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Private Law, Public Law
and
Human Rights

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Introduction

David A. Frenkel

Our world is a world of increasing mobility and interrelatedness. Our age is one when many problems should be solved through international cooperation and cannot be solved locally only. The response of the law to these developments is one of its main challenges.

This book offers a collection of essays to shed light on various issues in law. As diverse as the essays may look to the reader, spanning private and public law, contract law, criminal justice and human rights, they all deal with issues that are of current significance. They seek to illuminate these issues from an international perspective. It is not easy to categorise heterogeneous papers and inevitably some of the classifications may be seen as equivocal. However, I hope the readers will benefit from drawing a comparison to similar problems discussed in their countries as well as in their individual fields of research and practice. The authors make use of insights arising from jurisprudence, schools of thoughts, history, economy, sociology and the 'law and literature' trend, to develop new and creative solutions and interpretations of pending problems.

The essays are revised versions based on presentations at the International Conferences on Law, organised by the Athens Institute for Education and Research (ATINER) held in Athens, Greece. They were peer-reviewed and selected on the basis of the reviewers' comments and their contribution to the ongoing discussion of the respective issues.

The book is divided into four parts: 1) Private Law, 2) Criminal Law and Justice, 3) Public law, 4) Women in Literature, and 5) European Court of Human Rights. The first part is divided into: Copyright, Contracts of Employment, and Property Rights. The second part is divided into: Private Prosecution and International Criminal Justice. The third part is divided into: Immigration, and Public Participation in Decision Making. The fourth includes two essays on women in literature and the fifth part includes two essays relating to the work of the European Court of Human Rights (ECHR).

I hope that the readers will find this collection of essays stimulating and insightful reading not only for those who are interested in the particular issues discussed but also to acquaint themselves with current issues the world is facing. Many of the debates analysed are ongoing and the policy and interpretations suggestions brought up in the essays will undoubtedly contribute to the future course of the debates.

The following sections will briefly present the different contributions.

Private Law

The book commences with Andrew Percy Ross' essay *A Case of Scarlet Fever*. Ross argues that Courts' decisions on copyright cases are not always based on the criteria provided by Copyright Act. When parody defence is asserted, it appears that expert witnesses, as well as testimonies of the authors involved, exert a singularly powerful influence upon the decision of the court.

The second contribution is Penny-Anne F. Cullen and Richard J. Hickman's essay on *Contracts of Employment: A Preliminary Study of the Interaction between Relational Norms and Formal Agreements*. The authors investigate the interaction between the written contract of employment and the other informal factors that encompasses the obligations established *ex ante* and evolve *ex post* the formation of the employment relationship. The analysis refers to empirical data gathered to initiate the groundwork for future research regarding the influence of relational contracting in employment contract. They argue that trust should be evaluated as a relational text between the lines and how it acts as a bond between contracting parties.

Maria Luisa Chiarella's paper *Property and Fundamental Rights between Court Judgments and Constitutional Norms*, which is the third in this part, concerns the evolution of the interpretation of constitutional rights. It considers the relevance of human dignity, solidarity and equality in private law debate and in particular the relationship between person and economic rights. Chiarella refers to the debate on the difference of fundamental rights which, according to one of the theories exclude property rights, as they belong to specific individuals and have no universal applications and social rights which are universal rights which may belong to each individual, without differentiation. The essay aims to analyse the debate concerning fundamental rights according to the concept of multi-level citizenship, considering the direct effect of constitutional norms in private law relationship.

Criminal Law and Justice

The next essay is *The Public-Private Divide in Prosecutions and Obtaining of Evidence: Towards a Code?*, written by Claire de Than and Jesse Elvin. In English Law, and in some other legal systems which follow the English Law in that matter, every person has the right to bring a criminal prosecution in spite the existence of the Crown Prosecution Service. Though this possibility is little used by individuals acting in a personal capacity, private prosecutions have become much more common as corporations attempt to use them to protect commercial interests, and individuals as well as corporations are encouraged to bring them as a means of obtaining redress. De Than and Elvin argue that the relationship between certain organisations which exist solely to protect the commercial interests of particular corporations raises serious concerns about the potential abuse of state power by private organisations. The authors call for a specific code of conduct to guard against such abuse.

Johan D. van Vyver's essay *International Criminal Justice and the American System of Criminal Procedure* concludes this part. Van Vyver focuses on the protection of basic rights and freedoms within the confines of criminal justice. He calls attention to those norms of criminal justice that have come to be included in the concept of "due process of law" and more in particular to those that exemplify instances where the American criminal justice system is at odds with generally accepted international standards. He argues that those standards may legitimately be construed on the principles of criminal justice that have been incorporated into the Statute of the International Criminal Court and the Rules of Procedure and Evidence of the International Criminal Court.

