FORM AND SUBSTANCE IN ANGLO-AMERICAN LAW — A COMPARATIVE STUDY OF LEGAL REASONING, LEGAL THEORY, AND LEGAL INSTITUTIONS. By P.S. ATIYAH AND ROBERT S. SUMMERS [Oxford: Clarendon Press. 1987. xx + 437 pp. Hardcover: £35]

THIS book is a joint effort by two legal philosophers who hail from both sides of the Atlantic — Patrick Atiyah from England, and Robert Summers from America. Both authors require no introduction; indeed their works (too many to be detailed here [1]) are well-known throughout the common law world. Their collaboration in the present work is thus to be doubly appreciated, and, indeed, the very enterprise envisaged by the book itself (an inquiry into and an explanation of "the major differences in the nature of law and the general style of legal reasoning between England and America"[2]) makes the instant partnership imperative.

[1] Some (only) of their major works in legal theory include *Instrumentalism and American Legal Theory* (1982) and *Lon L. Fuller* (1984) by Summers; *The Rise and Fall of Freedom of Contract* (1979); *Promises, Morals and Law* (1981); and *Essays on Contract* (1986) by Atiyah. There are, of course, numerous other works as well as articles by these two prolific writers (Professor Atiyah, for example, is also well-known for his work in areas of so-called 'hard law'). And of especial relevance to the present review would be Professor Atiyah's *Pragmatism and Theory in English Law* (The Hamlyn Lectures, Thirty-Ninth Series, 1987).

[2] See P.S. Atiyah and Robert S. Summers, *Form and Substance in Anglo-American Law — A Comparative Study of Legal Reasoning, Legal Theory, and Legal Institutions* (1987) (hereinafter referred to as *Atiyah and Summers),* in their "Preface", at p. v.

I do not propose to present a detailed summary and critique of the book. Indeed, to attempt to do so would require a full-length study in itself. I shall only attempt to give a brief 'flavour' of the work itself, although even this will be necessarily subjective in nature, at least insofar as the choice of, and the impact upon, the reviewer are concerned.

As the sub-title of the book suggests, the present book may be divided into three different parts, *viz,* a comparative discussion of legal reasoning, legal theory and legal institutions, respectively, in the context of Anglo-American law. The primary thesis that links the various Chapters, however, may be simply stated; it is "that the American and the English legal systems, for all their superficial similarities, differ profoundly: the English legal system is highly 'formal' and the American highly 'substantive' ".[3] Although the concepts "formal reasoning" and "substantive reasoning" are virtually self-explanatory, it is a virtue of the book that the authors spend the greater part of the first (and introductory) Chapter carefully elaborating upon the precise meanings attributed to these key concepts. And the reader would be well-advised to pay more than cursory attention to this Chapter if he wishes to understand, more fully, the later Chapters that elaborate upon the aforementioned thesis. Yet, it ought, in all fairness, to be pointed out that most of the individual Chapters themselves are fairly self-contained, as well as extremely concise and highly readable, so that one could quite easily 'dip into' the book, although an entire reading would be necessary in order to equip the reader to judge whether the primary thesis has, in fact, been satisfactorily demonstrated.

As already mentioned above, Chapter 1 comprises the introductory Chapter. Chapters 2 to 7 deal with various aspects of *legal reasoning* from both theoretical as well as practical points of view. Chapters 8 and 9 concern the contrasting development of *legal theories* in both England and America, whilst Chapters 10 to 14 deal with various *institutional* aspects of the two legal systems. Chapter 15 is the conclusion to the book, and is valuable in pulling together the threads, so to speak.

Chapter 2 deals with the *authoritativeness* of laws in both England and America, arguing, *inter alia,* that the English system in this regard is more formal, for it is "usually enough" *vis-a-vis* the English legal system if the rule concerned satisfies "a source-oriented standard of viability";[4] in other words, no inquiry into substantive content is required, with the formal criteria being very clear in order to minimize conflicts between authorized sources of law. Indeed, as both authors pertinently point out, there are, in fact, relatively few authoritative sources of law in the English legal system. In America, on the other hand, there are "many content-oriented standards of validity",[5] and thus many more conflicts between authorities, not least because of the

[3] *Ibid.,* at p. 1. See, also, *ibid.,* al pp. 32 and 408. The authors point out, however, that this is a relative thesis insofar as there is usually an admixture or overlap of both formal as well as substantive reasoning, though on the whole, formal reasoning predominates in the English legal system whilst substantive reasoning predominates in the American legal system: see, *ibid.,* at pp. 2 and 410.

