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BOOK REVIEWS

Law as a Social System. By NIKLAS LUHMANN. Translated by KLAUS A. ZIEGERT. Edited by FATIMA KASTNER, RICHARD NOBLES, DAVID SCHIFF and ROSAMUND ZIEGERT. [Oxford: Oxford University Press. 2004. 498 pp. Hardback £52.50. ISBN 0–19–826238–8.]

JURISPRUDENTIAL WRITING should give insight into the nature of legal activity. The abstract character of the writing in this field often results in a failure to achieve this objective. The reader spends so long trying to make sense of the logic of the writer's terminology that its application to real life legal situations becomes lost to view. Philosophical elegance is achieved at the price of illuminating what is happening in the legal world.

Systems theories have at their core a belief that complex modern societies operate by developing a number of functional systems, each of which has its own peculiar function and internal logic. Take, as an example, selling a house. Estate agents have one set of systems, including specific euphemisms for describing the state of the property and processes for clinching a deal. Mortgage lenders have another set of systems for their interest in the transaction. Lawyers have yet a further set of systems for conveyancing and registering title. The end users, the buyer and the seller, are left often bemused by the peculiarity of each system as it impacts on their personal ambitions. The idea that these social systems are self-referential and have their own internal logic (which is often obscure to the lay person) would match the experience of many involved in such everyday transactions.

Luhmann was one of the most important systems theorists in the second half of the twentieth century in terms of his influence and the volume of his work. That a major volume bringing together his ideas has been made available in English is both very welcome and potentially influential. The book was the definitive statement of his ideas prior to his death in 1998 and, as such, is a major point of reference in the field. But the English editors note in their very helpful introduction that the work is difficult to read. The use of computational and cybernetic metaphors is meant to provide helpful analogies to other systems. But these are used in such a technical way as to obscure for many the straightforward message that is being explained. The internal logic of the metaphor takes over the message. On the one hand, it is a "must read" for serious legal scholars. On the other, it requires time, patience and tenacity. Very few undergraduates will get far with it, but some masters students might.

Given the clear problems, why should the serious scholar persist, even with such a good translation? The importance of the work lies in the insight that the conception of law as a self-contained system has when analysing legal practices. At its core, the message is that law provides an element of stability in a complex world by being a system in which the complexity is reduced and stability of expectations is offered. Of course, such stability comes at a price: the legal world's perspective on what is right does not always conform to that accepted in the wider world. Stability of expectations also cannot be guaranteed absolutely, since the law, however self-referential, has to interact and communicate with other

social systems. All that can be guaranteed is that legal change is not an automatic consequence of social change and that the law adapts at its own pace and in its own terms to changes in its environment. This vision of the law as a social *system* is important for understanding how law works, both in its contribution to society and even more clearly in its internal processes. The insights of this systems approach are not fundamentally new, even if the particular way of describing the law may be novel. Legal positivists like Joseph Raz (*Legal Reasons and Legal Norms*) write about "the legal point of view" and how it provides reasons for action that are different from the general range of ethical reasons and may often exclude or change the weight of wider ethical considerations. That more comprehensible terminology focuses on the citizen making decisions about how to conduct herself. Luhmann is more concerned with the structures of the legal system and the practices of the legal community. On the one hand it is more sociological, but on the other it remains very theoretical. There are some concrete examples of historical situations mentioned in passing, but few of these are offered as extended case studies to show the application of the theory.

The book has 12 chapters, the most abstract at the beginning. To begin, Luhmann examines the place of legal theory and its ambitions in understanding law. Systems theory attempts to describe the boundaries of law. Whereas much sociology of law is interested in the influences on the content of the law, systems theory assumes that its unity can only be programmed or reproduced by the system itself, not by factors in the external environment (p. 73). In this sense, the system is (operatively) closed. Such a conception tells us nothing directly about the connection between law and its environment. Change in one does not necessarily lead to change in the other. Thus, although constitutional law might seem to involve politics or higher moral standards, it is not necessarily the same and it can operate in its own terms (pp. 121–123). The plausibility of this analysis of law depends on how law is assumed to function. The stabilising of expectations through a series of distinct social systems makes social life manageable. But the legal system in its own terms cannot ensure social stability. Conceived in this light, the legal system cannot warn when the social foundations on which it depends are under threat (p. 161).

