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BOOK REVIEWS

Advocacy. By David Ross Q.C. [Cambridge: Cambridge University Press. 2005. xi and 143 pp. Paperback £15.95. ISBN 0521611172.]

This book is an introduction to the practice of oral advocacy encompassing preparation, the handling of witnesses, legal submissions, the address, the plea in mitigation, and ethics and etiquette. The majority of the book deals with many facets of the examination, cross-examination and re-examination of witnesses. The virtues of the book are its clarity and simplicity. The complex arts of advocacy are stripped down to their most basic parts and illustrated with examples from historic English and modern Australian trials. The examples are, on the whole, judiciously selected and instructive. There is no superfluous material, expression is always both economic and precise, and the results are always instructive. The style of the book manifests the qualities of the advocacy it teaches.

The book is a straightforward first introduction to advocacy, and it fulfils its function very well. It provides a firm foundation and explanation of basic techniques and practical common sense from which the young advocate will be able to build and add nuance and shape from his or her own experience. However, the publisher's further claim—that this book is "essential" for experienced barristers—is rather an exaggeration.

The book begins with a definition of advocacy (p. 1) as "winning cases. Nothing more and nothing less. It consists in persuading a court to do what you want". This conventional ("persuasion") and pragmatic ("winning cases") conception of advocacy sets the tone throughout. The author, without explanation but again adhering to the formula for short books on advocacy, equates persuasion and winning of cases almost exclusively with the oral part of advocacy. Further, and notwithstanding that the book mentions civil proceedings now and then, it is almost exclusively dedicated to criminal proceedings. This might be because many young advocates begin their practice in the criminal courts, or perhaps because the identification of advocacy with oral presentation inevitably confines the book to the criminal law field, where the common law's oral tradition persists in its strongest form.

All these assumptions place the book within a traditional conception of the learning and practice of advocacy. Mr. Ross states in the foreword that advocacy "is in a constant state of change. The excellent advocates in the past found new techniques ... It is now your task to find your own new ways", but there is little in his book to suggest anything new or modern in advocacy. His authorial style is quite different from, for example, Keith Evans in *Advocacy at the Bar: A Beginner's Guide* or Richard Du Cann in *The Art of the Advocate* (first published in 1983 and 1964, respectively), but his book perceives advocacy in the same way and imparts the same lessons. This sameness testifies to the stagnant and rather depressing state of English and Commonwealth writing on advocacy.

The modern work on advocacy must first recognise that advocacy is not confined to the criminal courts, and should seek to identify universal principles or techniques of persuasion that are equally applicable to cases before a jury, judge alone, appellate court, administrative tribunal, arbitral

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tribunal and international tribunal. This would require considerable synthesis and abstraction, but the result would be rewarding. Second, more attention is needed to argumentative technique in addition to the conventional emphasis on the presentation of evidence. Third, a modern work of advocacy must address persuasive written submissions, their relationship with oral advocacy, and also the other tools that technology now puts at the disposal of the advocate. It is a truism that an address to the court "should be logical and expressed in simple language" (p. 105) but what criteria should guide the optimal choice or combination of oral, written, graphic and electronic means to achieve logic and simplicity in, say, a complex patent case? This is not to deny the importance of the historical skills of oral advocacy, or the immense importance that the felicitous and experienced handling of oral testimony might have in leading a court through a mountain of documentary evidence to a favourable judgment; it is simply to ask writers on advocacy to address forensic persuasion in a modern way.

The complexity of modern litigation does not require advocacy to be broken down into a number of separate topics. The subject of forensic persuasion should be treated as a whole, and the common principles and techniques of advocacy identified and explained. What is required is a work as thoroughly concise and useful as Mr. Ross's, but which is comprehensive and modern as well.

DAVID J.A. CAIRNS

Our Republican Constitution. By ADAM TOMKINS. [Oxford: Hart Publishing. 2005. xii, 141, (Bibliography) 10 and (Index) 4 pp. Paperback £10.00. ISBN 1–84113–522–4.]

OUR REPUBLICAN CONSTITUTION argues that British constitutionalism not only has an historical republican pedigree, but that it would be much better off if it espoused republican values and practices further and more fully.

Adam Tomkins acknowledges that a coherent account of republicanism is not straightforward. Having said that, he identifies three main aspects of what he takes to be the core of his republican constitutionalism: anti-monarchism and popular sovereignty; freedom as non-domination and its consequences; and the institutional design of accountability. He draws heavily on the works of philosopher Philip Pettit and historian Quentin Skinner. As such, therefore, the book falls within a broader republican project. From this perspective, it is hard to understand why it does not deal more openly with other republican thinkers such as Viroli or van Gelderen. Perhaps this is due to the book's more modest aim, which is to apply the above three aspects to the British constitution; indeed, the main conclusion is that British constitutionalism was, is and should be republican. This conclusion is accompanied by an agenda of institutional reform for the future, including the abolition of prerogative powers, privileges and immunities; the replacement of current information laws to secure genuinely open government; the reformation of both Houses of Parliament as to their democratic election and liberation from party

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constraints; and, finally, the removal of the Crown and the Queen from the constitutional order.

