BOOK REVIEW

The English Legal Process in Context

FIONA COWNIE AND ANTHONY BRADNEY, *ENGLISH LEGAL SYSTEM IN CONTEXT*, 2ND EDITION, LONDON, BUTTERWORTHS, 2000, PAGES I-XXV, 1-362.
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"This book is about the English legal system." (1) So begins this textbook, in a manner both appropriate and misleading. Appropriate, because of the book's parochial focus on England; misleading, because the authors discuss the English legal process, not the English legal system as a whole. In any book about a common law legal system the reader would also expect a discussion of the categories or divisions of law, such as common law and equity, civil law and criminal law;[1] a historical introduction;[2] and a discussion of the constitutional background of the legal system,[3] all of which are not considered here. This is not necessarily meant as a criticism; it simply suggests that a different title might have been more appropriate. In terms of what the authors do cover, their placing the English legal process in the context of not only its theoretical, but also its actual operation, makes the work significantly better than other "legal system" or "legal process" books, which mainly use a state-centred and rule- centred paradigm. The success of this book lies in the authors' commitment to the importance of discussing law in context and in action, and in its juxtaposition of statutory provisions and empirical evidence as to their (non) operation in practice.

Chapter 1 lays the theoretical foundations for the authors' contextual, law-in-action approach. Their main criticism of a state-centred paradigm is that it ignores the fact that many disputes are resolved by non-state agencies. In their critique of a rule-based approach, the authors discuss the work of legal anthropologist Malinowski, legal theorist Gierke, legal realists Karl Llewellyn and Jerome Frank, legal sociologist Richard Abel, and structuralist Doreen McBarnet, all of whom argue for the necessity to study law in its practical operation, taking account of the socio-cultural context in which it functions. The only unfortunate omission here is to alert the reader to the impact of the political and economic context on law-in-action, the importance of which is emphasised particularly by legal comparativists.[4]

In chapter 2, headed "Courts", the authors first make the valid point, underpinned by statistical evidence, that courts are wrongly seen as central to the legal system. People often resort to alternative dispute resolution mechanisms rather than to litigation, if they pursue their claim at all. Objectives of dispute resolution mechanisms, such as mediation and conciliation on the one hand and litigation on the other, are explained, and the debate as to whether judges merely declare what the law is or also engage in law-making is briefly discussed.

Chapter 3, which describes the court hierarchy in England, is less successful. The authors first outline the categories of courts: courts of record and not of record, superior and inferior courts, and courts whose decisions are regularly reported and those whose decisions are not. This part introduces many technical terms, such as prerogative writ, mandamus, and certiorari, all of which are not explained, making the chapter a difficult one for beginning students, given there is no glossary either. A more substantial criticism relates to the authors' discussion of the actual court hierarchy. Given their emphasis on the practical operation of the law, the most important courts (statistically speaking) are clearly the Magistrate Courts, the lowest courts in the judicial hierarchy. Yet, the authors begin with the *highest* court in the English hierarchy, the European Court of Justice. Unfortunately, the authors do not point out the fact that this Court, in contrast to national English courts, does not allow for dissenting judgments, nor do they discuss the reasons for this. A lot of their discussion of the individual courts in the English court hierarchy will not make much sense to students, since the

courts' jurisdictions are not clearly explained, examples are not given, and undefined technical terms such as "Lords of Appeal in Ordinary", "admiralty law", "ecclesiastical courts", "Chancery", "civil and criminal division", litter the pages. A very brief explanation of Lord Woolf's reforms and objectives and the new Civil Procedure Rules is structurally ill-placed in the section on the County Court, even though they are not designed for that Court only, and there is no assessment of whether the reforms are going to be effective. Courts of special jurisdiction, such as Coroners' Courts, Courts of Chivalry, Courts-Martial, and Election Courts are described so briefly that they may as well have been omitted. In addition, a court diagram should have been included to facilitate an understanding of the appeal structure and the court hierarchy.

Chapter 4 deals with tribunals and it again is lacking clarity of explanation, and the more detailed focus on two tribunals, the Employment Tribunals and the Special Educational Needs Tribunal, is only partially successful. With regard to the first, good use is made of statistics to examine practicalities such as legal representation and likelihood of success, whereas the latter's subject jurisdiction is enumerated only in a footnote, which most students are unlikely to read. And its jurisdiction is so narrow that one wonders why it was chosen at all, given the book's emphasis on practical importance.