Luhmann's systems idea might seem to serve any objective a particular society might like; indeed the more complex chapter 4 suggests that social purposes are contingent, rather than inherent, in the nature of law. It is clear, however, that Luhmann adopts a basically Kelsenian approach which sees law as offering an alternative to private force (p. 171). At the same time, the contribution of law is to offer procedures through which decisions are taken and not just ideals to be followed. In this perspective, the law is fundamentally positivist—the fairness of what the system seeks to achieve is contingent, rather than inherent in what is treated as law. As in Kelsen, if norms belong to the system they are valid, whatever their fairness. The distinctive contribution of this theory is to focus on law as a system of institutions, rather than as a system of norms. Legal evolution, as described in chapter 6, is about the increasing complexity and differentiation of legal institutions. The development of a professional judiciary, described in chapter 7, reinforces the differentiation of law and the legal system as an autonomous and self-referential activity. Law is not just politics or morals, whatever the connection may or may not be. The strength of the system is

shown by the nature of legal argumentation discussed in chapter 8. In brief, legal reasoning is a distinctive language game. The picture is of an internal discourse, a distinctive set of reasons justifying decisions in terms of legal texts and precedents.

The systems theory provides a picture of law that does not focus on how the system interacts with other social systems. The concepts of differentiation and "structural coupling" are intended to suggest that systems are independent, but at the same time exist together and need to interact. Whilst Luhmann argues that the legal system is best analysed as self-referential (autopoietic), he acknowledges that there are connections with other systems; indeed some legal standards, such as "best interests", deliberately refer to the standards of other social systems. Whereas much legal scholarship looks at law in its social or political context, Luhmann wants to stress the structures that make law distinctive and separate. Clearly, there is enough in the way in which law works to justify the approach of Luhmann. But the question arises whether this is the most helpful way of understanding law. It produces a different kind of "pure theory of law" from that offered by Kelsen, but seems rooted in the same kind of intellectual ambition. As such, it is at odds with the mainstream of contemporary legal scholarship.

Luhmann's work engages with many strands of Anglo-Saxon legal scholarship, especially that developed in the US. It is possible to see the connections and the differences between his work and contemporary scholarship, especially in the later chapters of the book. Therefore the reader can see how far this particular way of perceiving the law is worthwhile.

Luhmann's perspective is distinctive. His metaphors are cybernetic, rather than the biological terms used by Teubner. Behind this (often obscuring) terminology lies an important analysis about the way in which law operates as a distinctive social system, a perspective which those practising law take for granted. To that extent, the analysis of the book illuminates legal practice in a helpful way. But it also deliberately underplays the connections between law and politics and law and social forces. The critique of the content and service that law provide depends on using external criteria, so Luhmann's theory does not perhaps stress the most important issues that face both the legal system and legal analysis.

JOHN BELL

Form and Function in a Legal System: A General Study. By ROBERT S. SUMMERS. [Cambridge: Cambridge University Press. 2006. 428 pp. Hardback £45.00. ISBN 0521857651.]

THE JURISPRUDENTIAL COMMUNITY has for some time been privy to previews of this book, which is posed to create, if not a Copernican revolution, at the very least a storm of debate. Summers traces the beginnings of the themes in his book to the Goodhart Visiting Professorship he held in Cambridge in 1991–92. For those of us who recall the first articles on the theme ("The Formal Character of Law" [1992] C.L.J. 242), the subsequent developments, as well as the most recent summary last year ((2005) 18(2) *Ratio Juris* 129), the release could not come sooner. A great deal more

time will need to pass before we can estimate the real impact of this highly ambitious work. This review is confined to providing a brief overview and some first impressions.

Although many of the insights presented in later chapters stand and can be judged alone, the methodological exegesis in chapters 1–3 is central to understanding the method and aims that pervade the detailed analysis in subsequent chapters. Part 2 of the book (chapters 4–9) applies this methodology to various legal phenomena, including the legislature as an institution, rules as precepts, contracts and related property interests as non-preceptual law, statutory interpretation as a legal methodology, and sanctions and remedies. Summers refers to these phenomena as first-level functional legal units. Part 3 of the book turns to second-level units (alternatively referred to as systematising devices), which assist him in explaining the overall form of a legal system.