[4] *Ibid.,* at p. 42.

[5] *Ibid.*

relatively greater number of authoritative sources of law. What is especially interesting in this Chapter is the illustrative detail as drawn from the case-law, which is at once both eclectic as well as interesting.

Chapter 3 considers the nature of *rules* themselves. The authors argue persuasively that there are relatively more flexible rules (as opposed to hard and fast rules) in America, and that this difference is linked, also, to different conceptions of rules by American and English lawyers as well as judges, respectively.

Chapter 4 proceeds with a study of the main areas of law proper. The instant Chapter deals with *statute law,* where, amongst other things, three main points are made. First, it is argued that statute law is not only more dominant in England but is also a more formal kind of law.[6] Secondly, the authors demonstrate that the method of statutory interpretation in England is more formal than that which obtains in America — a point that few people would, I think, dispute. And, thirdly, it is argued that there is lower "mandatory formality" with regard to statute law in America, *i.e.,* that there is less tendency for a formal reason to override, or exclude from consideration, or diminish the weight of, at least some contrary substantive reasons.[7]

Chapter 5 shifts to a consideration of the *common law,* and focuses on the doctrine of precedent. As the authors correctly point put, the doctrine of precedent is far stricter in England. Of particular interest (to the present reviewer, at least) are the authors' analyses of the major points of departure as well as the explanations for these differences between the operation of the doctrine in England and America, respectively.[8] There is also considered the contrasting methodologies of legal change. In America, for example, the courts are stated to be more activist, albeit in a relatively incremental fashion; in England, on the other hand, the change is stated to be sharp and legislative in nature.[9]

Chapter 6 considers the *trial process.* The authors argue that the trial process in England is more formal and truth-oriented. Of special interest is the discussion of the role and influence of the jury in both countries.[10]

Having regard to the previous Chapter, it comes as no surprise that the next Chapter (7) deals with *the judicial enforcement of law,* where, once again, the discussion supports as well as illustrates the authors' main thesis that the English legal system is more formal, and the American legal system more substantive. They argue that in England, a higher degree of "enforcement formality" is involved, *i.e.,* that there is, *inter alia,* greater accessibility to the courts, less delay in court proceedings, and greater finality of judgments." The further point is made to the effect that the American emphasis on due process is *not* a counter-example to the argument just enunciated.

6 Following the criteria stipulated in Chapter 1.
7 See *Atiyah and Summers,* at p. 16.
8 These include the volume of case-law, the difference of rates in dissenting as well as plurality opinions, as well as the stress (or otherwise) on predictability.
9 See *Atiyah and Summers,* especially at pp. 149 to 150.
10 See, *ibid.,* especially at pp. 169 to 177.
11 *Ibid.,* especially at p. 187.

The second main part of the book, so to speak, comprises the subsequent two Chapters and, as mentioned above, deal with the development *of legal theories* in both countries. These Chapters will be of interest to all who have an interest (even a passing one) in jurisprudence. They are highly readable (yet insightful) summaries of the development of the various theories.

Chapter 8 is entitled "Legal Theories in England and America: 1776". The authors convincingly demonstrate that English legal theory was more formal, whilst American legal theory was more substantive. Few would dispute this distinction, for, as is pointed out, the tradition of legal positivism still dominates the field. The authors are astute to point out that no proposition is made as such with regard to the interaction between theory and practice; the main thrust of this Chapter (and the text) is to demonstrate that with regard to both England and America, "theory and practice are 'all of a piece'" [12]

• Chapter 9 continues the 'story', so to speak, of the development of legal theory generally in both countries during the nineteenth and twentieth centuries, where the trend (or contrast, rather) was even more accentuated. This must be true, for legal positivism in the Haitian mould[13] is still very much alive and well. There arose in America, on the other hand (especially during the present century), both radical as well as less radical (but heavily substantive) legal theories. An example of the former (radicalism) is to be found in the works of both the American Realists'[14] as well as (and most recently) the Critical Legal Scholars.[15] An example of the latter is to be found in the writings of Ronald Dworkin who, in the authors' view in any event, is "an advocate of perhaps the most substantively oriented legal theory of all times".[16]

Chapter 10 marks the beginning of the authors' discussion of the various *institutional* factors that characterize both legal systems. This Chapter deals with the *courts,* and states that the English courts are more formal than their American counterparts which are more

[12] *Ibid., at p. 222.*

[13] See, *e.g.,* H.L.A. Han, *The Concept of Law* (1961); and by the same author, *Essays in Jurisprudence and Philosophy* (1983). See, also (for valuable comment on Hart's work), Neil MacCormick, *H.L.A. Hart* (1981); and Michael Martin, *The Legal Philosophy of H.L.A. Hart — A Critical Appraisal* (1987).