British republicanism is probably better understood in opposition to its rather loose target, "legal constitutionalism"—a very broad label for a number of academics and judges sharing some basic liberal convictions, such as the supremacy of law over politics, and the role of courts in defence of basic liberties and rights. British republicanism has a second enemy—common law constitutionalism—which appeared in the first half of the seventeenth century, was exemplified by the decisions of Sir Edward Coke, but then rejected. Tomkins contends that both British history and present practice turn on the central republican concept of political accountability, the control of the executive by representatives of the people. The legal protection of the British constitution is a corruption of political accountability, as the judiciary is itself not accountable to anyone. In other words, Tomkins prioritises some political aspects of the constitution over the legal ones.

Republicanism in general, and British republicanism more specifically, are intuitively attractive projects, at least at the intellectual level. Pettit in particular offers a compelling account of "freedom as non-domination" as a central feature of his consequentialist philosophy. Freedom as non-domination is a normative power: it amounts not only to living the life one ought to live, but also in having the power to act and to make one's life the way it ought to be even in the face of diverse social pressures. This is an alternative to the more classical liberal idea of "freedom as non-interference". Pettit argues that what matters is not interference *tout court*, but arbitrary interference. Interference is arbitrary when it does not track the "common avowable interest" of people. The government, therefore, is allowed to interfere in the way people organise their lives, provided that it does so by tracking their common avowable interests. The republican project consists not only in offering that understanding of freedom, but also in pursuing the political realisation in institutional terms of such an ideal. It stresses in particular the idea that every citizen has that normative power, notwithstanding social context and pressure. British republicanism, for example, argues that every British citizen will be free if political accountability of the government can be truly and openly exercised by parliament as representative of the people.

The question, then, is why such a noble set of ideals does not have wider support. The main reason is that republicanism is concerned with the institutions administering power, whereas the liberal view of freedom is more concerned with the individual being oppressed by the state or by other individuals. Interference by the state is defined as "*imperium*", interference by other individuals as "*dominium*". The former chiefly interests republicanism, but very little is said about the latter, especially by Tomkins. This would be irrelevant if it was possible to demonstrate that the eradication of *imperium* would have as a side-effect the disappearance of *dominium*. Republican insistence on procedure and institutions exposes it to the charge of indifference towards a set of substantive choices as far as policies are concerned. This is particularly true in situations of reasonable disagreement, where it is necessary to provide an answer to deeply problematic questions such as euthanasia and abortion. It seems that republicanism would have procedural values trumping substantive ones; thus, voting or another procedure would best resolve an issue involving

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persistent disagreement. But certain cultural and social values are of such importance that many people would simply reject the idea that procedural values take precedence over their cherished preferences.

As a consequence, the very objective of maximising freedom as non-domination through political accountability (or any other institutional device) does not yield any precise policy choice in situations of disagreement and must therefore be supplemented by other values. The injection of those values can be translated in constitutional terms with the idea of constitutional rights that shift the debate from procedural issues to more substantive ones. Moreover, constitutional rights give individuals a weapon to resist the interference of both the state and other individuals.

British republicanism has to be assessed eventually by reference to its own agenda. Tomkins presents the items as at first sight quite radical, even wild. But in fact a reform of prerogative powers, improvement of government openness and even modifications of the role of political parties are hardly revolutionary steps. All are feasible, but do not solve the more pressing issue of how to solve serious cases where disagreement is prevalent. One of the reasons why a liberal standpoint is more attractive is probably that it offers a more satisfactory set of values by balancing the relevant conception of freedom with other substantive values. Without doubt institutional questions will remain open, but our preferences will be better protected by a strong and open discussion of rights rather than procedures and institutions.

LORENZO ZUCCA

The Law and Ethics of Restitution. By HANOCH DAGAN. [Cambridge: Cambridge University Press. 2004. xxi, 331, (Bibliography) 34 and (Index) 9 pp. Hardback £55.00. ISBN 0–521–82904–6.]

THE number of books seeking to unravel the law of restitution has grown enormously over recent years. For two very different reasons, Hanoch Dagan's book is a unique and welcome addition to the field.

First, it focuses on restitution in the United States, something which in recent years few books have done. Coinciding as it does with the drafting by the American Law Institute of the Third Restatement of the Law of Restitution and Unjust Enrichment, Dagan's book very commendably aims to "contribute to the long-overdue resurrection of restitution in America". Secondly, in contrast to other works, the main focus of the book is not on the rules themselves, but on the values which underpin the law of restitution. It seeks to "present existing restitutionary doctrine in its best normative light". An understanding of the underlying norms, Dagan argues, should inform any debate on the future direction of the law. He identifies a trio of important values which the law should respect: autonomy, utility and community. Dagan is undoubtedly correct to recognise the importance of grounding restitution in values to which society is committed. For those already well versed in the law, the book is a rich account of how best this might be done.