The gift and, with respect, curse of the book lie in its first three chapters. At the philosophical core of Summers' work is the concept of form. This concept is to assist his answer to the fundamental question—what is the nature of a legal system?—without recourse to empirical investigation (pp. 93–94). Moreover, this concept is designed to distinguish Summers' work as the right answer to that fundamental question, by comparison with what he terms the "rule-oriented" analyses of Hart and Kelsen. Time and again Summers highlights the inadequacy of the view that a legal system is essentially a system of rules. Summers occasionally acknowledges that his criticism of rule-oriented approaches should be tempered to the extent that these approaches do not inherently exclude the nature and extent of the insights that his own method provides; yet, according to Summers, the work of Hart and Kelsen does not reveal such insights (p. 85 fn. 30). Ultimately, however, Summers' work is relatively free of references. Although he acknowledges the influence of a number of theorists (primarily Rudolf von Jhering), there is no detailed engagement with the work of any other theorist or philosopher, with the result that references are occasionally dismissive (*e.g.*, the references to Wittgenstein at pp. 77 and 83). In judging Summers we thus should not rely on his representation of any philosopher or philosophical tradition.

There are numerous metaphysical puzzles at the heart of Summers' concept of form. Although he spends three long and repetitive chapters presenting his methodology, most of the puzzles are left unanswered. Most striking is the relationship between form and purpose. Summers defines his concept of form, in relation to a legal unit, as the systematic and purposive arrangement of that unit. The form of a unit is its organisational essence, characterised by the unit's purposes, make-up, unity, determinateness, continuity of existence, mode of operation, instrumental capacity, intelligibility, distinct identity and ordered interrelations with other units. This is theoretically fine, but in practice Summers identifies the various attributes of the form of each unit through the prism of the purposes those attributes serve.

One of Summers' favourite examples, repeated throughout the book, is the form of rules designed to regulate traffic speed. If such a rule provides that no cars are to drive over 70 m.p.h. then it exhibits the formal feature of "definiteness", a feature that contributes to the efficacy of the rule much more so than would a rule requiring a driver to proceed at "a reasonably safe speed". One problem here is that Summers provides no real criteria

for the choice of definiteness outside the purpose it serves. Why not include the number of vowels in a rule as a formal feature, or the aesthetic value of the words as printed on a page of a published statute? These strange examples are meant to highlight that Summers is, first and foremost, engaged in an identification of the *purposes* of units; the identification of forms comes later, as if to hide the initial engagement.

The traffic rule example is perhaps the most difficult to criticise because the alternative "formal features" are so obviously purposeless, but there are many other examples in the book where the values Summers sees in the various phenomena he analyses override and determine the formal features to such an extent that what the reader requires—yet is not given—are arguments why those features, rather than others, have been identified. Summers sometimes falls back on the language of "the effects of forms" in order to distinguish them from purposes, but how is an effect of a form different from its purpose when the effect has been identified precisely because of the purpose originally attributed to the form? Another problem lies still deeper. Summers is keen to emphasise the purposes that form helps to generate. But, as we have seen, forms are themselves often identified precisely because of the purposes they are said to enunciate in the first place. In other words, the identification of forms via purposes already establishes that forms help to bring about purposes. Summers appears to be pulling himself up by his own bootstraps.

Inherent in this confusion is a neglect of historical and sociological reality. Summers often points to how forms are designed with purposes in mind, but he does not seem to allow for the possibility of forms arising, for example, due to the (often conflicting) interests of various parties. Consider the nepotism that once dictated the appointment of judges' clerks. Can it be said that this "formal" feature, not explicated by the contents of the rules governing a court, served a purpose? Even if it could be said to serve a purpose, would it be picked up by Summers' analysis? Is it not an aspect of the legal system that deserves to be noted, which contributes to our understanding of the force of tradition and other forces of sociological change? Summers does not engage with the philosophies of history or social change, yet these would have a great deal to say about the conflation of purpose and form in the description of a legal system. In short, Summers seems to ignore the greatest and most persistent bug in the history of philosophy (and, more generally, in the history of the practice of describing social phenomena): contingency.

Another related problem is that, due to the conflation of form with purpose, and Summers' keenness to distinguish his work from that of Hart and Kelsen, "rule-oriented analysis" is stripped to the barest and most simple analysis of the content of rules—as if this analysis of content did not involve grappling with the purpose of rules (pp. 79–88). Summers, however, does not really explain what he means by the content of a rule. He refers to the rationale of a rule as not being expressed in its content, but does not analyse the concept of expression, as if a rule could not carry within itself the seed of purpose.

The problems faced by Summers' concept of form can be called metaphysical because (on this reviewer's reading) the real aim of his book is ontological. Summers is correct that a rule-oriented approach is ontologically deficient—to the extent, of course, that such an approach

aims to provide a description of the nature of a legal system (rather than, say, the nature of a system of rules or the nature of the operation of validity in a legal system). Summers rightly refuses to accept that the nature of a legal system can be explicated by reference to a single snapshot in space-time of the contents of authoritatively promulgated rules. He is to be applauded for pointing to those features of the legal system that are so obvious that they have become invisible, like Nietzsche's army of the metaphors of truth. If his *a priori* scaffolding can help us to "see" more of our legal system, and to place that very question of "seeing" at the heart of our grappling with the question of the nature of a legal system, then Summers' contribution is impressive.