[14] See, generally, William Twining, *Karl Llewellyn and the Realist Movement* (1973); and Edward A. Purcell, Jr., *The Crisis of Democratic Theory — Scientific Naturalism and the Problem of Value* (1973). See, also, Lord Lloyd of Hampstead and M.D.A. Freeman, *Lloyd's Introduction to Jurisprudence* (5th Edn., 1985), at Chapter 8.

[15] See, *e.g.. The Politics of Law* (Edited by David Kairys, 1982); a Symposium on Critical Legal Studies in the January 1984 issue of the Stanford Law Review; Roberto Mangabeira Unger, *The Critical Legal Studies Movement (*1986); *Critical Legal Studies — Articles, Notes, and Book Reviews selected from the pages of the Harvard Law Review* (1986); and Mark Kelman, *A Guide to Critical Legal Studies* (1987). This is but a sampling of the enormous output of writings on the Critical Legal Studies Movement that have been published, especially in recent years.

[16] See *Atiyah and Summers,* at p. 263. Dworkin has, to date, published three main works, *viz.. Taking Rights Seriously* (1978); *A Matter of Principle* (1985); and *Law's Empire* (1986). Dworkin has himself generated an enormous amount of literature in response to his various concepts and arguments. An especially valuable collection may be found in *Ronald Dworkin and Contemporary Jurisprudence* (Edited by Marshall Cohen, 1984). A good collection of essays critiquing Dworkin's latest book *(viz., Law's Empire)* is to be found in Volume 6 of the journal *Law and Philosophy* (1987).

substantive. This proposition is supported by an impressive array of arguments.[17]

The next Chapter (11) is entitled "The Makers and the Making of Statute Law", and seeks, *inter alia,* to explain, *vis-a-vis* the English and American systems, the differences that concern statute law which were noted earlier.[18] The authors argue that there is more reliance in England on legislation to resolve problematic legal issues because, first, the country has strong centralized political institutions, and, secondly, because the judiciary in England has a relatively minor political role. Further, the authors point to the fact that the drafting of legislation in England is more professionalized as well as detailed. Of special interest to readers on both sides of the Atlantic (and, indeed, to any person in the common law world) is the rich variety of the illustrations selected from both England and America by the authors themselves.[19] Finally, the authors also point to the differences with regard to the legislative personnel themselves as contributing, in turn, toward the differences between the two legal systems.

Whilst still focusing upon institutional factors, the remaining three substantive Chapters are more specifically concerned with the personnel proper and their training, *viz.,* with the judges, lawyers, and legal education.

Chapter 12 deals with the *judges* who are (naturally) of vital importance in charting the destiny of the legal system. As expected, the authors argue that the English and American judiciaries are quite different, and proffer a number of possible and interesting reasons for this difference. They point out, for example, that "[b]y comparison with the American, the English judiciary is tiny, and exceptionally tightly organized".[20] Secondly, they focus upon the differences in the qualifications as well as modes of appointment and tenure of judges in both countries.[21] Thirdly, there is more professionalization of the

[17] These arguments include (for courts of last resort) the following factors: the selection of cases for decision (where the American courts are more activist and innovative insofar as social change is concerned, whilst the English courts are more concerned with correcting errors made in the lower courts); the procedure of appellate courts (that allows the American judge more opportunity for research as well as time for consideration, whereas under the English tradition, everything is more 'passive', where judges "are discouraged from setting off on voyages of discovery of their own, rejecting the views of both parties, and fashioning their own result to match some private vision of the public good or the rights of the parties": *Atiyah and Summers,* at p. 280); the presence of law clerks in the American system (who aid the judge in research); and dissent (which plays a more important role in the American legal system, and is characteristic of a more substantive approach toward the law that does not entail a united front, so to speak). Insofar as the lower courts are concerned, the factors just enunciated are also significant, although the authors point to *additional* factors that include the fact that the English court structure is more centralized and hierarchical than its American counterpart which is more diffuse, having a wider variety of courts with differing types of jurisdiction as well as a relatively greater degree of evasion and defiance of decisions of the higher courts.