The structure of the book is unconventional and will be slightly disorienting for Anglo-common lawyers. Although the boundaries of restitution in English law are still very much debated, a consensus now

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seems to have been reached that a claim in restitution (at least when it concerns unjust enrichment) involves the presence of a series of factors. These are (i) an enrichment, (ii) at the claimant's expense, which (iii) was unjust, and (iv) that no defence is available to the claim. The leading English textbooks structure themselves around these factors. Dagan's book does not; instead, he rejects outright the utility of the English taxonomy (which he attributes to Professor Birks), claiming that it "underplays the heterogeneity of the law of restitution". In other words, he is concerned that by restricting the analysis of restitution to four separate questions, there is a danger of simplification. For example, a "unified analysis of defenses implies that each defense is uniformly applicable throughout the field, thus inhibiting a contextual normative inquiry as to the propriety of a given defense to a particular restitutionary category". To facilitate this approach, Dagan adopts a structure which looks one by one at some of the contexts in which a restitutionary claim might lie.

The first two chapters usefully set out the aims and central thesis of the book. The third chapter is concerned with the first contextual analysis, "mistakes" (the plural emphasises that restitution responds to many different types of mistake). It first looks at autonomy and utility in the context of mistakes, and suggests a series of rules that would best protect those values. These ideal rules are then compared to current American law. Chapter 4 concerns "other-regarding conferrals of benefits" (including the claim of the good Samaritan) which traditionally yield very little restitution. In this chapter, Dagan challenges existing rules and suggests that the law ought to be more generous in allowing restitution. Permitting restitution, he claims, "can promote benefice" and "inculcate altruism". "Self-interested conferrals of benefits" (a category which appears in Tentative Draft No. 2 of the new Restatement) are the focus of chapter 5. After outlining the types of conduct that give rise to restitution (*e.g.*, paying a co-owner's mortgage and discharging a joint obligation) and why they do so, Dagan considers whether restitution should be more widely available against "free-riders" who take advantage of someone else's self-interested effort. His particular focus is the potential for governments to claim against tobacco companies for health treatment provided to smokers. The analysis contained in this chapter is both original and valuable.

Chapter 6 is highly contextual, dealing with "restitution in contexts of informal intimacy". It looks at three possible restitutionary claims: unjust enrichment between cohabitants, restitution for the supply of necessaries and rescission of gifts induced by undue influence. When properly understood, restitution might be used to "facilitat[e] relationships of long-term reciprocity". Chapter 7 concerns "wrongful enrichments", in which Dagan draws upon his earlier work, and also that of Ernest Weinrib, to address the difficult question of which wrongs ought (in a values sense) to yield restitution. What marks his account out from others is the breadth of analysis. Of particular interest are his discussions and recommendations for restitution of profits made from slavery or from using another's body parts without consent. Chapter 8 looks at the effect of contract on restitution, focusing in particular on restitution within a losing contract and whether a subcontractor can leapfrog a contractor to sue the owner for work done. The chapter is written with a particular clarity of expression and its ideas make a valuable and sensible contribution to the debate as to the proper relationship between contract and restitution. The last contextual study

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(chapter 9) on restitution in bankruptcy largely concerns the constructive trust and its relation to bankruptcy law. The final chapter succinctly pulls together the book's overall thesis.

Dagan's book is ambitiously wide-ranging and the ideas original and hugely thought-provoking. It will be of great interest to all restitution lawyers, whether American or not. A few observations might, however, be made. First, although Dagan contemplates his readership as including those "who are less familiar with the field [of restitution]", the book is not at all suited to anyone who does not already have a good understanding of the law. A great deal of prior knowledge is assumed. For example, the complicated defence of change of position is critiqued but nowhere explained. Even for the expert, the book would be a challenging read in parts. The reader's understanding of the book's important ideas would be enhanced by greater clarity of expression and by reference to hypothetical examples to illustrate the points made. Secondly, it is not clear exactly what holds the book together as a coherent whole; indeed, it reads more like a series of articles. Dagan writes that the book concerns the law and values behind "restitution", which he defines "loosely" as "benefit-based liability or benefit-based recovery". This seems to include not only remedies based on the gain to the defendant (the English understanding of restitution), but also remedies based on the cost to the claimant in a situation where the defendant has (in a loose sense) gained—clearly a very open-ended category. Although Dagan disagrees, there is a danger that his definition of restitution is too broad and that the subject might not be taken seriously as a result.