However, if his aim is to be truly ontological, Summers will need to confront issues at the heart of any ontological exercise. One of these issues is time: at what point in the development of a legal system do we position ourselves in order to observe its features? Clarification here may very well determine whether we can be said to be describing, or evaluating, or performing any other kind of activity vis-à-vis our analysis of the legal system. Further, from where do we judge the purposes of a legal system? From long after the event when a purpose has already been expressed, or at the point where we attempt to chisel values on to the face of reform? Are we describing how a legal system has developed or merely the point it has reached? And on what basis do we make an evaluation of the stage of development of a legal system? Summers also needs to clarify the sources of his analysis: what causes, actors, interests and other kinds of social phenomena does he allow into his universe, and where does he find evidence of them? At times, Summers refers to "accepted general concepts, their manifestations in practices, and the expressed critical attitudes of personnel" (p. 65), but he hardly discusses the detailed treatment of such issues in the philosophy of social science.

This review barely skims the surface. It hardly addresses Summers' analysis of second-level systematising devices, which is designed to reveal the alleged thinness and limited reach of both Kelsen's *grundnorm* and Hart's rule of recognition. The author's rich and multi-layered pictures of various first-level legal phenomena will be of immense importance to all theorists working within those specific fields. For policy-makers alone this book is a must. Sceptics should begin with chapter 10 to see just how much they can learn from Summers: the breadth of his scholarship is startling. Wittgenstein once said that the best philosopher is the one who can walk the slowest. If only we could slow Summers down and ask him to lead us through some of the metaphysical puzzles in this work, we should be well on the way to enriching our current feverish interest in the methodology of legal theory with an examination of the art of seeing: from where and when can we see what and how and why?

MAKSYMILIAN DEL MAR

Atiyah's Introduction to the Law of Contract. Sixth edition. By STEPHEN A. SMITH. [Oxford: Clarendon Law Series. 2006. xxxviii, 423 and (Index) 17 pp. Paperback £28.99. ISBN 0–19–924941–5.]

THE FIVE PREVIOUS EDITIONS of this classic work were written by Professor Atiyah. Standing on this giant's shoulders, Professor Stephen Smith, formerly a lecturer at Oxford and now at McGill Law School in Canada, has carried out the present revision. He is to be congratulated on reviving an important and stimulating text which many law teachers must have missed during the last five years or so. That faithful cohort of former readers will know that Atiyah's *Introduction* is neither an introduction nor a textbook, but rather a conceptual and penetrating survey of doctrines and theory, pervaded by a highly critical and analytical tone, and containing many suggestions for possible change.

Smith brings acute intelligence to his rather daunting task. His passion for contractual theorising is impressive. The new editor's hand is especially conspicuous in the sustained and sophisticated treatment of duress, undue influence, and "substantively unfair transactions". He has significantly restructured Atiyah's sequence of chapters, the main difference being a reduction in their number. On the whole, the new scheme is a success. However, the now rather shorter discussion of misrepresentation and breach should perhaps be expanded in the future.

This new edition contains more discussion of restitution and unjust enrichment than Atiyah's former editions. Smith's new emphasis reflects both the academic popularity of the subject and the fact that practitioners and judges have grown more familiar with this category of obligations. There is good discussion of major legal developments since the last edition in 1995, notably: the *Etridge* case on undue influence and "constructive notice" in the context of surety transactions; *Farley* v. *Skinner* on damages for vexation or psychic upset; the Unfair Terms in Consumer Contracts Regulations 1999; *Attorney-General* v. *Blake* on disgorgement of gains achieved by breach of contract; the Contracts (Rights of Third Parties) Act 1999; the *Investors Compensation Scheme* case on interpretation; and *The Great Peace* and *Shogun* decisions on mistake.

The text is elegant, accurate and clear. A minor but ultimately amusing error is that the word "recent" is often misapplied to decisions already long in the tooth. "Articles 85 and 86" (on cartels and abuse of a monopoly position) have now moved house. The *Panatown* case, the City of Cambridge's greatest and certainly recent contribution to the law of contract, is a surprising *casus omissus*.