[18] In Chapters 3 and 4.

[19] See *Atiyah and Summers,* at pp. 323 to 329.

[20] *Ibid.,* at p. 337.

[21] Generally speaking, in England, only active practitioners of many years standing are appointed to the bench, with no appointments directly from the academia as such. Further, appointments are less political. All this contrasts, of course, with the American position.

judiciary in England than in America.[22] And the authors also argue that English judges are far more homogeneous in their background, qualifications and experience than the American judges who -differ widely in these respects even amongst themselves!

Chapter 13 follows naturally from the preceding Chapter, and deals with the *legal professions* in both countries. The authors point, once again, to the contrasting 'pictures' offered by both countries, and state a number of possible reasons for this contrast. They assert right at the outset that the English bar is a unique institution, with no parallel in America. First, the English bar is very small, with a centralized structure and a high degree of homogeneity; the American legal profession, on the other hand, generally manifests many more diversities "not only *vis-a-vis* the lawyers themselves but also with regard to the nature of their practice as well as their legal education.[23] Secondly, there is a much closer relationship between the bench and bar in England, whilst there is much less of a common legal culture in America. Thirdly, the authors point to the factor of the orality of appellate proceedings and its implications; in this regard, the fact that much appellate work in America is done *via written briefs* is significant. Finally, the factor of traditions of competence and integrity with regard to both the public as well as clients' interests is considered. The authors point out, first, that the entry standards into the American profession are much more variable, in accordance with the American democratic ideal that law should be accessible to everyone — an ideal that is not unrelated to the main thesis of the book that argues that the American vision of law is one comprising *substantive* justice. Secondly, lawyers in America (so the authors argue) are much more political.

Chapter 14 is, as alluded to above, the final substantive Chapter of the book itself. It is entitled "Law Schools, Legal Education, and Legal Literature", whose importance ought not, in my opinion, to be underestimated simply because the training of legal personnel starts at the law schools themselves; and this lastmentioned fact must surely render this Chapter of more than passing importance to the main thesis advanced in the instant book. As with the survey of the preceding Chapters, the description of the present must be necessarily brief and impressionistic. The authors argue that there is a much more substantive vision of the law in the American law schools, the leading ones of which have great autonomy as well as a more powerful influence, generally speaking. This substantive vision is exemplified in, for example, the broader scope and purpose of the so-called 'casebooks' as opposed to the English textbook which focuses, in the main, on black-letter law. Further, the American law professors themselves play a relatively greater role in helping to formulate policy *via,* for example, their research and writing, arguments in court, aiding in legislative reforms, not to mention their regular (albeit temporary) secondment to do government work. And the American law schools themselves have been the source not only of the dominant general

[22] In England, the focus is on professional skills rather than with political or moral considerations.

[23] On legal education generally, see *Atiyah and Summers*, Chapter 14.

theory of law in America itself that the authors term 'instrumentalism'[24] but also of ideas about legal method itself.

The concluding Chapter (15) not only brings together the various threads hitherto discussed but also raises many new issues that ought also to be considered. In a review such as the present, it would be impossible to give a detailed description" (let alone critique) of the rich texture of this Chapter. Only a few points shall, therefore, be noted. What is, first, interesting is the fact that the authors critique both the formal as well as substantive visions of law in an even-handed fashion.[25] Of interest, too, in this Chapter is the recognition that jurisprudence can serve as a theoretical basis for more concrete comparative studies.[26] It is, however, unfortunate that the authors' rather negative critique of the Critical Legal Studies Movement was so short,[27] especially since there has been an effort by at least one Critical Legal scholar to posit an alternative to the present system.[28] It would have been interesting to have seen what a longer critique would have looked like, simply because the authors, while by no means of a conservative mould,[29] appear to embrace more traditional legal leanings. Finally — and this is a point in keeping with the authors' obvious sensitivity toward the rigours of scholarship generally — both Aityah and Summers recognize the problem of'causation'; they state, for example, that:[30]

> "We reiterate that we do not believe simple linear causal explanations exist between the styles of legal reasoning and the other factors we have identified as correlating with it."