Thirdly, much of the book's discourse on values assumes without explanation that society is primarily committed to autonomy, utility and community. These are, of course, important values; but they are by no means the only ones important to the law. By focusing on this trio, Dagan suggests what the rules of law should be. In parts this involves pushing one very important value—certainty in the law—to the sidelines. Finally, Dagan rejects "unjust enrichment" as a guiding principle because it is "question-begging and thus obfuscating", preferring instead a normative inquiry. He views the division made by Birks (and others) of unjust enrichment into four discrete inquiries as too simplistic and incapable of dealing with difficult cases. Whilst there is some truth in this criticism, there is a danger that Dagan, in rejecting much existing scholarship, is forcing the subject of restitution back to square one. Doing so might help rather than prevent the "decline" of restitution in America.

These concerns aside, the book is a welcome, original and timely addition to restitution jurisprudence, which will force lawyers to question and justify current doctrine.

AMY GOYMOUR

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Copyright Exceptions: The Digital Impact. By ROBERT BURRELL and ALISON COLEMAN. [Cambridge: Cambridge University Press. 2005. xxix, 310, (Appendices) 65, (Bibliography) 36 and (Index) 16 pp. Hardback £65.00. ISBN 0–521–84726–5.]

THIS BOOK'S province is the effect of digital technology on the "exceptions and limitations" to the rights of authors. Burrell and Coleman present a concise yet comprehensive survey of the important topics and recent developments in the field of copyright exceptions in the digital age.

International legislative response to the issues raised by the digital environment emerged in the shape of two World Intellectual Property Treaties (WIPOs) of 1996 on Copyright (WCT) and Performances and Phonograms (WPPT). The US implemented these Treaties with its Digital Millennium Copyright Act of 1998. As to the EU, intensive lobbying was followed by the adoption in 2001 of a Directive on the harmonisation of certain aspects of copyright and related rights in the information society (Dir. 2001/29/EC, hereinafter "the InfoSoc Directive"), which was meant to implement a harmonised legal framework to encourage content creation in the multimedia environment for the success of the information society. Article 5 of the InfoSoc Directive, unlike Article 10 of the WCT and Article 16 of the WPPT, does not establish a general rule but a list of copyright exceptions—one compulsory and twenty optional—thus restricting the instrument's harmonisation goal. Writing the Directive into national law proved to be a difficult task. It required amendments to UK law in a number of areas and was implemented through the Copyright and Related Rights Regulations 2003.

Taking the newly amended UK legislation as a case study, the authors examine the ways in which international and regional copyright systems have failed both to take into account the interests of users and think of creative ways of doing so. At the centre of the work is concern for the recognition of the need to preserve the user's status in the new borderless society created by the Internet and modern communication systems.

The book is divided into three parts. Part I carries out a meticulous assessment of a number of exceptions foreseen in the Copyright, Designs and Patents Act 1988, focusing on those concerned with public policy goals. The authors demonstrate that this type of "permitted act" is essential and that some problems are emerging in the UK in this context, because of the inflexible, outdated, unnecessarily complicated and uncertain nature of the legal provisions at stake. The doctrinal analysis covers copyright and freedom of expression, fair dealing for the purposes of criticism, review and news reporting and related exceptions, the public interest defence, use by researchers, educational establishments, and the library and archive provisions and related exceptions. Part II considers the role of exceptions and the legislative and political processes underpinning the present system, both supranationally and domestically. Part III addresses options for reform. The authors conclude that the UK's present regime of "permitted acts" should be extended as soon as possible and that, ironically, if the wording of the InfoSoc Directive were to be embraced more closely a range of more flexible exceptions would arise, generating a better deal for users. The Appendices are valuable, comprising Chapter III ("Permitted Acts"), s. 296ZE ("Remedy where effective technological measures prevent permitted acts") and Schedule 5A

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("Permitted Acts to which Section 296ZE Applies") of the Copyright, Designs and Patents Act 1988, the InfoSoc Directive, and section 107 of the United States Copyright Act 1976. The work also contains an extensive bibliography and an index.

The authors' style is extremely readable and the commentary enriched by the identification of problems, posing of questions, presentation of examples and scholarly insights. It is a must for anyone interested in this debate.

PATRICIA AKESTER

Using International Law in Domestic Courts. By SHAHEED FATIMA. [Oxford: Hart Publishing. 2005. li, 436 and (Index) 11 pp. Hardback £40.00. ISBN 1–84113–515–1.]

THE POTENTIAL RELEVANCE of public international law to domestic adjudication is increasingly accepted. But how and when international law may properly be invoked remains in many aspects controversial. Attempts to bring some order to this area of law are therefore welcome. Shaheed Fatima's contribution is a remarkable survey of recent cases in which English courts have looked to treaty obligations, rules of customary international law and other international materials. Fatima guides the reader through this immense body of case law with layers of meticulous subheadings prefaced by instructive commentary. The result is an impressive compilation for which practitioners in particular will be grateful.