Now that there is a new edition, the reviewer can legitimately ask for whom this work is likely to be useful or interesting. No lecturer could seriously recommend it as a stand-alone textbook. Furthermore, its title as an "Introduction" is problematic. It remains a tough book and is not (sensible) Long Vacation reading for the prospective student of Contract Law (although Oxford law dons might have higher expectations). Perhaps the earnest or intellectual student already embarked upon a course might use *Atiyah* to complement his textbook(s), but only if the relevant course and examination tradition are theoretical. Another readership is the law teaching profession. A third readership is the judge or practitioner with time on his hands (if such a person exists), whose intellectual curiosity is not satisfied by the black-letter approach of the standard textbooks.

Finally, this remains largely an "English" book. Its horizons might expand to include more discussion of Commonwealth developments, facilitated by Smith's present domicile, and comparison with the "soft law" principles, global or European, which now threaten to challenge the common law's hegemony in the regulation of contracts.

NEIL ANDREWS

Property and the Human Rights Act 1998. By TOM ALLEN. [Oxford: Hart Publishing. 2005. 356 pp. Hardback £40.00. ISBN 1–84113–203–9.]

THE TITLE of this excellent book is rather misleading. Although there is some discussion of the specific effect of the Human Rights Act 1998 in the UK courts, the major part is an in-depth discussion of the history of Article 1 of the First Protocol of the European Convention on Human Rights and its development in the courts at Strasbourg. In consequence the first chapters were initially read as a sort of extended introduction; however once the actual scope of the book was appreciated, its ordering and content became clear.

Professor Allen describes the book as an attempt to impose order on the increasing body of case law on Article 1. Since the book is concerned with property, the primary focus is on this article, although he notes that others—notably Article 8—are also relevant. Given that the discussion of Article 1 fills almost the entire 300 pages, one can see why discussion of Article 8 is logistically limited. However, the two articles do overlap, for example where "property" is also a "home". There are a number of UK decisions where both articles have been considered but no authoritative analysis of their interaction. This is not simply an academic issue: in *Ghaidan* v. *Godin-Mendoza* [2004] 2 A.C. 557 the House of Lords concentrated solely on the rights of the "tenant" under Article 8 and never mentioned the equally weighty claims of the landlord under Article 1. A rigorous examination of Article 8 and the connection between the two articles would be an important contribution to the jurisprudence.

In a sense all the book's discussion flows from Chapter 1, an illuminating analysis of the history of Article 1. It describes the fundamental disagreements that surrounded Article 1 at its inception, not only over the drafting but also over the question whether there should be a right to property in the Convention at all. Perhaps surprisingly the perceived Soviet threat to democracy was given more weight than the actual (and then recent) attacks on private property experienced by many signatory states. No consensus was reached in time for a right to be included in the main part of the Convention. A separate "right to property" was included in the First Protocol, which came into force in 1952, with no apparent conviction that the draft was ideal, but simply "the best compromise that could be achieved". Interestingly the initial proposal was for the adoption of a right based on Article 17 of the Universal Declaration of Human Rights, which in terms provides that everyone has a right to own property alone or with others, and that no one can be arbitrarily deprived of their property. It seems that none of the drafts proposed a definite right to own property. Article 1 simply gives a qualified right to freedom from interference with existing possessions. Allen does not

make anything of this distinction, referring to "a right to property", something that Article 1 arguably does not give. It would be interesting to know why the greater right was not included—perhaps simply an example of the "weak compromises" and "sloppy work" which characterised the drafting?

Discussing the specific issue of applicability, Allen concludes that there are few clear rules and principles and no doctrinal coherence, a conclusion that could apply to the whole of Article 1 (and indeed possibly the whole Convention). There is, for example, no common idea of what constitutes "possessions" (an issue which goes to the question of jurisdiction) nor any clear guidance as to what, if any, difference exists between each of the "three rules" in Article 1 identified in *Sporrong and Lönnroth* v. *Sweden* (1982) 5 E.H.R.R. 35, or between actions that can be justified in the "general interest" by contrast with the "public interest". Some cases seem to suggest that the distinctions matter, others that they do not. It may be because of this doctrinal uncertainty that the House of Lords has so far generally not attempted an analysis of the words of Article 1. Allen identifies the same doctrinal uncertainty over proportionality, an idea central to Strasbourg jurisprudence. He doubts whether strictly it applies to Article 1, which has its own built-in tests. At the heart of proportionality are the margin of appreciation and the area of discretion, the doctrines by which respectively the European Court of Human Rights and the UK courts limit interference with state policy decisions. It comes as no surprise to learn that in the European Court at least the test is not applied in a rigorous objective way. Rather, the focus is whether the impact upon an individual would be excessive, and judgments are "impressionistic". The concentration is on economic loss rather than the "usual focus of human rights on autonomy and dignity".

