

BOOK REVIEWS

A HISTORY OF THE KINGS SERJEANTS AT LAW IN IRELAND. By A.R. Hart [Dublin:Four Courts Press, 2000 xvi and (with index) 213pp £30.00]

This short book is split into three parts. The first and major part (some 140 pages) is a chronological survey describing and tracing the office of king's serjeant at law from the later thirteenth century until its demise in the twentieth. Part two contains a list of the serjeants at law and part three provides short biographical details of them. There are also three short appendices primarily discussing earnings of serjeants at and after the 1801 Union.

The first chapter, on the serjeants of the medieval Irish lordship, is a useful synthesis of mainly secondary material and owes a considerable debt in particular to the works of Paul Brand. The author makes a good job of succinctly explaining the various, and potentially confusing, terms used to describe lawyers during this period. The remaining chapters deal with the Tudor period, the Stuart era, the eighteenth century and the post-Union period. There are twin emphases: on the one hand, the legal role of the king's serjeants, including the development of the separate roles of prime, second and third serjeants and their decline *vis-à-vis* the attorney general and solicitor general; on the other, the increasingly political nature of the office of serjeant.

As the title makes clear, this is not a book about the workings of the wider legal profession. Consequently, little is said of the serjeants' social origins, educational background, professional development or the development of professional or ethical rules of practice. Even so, a history of this kind is an ambitious undertaking and the author is to be congratulated on producing a highly readable text based on solid research that forms a welcome addition to the publications of the Irish Legal History Society. One of the strengths of the book is the author's decision to take a long view and to discuss the entire history of the office rather than to devote his attention purely to the better-documented early modern period. This allows discussion of a range of figures, from Roger Owen (in an apparent minor slip, once, at page 66, mistakenly referred to as Roger Bacon) in the thirteenth century, to John and Patrick Barnewall in the sixteenth, Sir Audley Mervyn in the seventeenth, John Hely-Hutchinson in the eighteenth and Thomas Lefroy in the nineteenth.

With these, and many other, personalities involved, it is difficult to strike a balance between group biography on the one hand, and the wider social and political factors behind political the development of a legal office. As a compensation for the understandable concentration on the more prominent serjeants, short biographical descriptions of all the serjeants are given at the end of the book. It might have been useful had more been said in the text, particularly for the earlier periods, to tie some of these individuals together and in so doing provide a sense of who these men were and what it was in

their backgrounds and motivations that led to their appointments. But having said that, the benefit of the chronological approach is the sense of completeness it gives to the picture whilst presenting the reader with an exposition that is both interesting and easy to follow.

The chronological survey also means that of the host of fascinating questions raised by this work, they are inevitably better discussed in regard to some periods than others depending on the available sources. The unfortunate lack of surviving early documentary record can, as so often, serve merely to tantalise. If one were to ask why a successful counsel should wish to become king's serjeant, the motivations obviously might differ over time and even from generation to generation. It is clear that from the early modern period the motivation was often primarily political and the king's serjeants reached the apogee of their parliamentary influence and importance only at the end of the eighteenth century. In professional terms, the office could, and often did, eventually lead to a position on the bench (serjeants in the ordinary course could be called upon to go on assize or to act in a quasi-judicial capacity). In financial terms, the merits of the decision to accept office as one of the king's serjeants is much more difficult for the historian to assess. Precedence at the bar, and profit from crown business, would have to be compared to the impact the office would have on private practice and also the rewards of that practice. Sadly, the records do not seem to allow such comparison even in the eighteenth century. Nonetheless, the author does bring out some interesting issues and, where there is evidence, he makes good use of it.

The book is well-presented and carefully and amusingly illustrated with twenty three black and white plates. It also reads well, with considerable care taken to contextualise the developments described against the wider historical background. In conclusion, this work, as well as being of general interest in itself, also falls to be regarded as an indispensable foundation and point of reference for any future research in this narrow area.