While this book is conceived as a reference work, its collection and organisation of such a vast amount of material raises larger questions about the reception of international law by contemporary English law. The author generally leaves these questions unanswered, preferring to let the cases speak for themselves. But the cases do not speak with one voice, and the reader is left to fit the pieces together as best he can.

Perhaps the central question the book provokes, when read from end-to-end rather than as a reference work, is the validity of the distinction English courts have unevenly drawn between incorporated and unincorporated treaty obligations. In her attempt to organise and make sense of judicial pronouncements in this area, the author reinforces and even builds on these distinctions. She characterises treaties as directly incorporated, indirectly incorporated or unincorporated. Differing rules of justiciability, judicial notice and statutory interpretation are said to follow from these categories though, as the author acknowledges, the boundaries are not fixed and the rules may be changing.

The difficulty with these categories, from the international legal perspective, is that they privilege form over substance. As a matter of international law, the legal means by which a treaty is implemented in domestic law are generally irrelevant. What matters is that the obligation is given domestic effect. If this can be done through statutory amendments that do not expressly refer to the treaty lurking behind them, fine. If reliance on existing statutes suffices, so much the better. Even reliance on common law adjudication is not, in itself, objectionable. The result is what counts. It is therefore, in many cases, too simple to call a UK treaty "unincorporated" if by that term one means that the treaty is not being

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given legal effect in domestic law. If the treaty requires certain domestic results, and UK law produces those results in conformity with the treaty's requirements—though not as a result of an Act of Parliament expressly incorporating the treaty into domestic law—no state party or treaty-monitoring body will have cause to complain. The proof of this proposition (if any is needed) lies in UK treaty practice. If failure to incorporate a treaty's terms by statute into domestic law necessarily gave rise to failure to perform the treaty, the UK would not have ratified the European Convention on Human Rights, and countless other treaties directed at the domestic laws of their states' parties, without first enacting the required implementing legislation.

It therefore seems misguided to distinguish too heavily between treaties on the basis of their legislative status in domestic law. For example, the author characterises the European Convention on Human Rights as "indirectly incorporated" by the Human Rights Act 1998. Article 11(1) of the Convention guarantees freedom of association with others on terms almost identical to those of Article 22(1) of the International Covenant on Civil and Political Rights—a treaty for which no similar implementing statute exists in UK law. Must we therefore conclude that ICCPR Article 22(1) is "unincorporated" in spite of the nearly identical protection accorded freedom of assembly by the Human Rights Act? Too formal an analysis leads to the wrong conclusion.

Similarly, to describe an "unincorporated" treaty as non-justiciable, as English courts have sometimes done, is unsatisfactory. The courts should take judicial notice of all treaties binding on the state and should strive, within the bounds of constitutional doctrine and the rules of statutory interpretation, not to make decisions that will put the state in violation of its international obligations. The tricky part, of course, is determining how far the courts should go. But those difficult decisions are not greatly illuminated by elaborate distinctions between direct incorporation, indirect incorporation and non-incorporation. The cases collected in this volume reveal the tensions these unhelpful categories create. The author points to English cases describing unincorporated treaties as non-justiciable in one chapter, then quotes numerous cases in which courts have striven to interpret domestic laws compatibly with such supposedly non-justiciable treaties in the next. The inconsistency is in the law, not in the author's treatment of it. But the author seems sometimes too anxious to shore up distinctions that, left unsupported, might profitably fall away.

Fatima has written a reference work not a monograph. She may be right to keep her personal views on the difficulties in this area of law to herself. But one wants to hear more from this author. Let us hope she follows up this admirable work with further, more critical considerations of this developing area of English law.

Gib van Ert

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The Law of Public and Utilities Procurement. By SUE ARROWSMITH. [London: Sweet and Maxwell. Second edition, 2005. cxxxviii and 1547 pp. Hardback £160.00. ISBN 0421758503.]

SUE ARROWSMITH, law professor and Director of the Public Procurement Research Group at Nottingham, has done more than anyone to establish public procurement as a separate legal discipline in the UK. Its birth might be traced to 1994, when Professor Arrowsmith was a moving spirit behind the inauguration of the UK Association for Regulated Procurement. She has influenced the development of EU policy on public procurement and published with Sweet and Maxwell the best guides for practitioners to the subject in the first edition of *The Law of Public and Utilities Procurement* (1996) and contributions to the *Encyclopaedia on Public Private Partnerships and PFI*. She also established and still co-edits the first UK journal in the field (*Public Procurement Law Review*) and has worked with a UK firm to produce an expert web-based system and guide to the EC procurement rules, which includes a database of the relevant law, policy and cases.