There is a strong argument that, at least where the property concerned is land, such an approach is less disruptive of established principles. Allen alludes to but does not discuss the particular problems that can arise over land, where rights may affect third parties. In Chapter 8, where the emphasis is on the Human Rights Act 1998 and the response of the UK courts to this statute, he discusses the series of land cases on Articles 1 and 8 in the House of Lords: *Harrow L.B.C.* v. *Qazi* [2004] 1 A.C. 983, *Ghaidan* v. *Godin-Mendoza* [2004] 2 A.C. 557 and *Aston Cantlow and Wilmcote with Billesley P.C.C.* v. *Wallbank* [2004] 1 A.C. 546. Relying on *Ghaidan* he concludes that Article 8 at least is applicable to disputes between private individuals. The "horizontal effect" of Article 1 is less clear: in *Aston Cantlow* the lack of a public authority meant that it was not applicable; on the other hand, *Beaulane Properties Ltd.* v. *Palmer* [2006] Ch. 79, a first instance decision not available to the author, held that Article 1 does apply to disputes between private individuals concerning adverse possession. We await future elucidation. Allen concludes that Human Rights Act 1998, section 6 extends to judicial development of the common law. But, as he notes, not everyone agrees that human rights values are the only or most important ones; others, such as certainty and fairness, are equally important. He suggests that the flexibility of the private law balance may allow UK courts to reach the same result whether they rely on the Human Rights Act or the previous common law. Yet *Ghaidan* suggests that the courts are not in fact doing a balancing act but are using human rights principles almost exclusively. Certainly the House of

Lords needs to explain much more precisely how human rights fit into established legal principles.

Allen also raises, but does not pursue, the question of the value in using human rights legislation to protect commercial property. Article 1 applies to every legal person including corporate entities. Can a corporation have human rights? Is interference with the possessions of, say, a large bank deserving of concern? There is a real issue here that may not be easy to answer.

In the final chapter, Allen considers the purpose of Article 1 and concludes that it is conservative and stabilising. The judgments at Strasbourg, he suggests, sometimes reflect the fundamental disagreements which characterised the drafting but in "an uncoordinated fashion, without a consensus on their role in practical decision-making". Strasbourg may have the luxury of such an approach, but UK courts do not and as they develop their jurisprudence the gap between the two may widen.

This book should be read as an extended essay on Article 1, rather than as a guide to the practical application of the legal principles in Strasbourg and the UK. The width of the author's subject, "property", means that there is some sacrifice of detailed discussion, but this is a minor matter. Overall this is a valuable and very readable addition to the corpus of writing on human rights.

JEAN HOWELL

Boundaries of Personal Property Law: Shares and Sub-Shares. By ARIANNA PRETTO-SAKMANN. [Oxford: Hart Publishing. 2005. xxx, 242 pp. Hardback £45.00. ISBN 1–84113–459–7.]

ORIGINATING IN the author's Oxford doctoral thesis supervised by the late Professor Peter Birks, this work's commendable aim is to map the post-modern taxonomy of personal property law, using as a focal example shares directly held and shares held through intermediaries (termed "sub-shares").

The author is keen to delineate the boundaries of personal property, in particular the boundaries between rights *in rem* and rights *in personam*, emphasising that "the law of property can be cleanly separated from the law of obligations" (p. 90). Using Birks' definition, the author correctly identifies rights *in rem* as rights "demandable against anyone who holds or is trying to hold the relevant *res*", and rights *in personam* as "rights exigible only against the person against whom they originally arise" (p. 90). Therefore, rights *in rem* equate to proprietary rights, rights *in personam* to personal rights. To assess whether shares can be characterised as rights *in rem*, the author begins by noting that each share is a bundle of "rights *in personam* against the company" (p. 82). Sub-shares "consist in a set of rights *in personam* ... subsisting between the sub-share holder and his intermediary" (p. 83). The author then seeks to adduce further proof that shares are not rights *in rem* in the following manner:

First, shares (leaving aside bearer shares) are not locatable in space. They are not *locanda*. One cannot follow shares which have no natural location in space. Although private international law sometimes ascribes a *situs* to shares, that *situs* is a fiction for choice of law purposes.