Notwithstanding the limitations that are necessitated by the problem of'causation' which is exemplified by the caveat expressed in the abovementioned quotation, it is my view that the authors have succeeded eminently in substantiating their primary thesis that, on the whole, English law is more formal, and American law is more substantive. And, in the process of accomplishing this, they have displayed a quite remarkable command of both legal as well as extra-legal materials — a command that is all the more impressive because the book straddles a great many areas of the law and analyses the role of its institutions. What is equally impressive is the fact that each substantive Chapter is, as mentioned earlier, not only relatively short but also (whilst contributing to the support of the main thesis, as just

[24] Though this particular terminology is probably Summer's: see, *e.g.,* his *Instrumentalism and American Legal Theory, supra,* note 1.

[25] See *Atiyah and Summers,* at pp. 420 to 426. And *cf.* the suggested practical reforms at pp. 426 to 428.

[26] And see, also, *ibid.,* where the authors, in their "Preface", at p. v, state thus: "This book is a contribution both to legal theory *and to comparative studies."* (emphasis added). See, also, *ibid.,* especially at pp. 415 to 420, and 429 to 430.

[27] See, *ibid.,* especially at p. 431.

[28] See, generally, the more recent works of Roberto Mangabeira Unger, especially. *The Critical Legal Studies Movement, supra,* note 15; *Social Theory: Its Situation and Its Task* (1987); *False Necessity: Anti-Necessitarian Social Theory in the Service ofRadical Democracy* (1987); and *Plasticity into Power: Comparative-Historical Studies on the Institutional Conditions ofEconomic and Military Success* (1987); the last three works represent a multi-volume exposition of Unger's latest views in the context of social theory.

[29] Indeed, one of the strengths of the present book is that it adopts an approach that seeks to take account of the wider context.

[30] See *Atiyah and Summers,* at p. 410. See, also, *ibid.,* at p. 359.

mentioned) self-contained; and this enables the reader to 'dip into' the book at his leisure. This is not to state that each Chapter is simplistic in both approach as well as substance; quite the contrary. Each Chapter, though relatively short, is extremely richly textured, but is written with such clarity that the reader would be able to follow the argument(s) quite easily.

Some might argue that the main thesis advanced by the authors is nothing new, at least insofar as many, if not all, legal personnel versed in the common law system would at least *intuitively* be in agreement with it. Insofar as this *intuitive* feeling is concerned, such critics are probably correct. No writer has, however, *demonstrated* (in any systematic fashion at least) that this intuitive feeling is indeed true both from a theoretical as well as a practical point of view. And it is my view at least that the demonstration of the obvious is often the most difficult task to embark upon; it requires a range of scholarship that goes beyond the mundane (or even the esoteric, for that matter) and which has, in turn, to be coupled with both analytical insight as well as synthesizing expertise.

Before concluding this review, I would like to return to a theme that may appear to have been 'flogged to death' — at least insofar as the views of the present reviewer are concerned.[31] I do not wish to belabour the point, and will thus only briefly restate it. Whilst this book (as well as others) may be highly interesting from both theoretical as well as practical points of view, it does not deal with the local (Singapore) position. The real merit of a work such as this lies (in my view at least) in its function as a source of 'theoretical tools' that may be brought to bear in our analysis of various facets of the Singapore legal system. Such 'tools' need not (indeed, often cannot) be applied without modification; but, they do provide useful points of departure. This function is often overlooked. What is worse, of course, is the fact that a book such as this may, if utilized in an unimaginative fashion, actually serve to *reinforce* an uninteresting attitude toward the law in general and Singapore law in particular. Some readers, for example, might unhesitatingly jump to the conclusion that because Singapore law, is based on English law, that the Singapore legal system is therefore necessarily more formal. I am not arguing that this would not be a fair description of the Singapore legal system. What I am arguing, however, is that one *cannot blindly assume* that the *reasons* for the final result are the same. Indeed, it may well be the case that the Singapore legal system is not really as close to the English legal system as appears at first blush, and/or that, in any event, it may in fact contain the potential to be developed in a fashion that is *distinctly local in* character. Admittedly, more research and analysis has to be done. But, the silence in this respect has, unfortunately, been quite deafening.

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[31] See, *e.g.,* my review of Ralf Dahrendorf's *Law and Order* (1985) in (1986) 28 Mai L.R. 372, especially at pp. 376 to 377.