JOHN FINLAY

School of Law, University of Glasgow

THE POLITICS OF TRANSITION: A HIDDEN HISTORY OF SOUTH AFRICA'S NEGOTIATED SETTLEMENT. By R. Spitz with M. Chaskalson [Oxford: Hart Publishing, 2000, xviii and (with index) 461 pages, Paperback, £25.00]

This well-written and thoroughly researched book tells the full story of the negotiation of South Africa's interim constitution. This came into force on the eve of the country's first non-racial, democratic elections in April 1994 and was superseded for most purposes in February 1997 when the final constitution enacted by the elected Constituent Assembly and certified by the Constitutional Court took legal effect. In short, it focuses on the negotiations that resulted in a constitutional document, which lasted less than three years. That of course does not mean that it was not of the utmost importance. As

the authors fairly point out, the interim constitution had a huge influence on the shape of the final constitution. This was because under the terms of the settlement the final constitution had to satisfy a significant set of constitutional principles, which had been agreed through a process of intense bargaining among the parties during the Kempton Park talks.

Nevertheless, it is one of the great strengths of this book that it faces up to the two-stage nature of South Africa's transition. The authors do not pretend that the interim constitution was the end point in the process of South Africa's passage to a new political dispensation. This is not a trivial issue as far too many writers on South Africa's transition succumb to the temptation to treat the Multi-Party Negotiating Process (MPNP) at the World Trade Centre in Kempton Park as the culmination of the transition. One consequence has been the portrayal of the outcome as a win-win solution in which former enemies agreed to share power in a new dispensation. In fact, the provision for power-sharing among the parties which won more than 5 per cent of the vote was a feature only of the interim constitution and not of the final constitution. It is especially absurd to present the outcome of the South African transition as a consociational settlement, given both the temporary basis of power-sharing and the nature of that power-sharing. In particular, there was no provision, even in the interim constitution, for the operation of minority vetoes. It would be closer to the mark to say that the parties qualifying for seats in government, apart of course from the African National Congress with over 62 per cent of the national vote, secured a share of office rather than of power. In fact, after two years the National Party left the Government of National Unity, frustrated at its lack of influence on policy.

The two-stage process entailed the holding of elections under an interim constitution endorsed under the institutions of the old order and then proceeding to the drawing up of a final constitution by a democratically constituted constituent assembly following the elections. What it achieved was to make the transfer of power from minority to majority rule more palatable than anyone might reasonably have expected. Remarkably, South Africa achieved this change constitutionally and in a way that has entrenched constitutional government. However, it would be a mistake to describe the change as peaceful. In fact, the period between February 1990, when President de Klerk lifted the ban on the ANC and other prohibited organizations, and May 1994, when Mandela was inaugurated as the first President of a truly democratic South Africa, were the most violent in the country's history. However, the country did avoid the racial bloodbath that had long been predicted would accompany the demise of apartheid.

Spitz and Chaskalson provide the most detailed account one could wish for of the negotiations that took place in the MPNP. However, they never allow their enthusiasm for that process to blind them to the wider context in which the negotiations took place. Their awareness of the larger picture leads them to identify the Record of Understanding between De Klerk and Mandela in September 1992 as a key turning point in the transition, along with the multi-party planning conference in March 1993 that launched the MPNP. The importance of the pact between the National Party and the ANC, which the agreement between De Klerk and Mandela represented, is underlined through their analysis. This emphasizes the role played by the informal

Ramaphosa-Meyer channel and by the figures of Maj Maharaj and Fanie van der Merwe on the Sub-Committee of the Planning Committee of the MPNP.

The book is divided into six parts. The first describes the historical background to the MPNP. The second the process itself. The third core constitutional issues, such as the sections in the interim constitution on the executive, the legislature, the constitutional court and the powers of the provinces. A fourth examines the position of the Concerned South Africans Group (COSAG), an alliance of parties opposed to the pact between the National Party and the ANC. A fifth analyses the drafting of the interim bill of rights, while the sixth sums up the significance of the interim constitution and examines its influence on the final constitution. In addition, the book contains a chronology of events and a listing of the most significant figures in the negotiating process by party. The longest section of the book, over a third of its entire length, is devoted to the drafting of the interim bill of rights.