Furthermore, "what is located turns out to be no more than the person, that is, the company against which the rights are exigible. There is nothing to follow, only a person to find. There is no way in which rights implicit in shares can be said to follow the location of the share ... Sub-shares cannot be *locanda* in any other way than can be shares" (p. 107). Secondly, "[t]he external boundary of the law of personal property must leave intact the contrast between property and obligations ... [A]lienability cannot successfully be used to discriminate between property and obligations" (p. 158). In the first place, even rights *in personam* are alienable. Furthermore, rights *in rem* (such as a beneficiary's interest under a protective trust) are not necessarily alienable. Accordingly, the fact that shares can be transferred or alienated does not earn them a place in the law of personal property. Thirdly, the assertion that assets which are *vindicanda* (*i.e.*, things capable of being vindicated) become property does not respect the line between property and obligations. For example, contractual rights may be vindicated through the tort of interference with contractual relations.

The author therefore concludes that shares are not property (as opposed to obligations) whilst acknowledging that the "conclusion that shares are not property in the technical sense challenges every natural instinct and all ordinary usage. It is contradicted again and again in the literature" (p. 107). Presumably the author's conclusion about shares would apply *a fortiori* to debts.

While it is essential to achieve good taxonomy, one feels that the author has not attempted to deal with the implications of her conclusion for the general law. A few instances of this suffice for present purposes. The author says that "[a] trust as a mechanism is neutral as to the nature of the interest held within it" (p. 211). Presumably this means that if the underlying trust asset is a bank account (a right *in personam*), the beneficiary only has a right *in personam* against the trustee. This seems to follow from the author's conclusion that "[s]ub-shares are equitable interests under a trust" (p. 146) and they "consist in a set of rights *in personam* ... subsisting between the sub-share holder and his intermediary" (p. 83). But, if that is the case, how is the beneficiary protected from the trustee's insolvency? How is the beneficiary's position different from someone merely having a contractual claim against the trustee? The author's answer may be that "[i]mmunity from insolvency is not a feature of property rights *per se*, but rather of ring-fenced rights howsoever characterised" (p. 211). That may be so, but absent specific legislation, one cannot achieve immunity from insolvency without saying that the beneficiary has a proprietary right to the ring-fenced asset. If a trust beneficiary merely has a right *in personam* against the trustee, how could the beneficiary make any proprietary claim via the tracing process with regard to assets transferred in breach of trust? In fact, the author also recognises the possibility of a proprietary claim to traceable substitutes (p. 176). Is the process of making a proprietary claim via tracing not similar to exercising a right *in rem* in the original asset? The claim is certainly following the (traceable) asset, exigible against anyone who holds the asset. The author also does not discuss the effect of security interests, which according to the conventional analysis create a right *in rem* with respect to the collateral. However, since the author says that a trust is neutral as to the nature of the interest held within it, does that mean that a security interest behaves in the same way too? Would a mortgage over shares and

book debts only create a right *in personam* against the mortgagor? Should a third party debt order be characterised as an exercise of jurisdiction *in personam*, as opposed to jurisdiction *in rem*? (*Cf. Société Eram Shipping* v. *Cie Internationale de Navigation* [2003] UKHL 30, [2004] 1 A.C. 260; *Kuwait Oil Tanker* v. *Qabazard* [2003] UKHL 31, [2004] 1 A.C. 300.)

There are also minor blemishes. For example, the author states a legal assignment under Law of Property Act 1925, section 136(1) would not apply to sub-shares because they are equitable interests (p. 145). This is incorrect because it is established that the statutory phrase "other legal thing in action" includes equitable choses in action: *Torkington* v. *Magee* [1902] 2 K.B. 427.

Be that as it may, this work deserves careful study. In many respects it provides material for a fascinating study. Few authors pay as serious attention to good taxonomy as Dr. Pretto-Sakmann. What this work has shown us is that good taxonomy of personal property law does indeed need some post-modern examination.

LOOK CHAN HO

An Eye for an Eye. By WILLIAM I. MILLER. [Cambridge: Cambridge University Press. 2006. xiii, 241, (Endnotes) 38, (Bibliography) 14 and (Index) 8 pp. Hardback £16.99. ISBN 0–521–85680–9.]

THIS IS a refreshing and thought-provoking book, the thrust of which is that justice is all about "owing", "paying back" and "getting even". In the first chapter Miller discusses the scales of justice as metaphor and symbol. His fascinating discussion sets the stage for the author's use of the notions of balancing rights and wrongs, personal accounts, "getting even", owing and repaying, debt and credit. The scales, at least as Miller evokes them, represent not the weight of evidence or of right and wrong, but of what is given and taken, paid and owed. If you wrong me the scales are tipped; you have wronged me and I "owe" you a wrong. Justice is all about repaying that wrong. This in a nutshell is Miller's theory of justice; the rest of the book contains discussion of different aspects of the theory.