The first edition of this book provided the first comprehensive analysis of the legal regulation of procurement applying in the United Kingdom, covering purchasing by public bodies as well as by the privatised water, energy, transport and telecommunications utilities. It quickly became "the bible" in its field. Professor Arrowsmith has now produced a second edition, which as she notes in her preface is "long overdue": since 1996 the EC public procurement directives have twice been extensively amended, first in the late 1990s and more fundamentally in 2004. The trickle of EC public procurement cases has become a torrent and both the European Commission and the UK's Office of Government Commerce have begun to produce interpretative documents. Meanwhile the UK government's forays, ahead of many other countries, into privatisation and transparency have resulted in the Private Finance Initiative (PFI), the Freedom of Information Act and "Best Value"—the policy which replaced compulsory competitive tendering and which requires demonstration of the value for money of local government in-house services. When equality and environmental and health and safety measures at national and European level are added to this, it becomes readily apparent how complex the task of buying goods and services for the public sector has become. As Arrowsmith notes "Overall, there is no doubt that the risks and complexities of regulated procurement, at least for entities in the public sector, have substantially increased as a result of increased judicial and legislative activity at Community level".

So when the second edition of Arrowsmith's book landed on my desk in the autumn, I gave a great cheer. Spectators may have wondered what could be so gripping that kept me fixed for all its 1500 pages.

Practitioner and academic texts, particularly further editions, can vary in quality and purpose. This new book is however no marketing tool or RAE text. The work has been almost completely re-written and is greatly expanded. One of the strengths of the first edition, which becomes even more apparent in the second, is Arrowsmith's grasp of the business context and her willingness to deal with the grey issues encountered there, reasoning through to a practical conclusion by means of a thorough and authoritative analysis of the state of the law. At a high level the discussion

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is very helpful as to how procurement law affects privatisation, the various ways that framework agreements can be established and PFI procurement. But there is also very useful discussion of the nuts and bolts of the procedures, for example, in the definition and application of award criteria to select the winning bid (paragraph 7.112 *etc*.). Arrowsmith draws out very well the uncertainty in the law about how far the courts will, and indeed are, competent to intervene to police the application of award criteria, given their limited experience in this area. Her discussion demonstrates the role which academics can play in helping a sound legal framework to emerge. Similarly her comments on the purpose of the Directives and therefore the limits of the ECJ's jurisdiction, whilst of more academic interest, are enlightening also for the practitioner. Here is an academic fully able to conduct and extend the academic discussion, while engaging productively with the world outside the academy.

The text was finished after the adoption of the 2004 directives but before they were translated into UK regulation. The book therefore is able, though without full reference to the regulations, to deal with the new possibilities in the directives—"competitive dialogue" and "electronic procurement" for example—while also explaining how the reform and consolidation affects the rules as understood and applied prior to 2004. Chapter 3 contains a useful and footnoted summary of the main changes brought by the 2004 directives. The text also deals with the *Alcatel* judgment and the UK government's proposal for implementing this in UK law. *Alcatel* and a subsequent ruling found that national courts in EU Member States must in all cases be able not simply to award damages but also to review and set aside award decisions on procurement contracts subject to the directives; as a result there must be a period of time between the decision to award the contract and the start of the contract to ensure that complainants are able to bring actions in the national court for suspension and setting aside of the decision.

Arrowsmith has devoted her career to the principle, in which she believes strongly, that some form of judicial control of government procurement is appropriate. She also supports, as any observer must, the objectives of the directives in opening up the internal market. However, she states

> my research and practical activities in the field over the last 10 years have led me to become ever more sceptical of the value of detailed regulation as a means of achieving procurement objectives, at least in the UK environment, and ever more appreciative of the costs of inappropriate regulation and this has led me to doubt the wisdom of the EC's current approach to public procurement.

How do the 2004 directives meet this criticism? Their promulgation followed an EC green paper which declared that fundamental change was not needed. The Green Paper however triggered a debate, in which the UK vigorously participated, that led to a very different conclusion. As Arrowsmith notes, bearing in mind the difficulty of getting agreement on any reform of EC legislation, "contrary to initial expectations, the debate launched by the Green Paper did ultimately lead to significant changes to the legal framework". Indeed the new features of the 2004 directives do read like a shopping list of UK gripes. But the process is perhaps an object lesson in what can and cannot be achieved. Sadly, the Commission's eventual willingness to reform did not ultimately lead to a great product:

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the new rules are very long and very complex. Arrowsmith's judgment on the new rules is damning: "Despite simplifying provisions ... the rules remain unnecessarily complex and detailed. The new provisions are, for the most part, even more complex and convoluted than the old ones; the new provisions create many important new ambiguities ... Overall the new directives are ... neither simpler nor clearer than the existing rules" (para. 3.31). This is a sad but just conclusion from an informed commentator. Regulators are always tempted to regulate in detail, to block every loophole. This creates inflexibility, and legislation with which it is hard to comply and which is not forward-looking. That said, it is important to bear in mind that if the rules are properly understood and applied they do act as a good discipline, which can encourage good and discourage bad purchasing decisions. Ingenuity and imagination need to be concentrated on applying the rules creatively, not avoiding them.