The authors conclude that the bill of rights “finely balanced the protection of existing rights, such as property ownership, against the need to equalise conditions and opportunities” (p 401). They also argue that this section of the interim constitution was not the simple product of a deal between the National Party and the ANC. The method adopted by the authors both in relation to the core constitutional issues and to the bill of rights is to highlight the wording of the relevant section of the interim constitution and then to discuss the proposals that were made in the course of arriving at this wording. The author provide a fascinating reconstruction of the drafting process, which fully justifies the description of the book as a ‘hidden history’ of the country’s political settlement. The authors’ careful judgments, their lucidity and their command of the issues they examine all provide good reason for supposing that this book will long be seen as a work of seminal importance on South Africa’s transition.

ADRIAN GUELKE

School of Politics, Queen’s University Belfast.

THE STATUTORY REGULATION OF BUSINESS TENANCIES. By Michael Haley. Oxford University Press, 2000, hardback, xlix and (with appendices and index) 435 pp.

This handsomely produced volume on the continuation, renewal and termination of business tenancies under Part II of the Landlord and Tenant Act 1954 is a new entrant in a market which already boasts a number of well-established texts. It has the advantages of novelty and freshness, some of its competitors having run through several editions at least. It is also more attractive to the reader than the multi-volume treatises on the law of landlord and tenant in that the focus on the statutory regulation of business tenancies provides an opportunity for consideration of the historical development of legal policy as well as an analysis of current provisions. Thus, the opening chapter provides an extensive survey of the policy debate from the early part

of the twentieth century, the entanglement of business tenancies with rent restriction legislation, through the periods of legislative activity leading up to the Landlord and Tenant Act 1927 and the Landlord and Tenant Act 1954, to the closing decades of the last century when the Law Commission's reform proposals aimed at streamlining the statutory procedures were not acted upon by Parliament. He notes in contrast the recent reform of the law of business tenancies in Northern Ireland, as a result of the activities of the Law Reform Advisory Committee for Northern Ireland.

Continuing the Anglo-Irish comparison in historical terms, Haley cites the operation of the Town Tenants (Ireland) Act 1906 and suggests that the first legislative intervention in England, the 1927 Act, "was to echo legislation which was thought to operate well in both Eire and France". Perhaps more could have been made of the fact that by the end of the nineteenth century *in the United Kingdom*, there were essentially two conceptions of the landlord-tenant relationship, one firmly based upon Victorian *laissez-faire* philosophy, the other expressing the concept of tenant-right, the tenant's right of property in his goodwill arising from mere occupation, and that when the 1927 Act was passed, the Town Tenants (Ireland) Act 1906 was in operation not only "in Eire" but in Northern Ireland. This inconsistency in British legal policy has a contemporary dimension, in that Scotland has never had a comprehensive business tenancies code to match those currently operating in Northern Ireland or in England and Wales. The question why this difference should be maintained is more a matter for politicians and economists than for legal commentators, but legal texts can make an important contribution to the wider debate by shedding light on how a highly technical legal code actually operates in practice and demonstrating that even a finely-balanced and carefully refined statutory code such as the 1954 Act continues to be heavily litigated almost 50 years after its implementation. The economic cost of statutory intervention and the impact on property markets of intervention or, in the case of Scotland, non-intervention (except in relation to shops), remain to be explored. In the opening chapter of Haley's book, however, the entire subject is opened for a wide readership.

The remaining nine chapters of the book provide comprehensive coverage of the legislation and the huge body of case law in all its technicality. The book is well-structured and as a reference work is easy to navigate, the result of an extensive general index, chapter outlines at the beginning of each chapter, and ample use of side headings. The text in the form of numbered paragraphs is lucid and authoritative. While extensive reference is made to reported and unreported cases, this is combined with a nice balance between text and footnotes, so that legal policy, settled law and unresolved issues emerge with consistent clarity from the text.

Some essentials of the statutory scheme are addressed in chapter two: contracting out, the continuation tenancy and the concept of competent landlord, for example. Chapters three and four deal respectively with the scope of the Act and the landlord's notice to determine. Chapter five has some surprises. Headed "Tenant's Rights", it not only deals with the tenant's part in the procedural chess game but also provides an excellent account of his rights to compensation for disturbance and misrepresentation, as well as final disposal of the case. This somewhat novel grouping of topics works well and will be useful to those seeking to understand the tenant's perspective in the round, without getting too bogged down in the details of

landlord's opposition. The remaining chapters deal successively with interim rent, discretionary grounds of opposition, mandatory grounds of opposition, renewal of the tenancy, and tenants' improvements. The appendices contain the extant provisions of the 1927 and 1954 Acts, and the relevant forms.