Chapters 5 and 6 discuss legal reasoning. The concern of chapter 5 is the common law, whereas chapter 6 deals with statutes. Given increasing legislative activity and the proliferation of statutes, the order of these chapters should, from the authors' perspective, logically have been reversed. Chapter 5 explains the idea and the advantages and disadvantages of the doctrine of precedent clearly. But the same cannot be said for the difference between ratio decidendi and obiter dicta. Nor are dissenting judgments mentioned, which would have thrown light on the practicality of the doctrine of precedent. In addition, chapter 5 should have explained the difference between statute and case law, and should have outlined the areas of law governed by statute and case law. Chapter 6 outlines well the rules of statutory interpretation and their inherent difficulties, but the brief discussion of the Human Rights Act 1998 (UK) and its impact lacks attention to the historical background of the Act: the European Convention on Human Rights (only mentioned in a footnote), and the effect of

decisions by the European Court of Human Rights, declaring English statutes in breach of the Convention.

Chapter 7 is dedicated to legal education and the socio-economic and gender distribution of law students, but omits any mention of actual university entry requirements, simply stating that "[l]aw students are highly successful at A levels". (128) For foreign readers, a discussion of the university versus college system in England would have been useful.

Chapter 8 follows logically, looking at the legal profession and its persisting inability to achieve gender and ethnic equality. Unfortunately, despite the heading "Solicitors and Barristers", the work each branch of the profession does is not explained.

Chapter 9 deals with the judiciary and is an exception to the parochialism elsewhere in the book. Regarding the selection of judges, England is compared to France, Germany, and Japan, and its selection process discussed in terms of both advantages and disadvantages. The separation of powers doctrine is outlined with reference to the United States; however, the issue of judicial review of the legality of legislation is not mentioned, even though European Court of Human Rights decisions and the enactment of the Human Rights Act have made inroads into the previous absence of judicial review in England. A surprising omission occurs in the section discussing judicial independence. Whereas the authors state "judges should not be part of the government" (165), the importance of judicial independence from the executive government and its potential attempts to influence judicial decision-making are not mentioned.

The remaining chapters, though, are very good in fulfilling the authors' promise to take a contextual approach. They concern such matters as "The Civil Court in Action", "Private Security and Other Non-Police Agencies", "The Public Police: Uncovering Crime and Powers of Stop and Search", "Powers of Arrest and Search", "Investigation and Prosecution", "The Magistrates' Court", and "The Crown Court". While outlining the relevant statutory rules, the chapters also examine law as it operates in practice, thereby successfully highlighting the difference between law on paper and law-in-action.

The book utilises a very unfortunate non-consecutive footnoting system. Each chapter begins with footnote 1 but, once note 20 is reached, the footnote numbering goes back to 1, even in the middle

of chapters. This makes it more difficult to find previous references, which are merely indicated by the author's name and op cit. Another very annoying feature of the book is the incredible number of spelling and grammatical mistakes, especially in chapters 3 and 4. Examples include (all emphases added) "[m]agistrates must sit with *a one* of the above" (57), "*their is* wider provision for" (57), "target … is being *acheived*" (82), "[this] will not … *effect* … lawyers" (127), "the *principle* criterion". (172) It is surprising that a publisher of Butterworths' reputation did not pick these up in proof-reading the manuscript. Considering that most teachers would want their students to be able to spell correctly, this book provides a bad role model.

In conclusion, if students manage to read their way past certain unexplained details and technical terms as outlined above, the book's contextual and law-in-action approach makes an important and relatively innovative contribution to the enhancement of students' understanding of the English legal process. It is suggested, however, that concerns, such as the ones mentioned in this review, are addressed in a future edition.

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1 For example, G Slapper and D Kelly, The English Legal System 3rd ed (London: Cavendish, 1999) and GL Gall, The Canadian Legal System (Toronto: Carswell, 1990).

2 For example, RJ Walker, The English Legal System 6th ed (London: Butterworths, 1985) and R Byrne and JP McCutcheon, The Irish Legal System 2nd ed (Dublin: Butterworths (Ireland), 1990).

3 Byrne and McCutcheon, supra note 2, Slapper and Kelly, supra note 1, and Gall, supra note 1.

4 O Kahn-Freund, Uses and Misuses of Comparative Law (1974) 37 MLR 1, at 27; MA Glendon, MW Gordon and C Osakwe, Comparative Legal Traditions 2nd ed (St Paul: West Publishing Co, 1994); A Marfording, The Fallacy of the Classification of Legal Systems: Japan Examined, in V Taylor ed, Asian Laws Through Australian Eyes (Sydney: LBC Information Services, 1997) 65, at 88.