translating amorphous and fuzzy practices into clear, robustly detailed constituent components. Even the most seemingly straightforward of ideas are deconstructed with precision. Importantly for a comparative project, the work is likely to be accessible to those interested in either jurisdiction, without the need for an expert knowledge of both.

In terms of structure, the book reviews the approach of German and English approaches to legal interpretation across three arenas: in conventional primary legislation, in areas involving constitutional rights and in areas requiring harmonious interpretation with European Union law. It is possible to summarise Brenncke's general findings: there are important idiosyncrasies in each jurisdiction, and yet overall, their respective judges are faced with very similar problems, and both English and German courts both take very similar approaches in practice. These points are demonstrated convincingly throughout the work, alongside discussion of more narrow, specific issues concerning statutory interpretation.

\*School of Law, University of Leeds, [s.e.brown@leeds.ac.uk](mailto:s.e.brown@leeds.ac.uk).

The first section tackles ‘conventional’ canons of construction, which Brenneke subjects them to rigorous examination. Perhaps unsurprisingly, he suggests that the specific words of a statute provide a weightier influence in English courts. He also suggests that English judges are more transparent when it comes to selecting canons of interpretation, although this reviewer remains sceptical. The ‘powerful’ influence of Parliamentary sovereignty in the English jurisdiction (and lack of this feature in the German context) is, of course, acknowledged. But Brenneke is keen to highlight the clear parallels between the two approaches. Despite their ‘different default positions’ (129), he suggests that overall, the two jurisdictions house a lot of similarities, and adopt a similar style of interpretation in practice. This feels intuitively right, and an excellent empirical case for this. There are some fascinating passages here, detailing, for example, the tendency of English courts to focus on hypothetical ‘reasonable Parliament’ rather than the intentions of the actual Parliament, and the importance of labelling a given judicial technique in the German courts. Naturally, however, given the nature of the work, there is an artificiality in reducing certain aspects of judicial practice to descriptive trends. For example, Brenneke’s assertion that English courts first ‘try out’ the literal rule before moving onto a purposive approach feels a little false, although it is probably true that some rules of construction are generally viewed as ‘primary’ and others as ‘secondary’ (61). Equally, some passages characterising the English judges as a whole, suggesting they are the enamoured of the purposive approach (62; 106–7) and have few qualms about imputing terms into statutory texts (52) feel a little overbroad to apply as general statements; some of our judges are clearly more conservative in this and other respects.

The next chapter compares the German courts’ approach to interpreting statutes in light of fundamental rights with the English courts’ treatment of section 3 of the Human Rights Act. Overall, as with the preceding chapter, the general position is that despite utilising very different sources of rights, and some noteworthy differences in formal approaches—notably, the German approach being much more structured than the generally quite vague exercise conducted by English judges—the approach across both jurisdictions has much in common in practice. Importantly, however, Brenneke criticises the English courts for going too far in this regard, not because they necessarily go further than their German counterparts, but because this apparent overreach is institutionally (and perhaps constitutionally?) illegitimate. This position is well argued and sophisticated and some points made here are difficult to rebut, such as the curious retrospective application of the Human Rights Act. Others are more contestable, such as the alternative interpretations of section 3 HRA (148–51). The blanket statement that English judges are comfortable departing from the specific statutory language (190–4) is also contestable; in some cases, this is certainly true, as the author demonstrates using *Ghaidan*, a leading case in the area. However, whilst it is acknowledged that ‘other case law exists’ (193) it feels as though this underplays the cases in which judges have found that rigid statutory language has acted as a significant barrier to the operation of section 3 HRA (see eg *AS (Somalia) v Secretary of State for the Home Department* [2009] UKHL 32; [2009] 1 WLR 1385 at [19], per Lord Phillips and *Mathieson v Secretary of State for Work and Pensions* [2015] UKSC 47; [2015] 1 WLR 3250 at [49], per Lord Wilson).

This is followed by a mammoth chapter on construing national legislation in light of European Union law. Brenneke’s take-away point here is that both English and German courts are generally complying with EU law requirements, and that the approach adopted by English courts might actually be going too far. He robustly criticises the approach of the House of Lords in the late 1980s, claiming they were labouring under the misapprehension that EU requirements were more stringent than, at least according to him, was actually the case. The reasons supporting this claim are ingenious and quite novel, but for this reviewer struggle to completely write off some of the Court of Justice’s later, more muscular developments which go against the argument. Here we again find the claim that the two jurisdictions share much common ground, something detailed in a comprehensive analysis of the various respective factors which form part of each court’s approach. As with the preceding sections, Brenneke’s analysis largely manages to convince.

Two final comments are worth mentioning. This book on 'judicial law-making' features very little on the individual approaches of judges. This is, of course, not a necessary avenue for this work to explore, but there are occasional comments about the collective nature of judging in German courts (which do not publish formal dissents) alongside nods to the visions of certain judges such as Lords Denning and Oliver, so it is a shame that this aspect was not explored further. Similarly, the author wisely sidesteps an unnecessary debate into the nature of Parliamentary sovereignty and its limits, adopting a basic Diceyan model without comment on its merit. This is perhaps for the best, but sometimes these ideas are used to buttress more controversial arguments, and as such are at risk of sounding a little simplistic ('Parliament is the ultimate guardian of constitutional principle as opposed to judges' at 253), which is a shame in a work which so persuasively shows that even the most straightforward of ideas (such as interpreting a statute literally) are laden with complexities and difficulties.

Ultimately, these relatively minor issues really concern not what *is* in the book but what *is not*. Ultimately, *Judicial Law-Making* is a sophisticated and accomplished work, an important project tackled admirably, with the author's considerable expertise shining throughout.

LEWIS GRAHAM\*

\*University of Cambridge, [lg513@cam.ac.uk](mailto:lg513@cam.ac.uk).