A credible account of the legal regulation of business tenancies requires a practical understanding of the relevant commercial context and a willingness to comment on unresolved issues. Haley consistently demonstrates both: the chapters on the landlord's notice to determine, interim rent and landlord's opposition are outstanding in this regard. The book has a forward-looking approach in that the Law Commission's reform proposals, while not yet adopted, are used by the author to create an agenda for future developments to which he adds his own often trenchant comments (see, for example, his discussion of possible reforms to section 30(1)(f), landlord's intention to redevelop.) He also refers extensively, in footnotes, to the discussion paper and report of the Law Reform Advisory Committee for Northern Ireland, whose proposals for reform were implemented in the Business Tenancies (Northern Ireland) Order 1996. Although no reference is made to Lands Tribunal case law, the cross-referencing to the 1996 Order with accompanying comment makes the book of considerable value to Northern Ireland legal and property professionals.

In his preface, Haley expresses the hope that his text "will appeal to anyone whose work, research or studies concern business leases." The exhaustive coverage and excellent quality of the policy and doctrinal analysis afforded by the book certainly vindicate that intention.

NORMA DAWSON

School of Law, Queen's University of Belfast

*CRIMINAL LIABILITY. By Finbarr McAuley and Paul McCutcheon.
[Dublin: Round Hall Sweet & Maxwell. 2000. lxxvi and (with index)
950pp. Paperback £168; Hardback £108]*

The production of learned treatises on the general principles of the criminal law has a long and venerable pedigree, ranging from Hawkins and Hale to Gordon and Glanville Williams. Such books can have an immense influence. Thus for some years Glanville Williams in his treatise on *The General Part* provided what was in many ways the fount of classical criminal law theory, but over the last quarter of a century the baton has been taken up by scholars of the succeeding generation, including Fletcher, Lacey, and Ashworth. Up to now Ireland has made no contribution to the genre, but now that deficiency has been remedied, and remedied in a most impressive way, by Barry McAuley and Paul McCutcheon.

To produce a book of this sort nowadays is no easy task. In the age of the great institutional writers, the task was confined to an analysis of the case law, and in the absence of any appellate jurisdiction in criminal cases there was not much of that. Two hundred years later, the picture has changed

beyond all recognition. Nor is it just the case law and legislation that have to be assimilated. One of the axioms of modern criminal law scholarship is that criminal law does not operate in a vacuum, and that a purely analytical approach does not get us very far. In an influential article published in 1990,* Peter Alldridge argued that courses on criminal law need to take account of many other academic disciplines, including philosophy, psychology, history and ethics. If this applies to those who are taught, it must apply all the more to those who seek to teach them.

The full title of McAuley and McCutcheon's work is *Criminal Liability: A Grammar*. Unlike a dictionary, which merely gives translations and definitions, a grammar is a key to the way a language works. The principal aim of the authors, as declared in the preface, is to provide a systematic treatment of what used to be known as the "general part" of the criminal law. However, in seeking to provide a key to the workings of the criminal law, the authors declare that they are departing in two respects from the canonical scheme adhered to by contemporary treatise writers: first of all by adopting a strongly historical approach, and secondly by placing their discussion of criminal liability in the broadest possible comparative context. In doing so, they demonstrate a truly impressive breadth of scholarship. Peter Alldridge's influential article is not cited, but its precepts have certainly been taken on board.