Public Law

The first essay in this part is Paola Chiarella *Social Security for the Immigrants and New Perspectives of Citizenship*. Chiarella analyses the social protection and the political condition of Immigrants in order to offer new models of legal safeguard and new forms of citizenship. Her aim is to investigate how the social protection of immigrants is still unsatisfactory and if it is possible to set up a "territorial citizenship" that recognises political rights of immigrants. The authoress argues that it is possible to obtain new theoretical and practical patterns of advanced democracy that takes *ius domicilii* as a renewed paradigm for citizenship (beyond *ius sanguinis* and *ius soli*). The basic idea of this paradigm is the concept of contiguity based on the importance of sharing a common space.

Andrea Saba, in his essay *Public Participation in Environmental Decision-Making: the Implementation of the Aarhus Convention in the case-law of the Compliance Committee* provides that public participation enhance the quality and the enforcement of environmental decisions. Public participation should first ensure that all options are open so that effective public participation can take place. Procedures then are required to include reasonable time-frame for the different phases, allowing sufficient time to inform the public and to participate effectively during the environmental decision-making. Reasonable time-frames require the consideration of the nature, complexity and size of the proposed activity. The input of public participation should finally have a real impact on the decision. However, while environmental assessment may play an important role in facilitating the effectiveness of public participation, the Aarhus Convention neither makes an environmental assessment a mandatory part of public participation procedure nor regulates situations where the assessment is required.

Women in Literature

This part commences with Aleksandra Tryniecka's essay *The Author and her Work: Charlotte Brontë's 'Shirley' as a Therapeutic Experience*. Shirley, who until this novel came out, was distinctly male-name and would have been an unusual name for a woman, is a landowner, an independent heiress and full of ideas about how to use her money and very interested in business concerns. Not considered matters for women at the time. She refuses to marry somebody whom she does not love, despite the demands of her uncle. This led to fights between them which were followed by her uncle leaving Stillborough, where Shirley owned the land and lived. At the end, Shirley marries another person, Louis, and not the one her uncle wanted her to marry, though she has moments of indecision and panic at the thought of giving up her independence. Tryniecka offered a view point which places the author of the text on the pedestal while it is the reader who responds to the text emotionally, the author is similarly guided by the purpose of establishing its meaning. Consequently, this meaning can be related to the author's personal experience. Tryniecka strives to present writing as an artistic and aesthetic endeavour aiming not only to please the potential reader, but also to order the writer's reality. *Shirley* strikes the reader as a profound psychological insight into the young woman's mind. By allowing a glance into somebody else's life, Brontë lays bare her own restless feelings, while entering the confessional mode of writing. Tryniecka illustrates the close relation between the authoress of *Shirley* and the novel itself. Moreover, she discusses the process in which the work *redeems* the author, while it remains obvious that it is the author who influences the work, endowing it with a wilful shape and intended meaning.

The second essay in this part is Anna Chronopoulou's *Unwritten Lawyers: A Comparative Approach on the Representation of Women Lawyers in the Anglo-American and European Literature*. The growing number of women entrants in the legal professions worldwide resulted in the production and consumption of an exhaustive body of literature. Chronopoulou examines women lawyers' experience in everyday legal practice and also explored the problems that women lawyers face. The growing presence of women lawyers in the legal profession attracted attention on both sides of the Atlantic and created enormous academic interest in the investigation of the portrayals of women lawyers. Nevertheless, the position of women lawyers in literature has not yet become the object of extensive research. This essay seeks to address this absence and to examine its reasons.

European Court of Human Rights

Taixia Shen essay *Are the New Filtering Measures of Applications by the European Court of Human Rights Effective?* Is the first of the essays included in this part. Shen studies the contents and effects of new measures of the reform launched by the ECHR for improving its filtering capacity of applications. The statistics show that the new judicial formations and the Filtering Section are effective in reducing the number of pending applications

and in improving the filtering ability of applications by the Court and useful for optimising resources and focusing energy on the most important applications that require a thorough review. The author argues that the new admissibility criterion should be studied after its application by the single-judge and the three-judges committee, but in any case the Court still faces the problems and needs to advance the reform.

In the final essay in the book *The Judges of the European Court of Human Rights as a Special Socio-professional Group of Global Influence*, Anatoli Bayashou analyses the judges of the ECHR as a community of people ensuring the functioning of the Court. The urgent need for this analysis is provided by the inevitability of judges representing the national legal systems and by the influence of their decisions and judgments on the national legal systems and the national perception of the principles of international law. The budget of the ECHR has become 50 times higher in 2013 than in 2000. The group is consolidated by their cooperation in real time, hence establishing a common identity. Earlier, the reforms of the Court have been concerning the human rights provided by the Convention of 1950. However, according to Bayashou, nowadays the reforms refer mostly to the structural reorganising of the Court and procedures of judges' activity. The author argues that the global influence of judges is concentrating on advisory opinions within the Grand Chamber. The arguments are enforced with the interdisciplinary approach combining the sociological approach towards international relations, organisational sociology, and law of international organisations.