Miller proceeds to discuss the roles of *talio* in effecting justice. In the second and fourth chapters he argues at length that literal *talio* was, at least in some cultures, a means for ensuring monetary compensation. The threat of literal *talio* also greatly increased the compensation offered in lieu thereof. *Talio* thus raised the value of life and limb: your offer of compensation will be much greater when you know I can choose to take your eye instead, or in Miller's typically witty words: "For you to save your eye, you are going to have to pay an arm and a leg" (p. 50). *Talio* also had a major deterrent effect, particularly as in some cultures there was little or no distinction drawn between intentional and accidental injury. One is persuaded, as suggested by Miller, that in such circumstances there would be many fewer accidents. The author adds contemporary critique to his historical, literary and legal ruminations. By excluding the principles of *talio* and vengeance, modern tort law, which aims to make the victim whole, ultimately grossly undervalues human life.

The book develops its central theme with a discussion in the third chapter of how human bodies and body parts came to be replaced by

animals (as, for example, in sacrifices) and animals in turn by money. Thus Isaac was replaced by a lamb, and lambs and other animals came to be replaced by coins which, to this day, frequently feature images of animals and still have heads and tails. The words "Fee" and "Pecuniary" both derive from words meaning cattle, in English and Latin respectively. In our language and sentiment there is something of a continuum between the world of "an eye for an eye" to one in which only money changes hands. The fundamental notion of body parts being transferable is thus less alien to us than we realise. The relationship between *talio* and compensation is illuminated further in the fifth chapter, where Miller illustrates how the metaphors of right and wrong, of injury and vengeance, mix with those of debt and satisfaction, payment and repayment. This is potently illustrated by the author's citation of Cyrus, who asked "that he might live long enough to be able to repay with interest both those who had helped him and those who had injured him" (p. 69).

The author's discussion of *The Merchant of Venice* in the sixth chapter is the highlight of the book. Miller's background in English literature is here used to give support to his theory. He does this very persuasively, as illustrated by some examples: Graziona and Bassanio speak of "fleecing" Portia (p. 73); the repeated pun on "Iuwes", Shakespeare's spelling for Jews, "ewes" and "use" (*i.e.*, interest) (p. 79); and Launcelot Gobbo's concern that making Christians of Jews will "raise the price of hogs". All these examples lead Miller to conclude that in *The Merchant* "There is no way to separate bodies, flesh and money. They travel in the same circle" (pp. 72–73). At the heart (or nearest the heart) of the play is Antonio, whose flesh is to satisfy a debt. Shylock, with his scales and knife in court, "is made to be a parody of Lady Justice" (p. 79), such that "we are to believe that the play reveals the triumph of mercy over justice, though justice hardly gets a fair shake in the play, and mercy, well, spare me such mercy" (p. 79).

The author further elaborates on the relationship of *talio* and compensation in the seventh chapter, a discussion of memory, debt and vengeance. Miller notes that in talionic cultures compensation often encouraged rather than suppressed revenge by concretising the memory of an injustice done and the consequent need for vengeance; but it did also buy some time for tempers to cool. The author's discussion of mnemonics and debt here is greatly enhanced by his riveting discussion of *Hamlet*.

The substance of the book deserves further contemplation, but the author's style and sources are noteworthy too. The language is varied and colourful, the author employing "nary" (p. 178) and "reliquary" (p. 190) side by side with "nanosecond" (pp. 171, 185) and "knuckle-head, snob or sicko" (p. 173). The author's style is crisp, personal and often witty, distinguished by his use of diverse and interesting sources. The author cites a plethora of medieval and ancient laws, including the Bible, Hammurabi and King Ælthelberht's laws. Miller's specialisation is Icelandic law and lore, and he uses these fascinating sources to great effect throughout, without excluding the more familiar, such as the films of Clint Eastwood (p. 147). In addition, the work is liberally sprinkled with philological and etymological insights. For example, the author notes that Peace and Pay, much like the Hebrew *Shalom* and *Shalem* (meaning both "whole" and "to pay"), derive from the same root. He also discusses the origins of Lord,

Fee, Pecuniary, Wholly, Holy, Health and Healing, Sad, Satisfactory, *helig*, *mund* and more.

In conclusion, this is a superb book. The reading is easy, even entertaining, and the arguments might just change the way you think of justice, debt, payment and satisfaction. Miller resoundingly demonstrates that legal history can be exciting.

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