The interplay of the procurement directives with national legislation is also a matter of interest. The Freedom of Information Act 2000 is discussed in chapter 2. Freedom of information is an important component in promoting transparency in procurement decisions. The 2000 Act is interesting because it is not a procurement measure but procurement decisions are significantly affected by it. The provisions of the 2000 Act do not contradict the transparency provisions in the Directives; they go further. Procurement is caught by a side wind, arising from other measures aimed at other targets. This demonstrates the need for a comprehensive procurement law text, which takes account of all the relevant legislation and guidance. Arrowsmith's book does just that.

The only area in the book which is rather thin, and to which more attention might have been paid, is the interplay between the procurement rules and competition law. This is perhaps on the edge of Arrowsmith's concerns but it would be interesting to see a competition lawyer address the law on public procurement and identify what competition law has to say in addition. The Office of Fair Trading published in September 2004 preliminary research on the impact of public sector procurement on competition. Its study contains an in-depth economic analysis of the relationships between public procurement and competition. There must be a similar task for lawyers to do!

ROSEMARY BOYLE

Non-State Actors and Human Rights. Edited by PHILIP ALSTON. [Oxford: Oxford University Press. 2005. ix and 387 pp. Paperback £27.50. ISBN 0–19–927282–4.]

NON-STATE ACTORS AND HUMAN RIGHTS, the most recently issued edition in the "Collected Courses of the Academy of European Law" series, addresses the international entities cast together as "non-state actors" and their respective roles and potential for implementing human rights. Edited by the redoubtable Philip Alston, the collected essays are detailed and thoughtful, and provide an excellent overview of an under-theorised area within international law. The volume is logically organised into three parts. Following an introduction to the field in the first section, the subsequent two parts examine the roles of non-state actors played, respectively, by

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non-governmental organisations and international organisations, and by corporations.

Written by the editor, Chapter One ("The 'Not-a-Cat' Syndrome: Can the International Human Rights Regime Accommodate Non-State Actors?") challenges as misleading the standard international law characterisation of influential and multinational organisations, including the World Bank and the International Monetary Fund, as (merely) non-state actors. It concludes with a brief exegesis of the remainder of the book. Chapter Two ("The Changing International Legal Framework for Dealing with Non-State Actors") by August Reinisch provides historical perspective into the evolving role of non-state actors as participants in developing and protecting human rights. Voluntary codes of conduct and the revival of extraterritoriality within domestic courts are two factors identified as driving this phenomenon.

Identifying criticisms directed at non-governmental organisations for their increased influence, Chapter Three ("The Evolving Status of NGOs under International Law: A Threat to the Inter-State System?") defines these entities by their lack of governmental capacity. Acknowledging that non-governmental organisations have become increasingly important, Menno T. Kamminga nevertheless concludes that their status on the international level remains relatively weak. Chapter Four ("Economic, Social, and Cultural Human Rights and The International Monetary Fund") probes the ambiguous status and human rights obligations of non-state actors by examining the relationship between the powerful International Monetary Fund and the far-reaching International Covenant on Economic, Social, and Cultural Rights. The organisation's legal counsel, Francois Gianviti, strikes a balance by maintaining that as a non-state actor the entity is neither a party to nor bound by the treaty's mandates, while also conceding that broad circumstances exist wherein it can readily contribute to implementing the Covenant's aspirations.

Chapter Five ("Catching the Conscience of the King: Corporate Players on the International Stage") considers whether multinational corporations can be held criminally responsible for human rights violations. After assessing three distinct theories under which these charges might be brought, Celia Wells and Juanita Elias determine that present protections of corporate economic rights present a formidable challenge to such liability. Chapter Six ("Corporate Responsibility and the International Law of Human Rights: The New *Lex Mercatoria*") proffers an optimistic vision of corporate responsibility centred on the emergence of a modern *lex mercatoria*. In support of this assertion, Ralph G. Steinhardt maintains that four separate regimes—those of the market, domestic regulation, civil liability and international regulation—each promotes good business practices amongst corporations. Chapter Seven ("The Accountability of Multinationals for Human Rights Violations in European Law") addresses the mechanisms through which the European Union might hold multinational enterprises accountable for human rights violations. After a thorough analysis of competing concerns, Olivier De Schutter suggests that the European Union's experience creating socially responsible regimes, for example in South Africa, could lend itself equally well to matters of corporate governance. Finally, Chapter Eight ("Human Rights Responsibilities of Businesses as Non-State Actors") discusses the role of transnational corporations and human rights obligations from an

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international law perspective. Referencing a United Nations soft law that one of the authors was instrumental in drafting, David Weissbrodt and Muria Kruger offer the draft "Norms" as a template for good corporate practice.