The historical approach adopted by the authors makes for one of the strongest features of the book. In the preface, the authors cite E.B. Tyler's comment that it is always unsafe to explain by the light of reason things which want the light of history, and care is taken throughout the book to set all the principles and rules discussed therein in their historical context. The whole of the first chapter is taken up with a discussion of the origins and development of the criminal justice system, of the concept of culpability and of other fundamental principles of the modern criminal law, and this emphasis is continued throughout the whole work. Thus, to take a few examples at random, in Chapter 6 the evolution of *mens rea* is set in the context of the transition from collective to individual responsibility; in Chapter 9 the concept of relational liability is traced from its roots in the institution of frankpledge and the maxim *voluntas reputatur pro facto*; in Chapter 16 we are shown how the rationale of legitimate defence evolved from one of conflict avoidance to one of subjective necessity. In providing this historical background the authors draw not only on the history of the common law but on Roman law, Canon law, Brehon law, and Anglo-Saxon law. This aspect alone makes the book well worthy of study.

The authors live up equally well to their claim to have placed their discussion in the broadest possible comparative context. One of the weaknesses of classical criminal law theory has been its failure to draw on the insights of other systems, and this is an error that the authors have made every effort to avoid. Though the main emphasis is on the law of the Irish Republic, the reader is taken on a tour of the common law world including England, Australia, Canada, New Zealand, the West Indies and various jurisdictions in the United States and in Africa. The discussion is not confined to the

* "What's wrong with the traditional Criminal Law course?" (1990) 10 *Legal Studies* 38

common law alone; the authors are equally at ease in the civil law world, with reference being made to the legal systems of Italy, France, Germany, Austria, Spain and South Africa. Nor is Scotland forgotten, as it so often is by legal academics from other parts of the British Isles. The one poor relation, curiously enough, is Northern Ireland; thus for instance, though several cases and statutes from this jurisdiction are cited, no mention is made of sections 1 to 3 of the Criminal Justice Act (NI) 1966. This is a strange omission, given the authors' encyclopaedic discussion of the defence of insanity.

The historical and comparative approaches are not the only ones adopted in the book. The authors demonstrate a ready grasp of jurisprudence and legal philosophy, with reference being made to the writings of, among others, Aristotle and Plato, Austin and Bentham, Kant and Hegel, Hart and Devlin, Finnis and Raz. At least one of the authors has an interest in criminology, and that is reflected in the discussion in the opening chapter of the writings of Gall, Beccaria, Lombroso and Goring. Darwin gets a look in, as does Cicero. In their preface the authors deplore the constitutionalisation of Irish criminal justice in the 1960s, which they declare has had a wholly detrimental effect on the development of the substantive criminal law in the Republic. However, the constitutional dimension is by no means ignored, and is taken on board where necessary – for instance, in the chapters on causation and vicarious liability.

As any teacher of criminal law knows, all the “context” in the world is no use without a thorough grounding in legal analysis. A good criminal lawyer must be both “hard” as well as “soft”, and in writing this book the authors demonstrate a degree of analytical skill that would come up to the standards of the crustiest of black letter lawyers. The nature of automatism, intention and recklessness, the equivocality theory in attempts, the relationship between accomplice liability and the joint enterprise rule, the effect of fraud and duress on consent – all of these problems are grist to the authors' analytical mill.

A jack of all trades is often a master of none, and adopting the “broad brush” approach advocated by Alldridge and others can lead to superficiality and lack of depth. However, this is not a charge that can be levelled against Barry McAuley and Paul McCutcheon. One only has to look at the immensely detailed footnotes, or at the fifty-odd pages of tables at the beginning, or at the enormous bibliography (a very useful feature of the book), to see that in this case depth of scholarship has in no way been sacrificed to breadth. The book scores highly on both counts.

All in all, this is one of the finest works on criminal law to have been published in the last twenty-five years. Anecdotal evidence indicates that it has already been cited several times in the appeal courts of the Irish Republic, and one hopes that it will find a wider audience. In their preface, the authors deplore the current legal culture – a culture characterised by what they describe as “a breathless rush to summarise the *status quo* and map current developments”, while “little attention is given to the process of intellectual formation that distinguishes education from the acquisition of information and the mastery of technique, and that provides the practitioners of the future with a critical appreciation of the legal tradition in which they operate and the proper function of this or that branch of the law within it”.

They call upon academic lawyers to invert this order of priorities by reclaiming the territory that is uniquely theirs. In producing this excellent book, Barry McAuley and Paul McCutcheon have given us all an example of how this task should be fulfilled.

JOHN E. STANNARD

School of Law, Queen's University of Belfast