M.A. STEIN

International Air Carrier Liability: *The Montreal Convention of 1999*. By PAUL DEMPSEY and MICHAEL MILDE. [Montreal: Centre for Research in Air and Space Law, McGill University. 2005. viii, 259, (Appendix) 185 and (Index) 17 pp. Hardback £103.00. ISBN 0–7717–0636–7.]

THIS WORK is the latest publication of the Centre for Research in Air and Space Law, the research arm of McGill University's Institute of Air and Space Law. The authors are distinguished legal scholars and eminent publicists in the field of air law.

Their book is the first to address the Montreal Convention for the Unification of Certain Rules for International Carriage by Air 1999. In the words of the authors, their aim is to provide a "compact analytical guide to the 1999 Montreal Convention" (p. viii) for use by law students, aviation practitioners and the general public. As one would expect from a book coming from the best authorities in the field, it guides the reader in comprehending the many issues which arise from the entry into force of the Convention. A particular strength of the book is that it examines the interrelation of the Montreal Convention with the Warsaw Convention regime, which is an amalgam of international conventions, protocols, collective inter-carrier agreements, regional groupings and domestic legislation.

The structure of the book follows the articles of the Montreal Convention. The opening two chapters provide a short introduction to its legislative history, as well as a synopsis of the evolution of the liability regime from the unamended Warsaw Convention 1929 to EC Regulation 2027/97. The authors summarise the main elements of the Warsaw regime and explain both from a legal and a socio-political perspective the reasons that led initially to the multiplicity of instruments attempting to update the Warsaw Convention and subsequently to the adoption of the Montreal Convention. Further, they summarily present the innovations and achievements of the Montreal Convention, without losing sight at the same time of the "procedural flaws" (p. 41) in the preparation of the Convention. In Chapter 3 the various principles of interpretation applicable to determining the meaning of international treaties are concisely examined.

Chapters 4–11 are a detailed commentary on the articles of the Montreal Convention. The authors compare the articles with the corresponding provisions in the Warsaw regime, and provide extensive references to relevant case law, particularly that of the US and the UK. Moreover, some of the terms that cause difficulties in the interpretation and application of Convention articles, such as "bodily injury" and "accident", are analysed in a very clear and understandable way. At the same time, the authors pose a number of practical questions, which encourage the reader to delve into further research and to engage

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constructively with the competing arguments and the reasoning behind conflicting case law.

The argument that air carriers are deemed to be "general 'insurers' for any type of alleged damage suffered by a passenger" (p. 148) is comprehensively considered in light of the judgments in *Wallace* v. *Korean Air Lines* 214 F.3d 293 (2d Cir. 2000) and in *Morris* v. *KLM* [2002] UKHL 7. Furthermore, the authors provide a detailed and thorough discussion of the recent controversial majority judgment of the US Supreme Court in *Olympic Airways* v. *Husain* 540 US 644, 652 (2004). They rather ironically characterise that judgment as "the case of the catatonic accident, for he who does nothing at all may now actually be committing an accident" (p. 157), and support the view that the practical implications of *Husain* are troubling. It would have been very interesting to see whether, in the view of the authors, the unanimous decision of the House of Lords in *Re Deep Vein Thrombosis and Air Travel Group Litigation* [2005] UKHL 72, [2005] 3 W.L.R. 1320, has improved the position of carriers. Unfortunately, at the time the book was written the judgment in *Re DVT* had not yet been delivered.

In addition, the book provides a welcome explanation of the final clauses of the Convention, which have not received systematic attention by similar publications in the United Kingdom. The authors raise the issue that uniformity is not being achieved by adopting a Convention which is "equally authentic" in six languages, but they claim that "the English version is *de facto* more equal than the others" (p. 259), an element that will need to be assessed in light of future case law.

The book concludes with a very helpful collection of the full texts of the Convention, as well as the conventions, protocols, collective inter-carrier agreements, regional groupings and domestic legislation that comprise the Warsaw Convention system. On a more general note, the footnotes to the text contain a useful breadth of additional information and a good topical index is provided. However, considering the enormous amount of literature referred to in the book, a bibliographical index, as well as a complete table of cases, would have provided a clearer overview of the analysis.

In conclusion, the book not only succeeds in its stated objective but also goes a step further and offers a thought-provoking analysis of the Montreal Convention. This work comes at a most interesting time, when the Convention is gaining wider acceptance and the first cases involving its application are starting to be adjudicated by courts around the world. Similarly, air carriers are considering the readjustment of the allocation of risks in their contractual arrangements with service providers so as to reflect their exposures under the Convention. The book provides a clear and detailed analysis of the normative framework of the Convention, as well as references to a whole range of relevant literature and case law. In this reviewer's opinion, it is an interesting, instructive and essential work for both legal academics and practising lawyers involved in the aviation industry.

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