A History of the Philosophy of Law in the Common Law World 1600-1900 BY MICHAEL **LOBBAN** [Dordrecht: Springer, 2016. x + 267 pp. Softcover: €39.99]; *Legal Philosophy in the Twentieth Century: The Common Law World* BY GERALD J **POSTEMA** [Dordrecht: Springer, 2016. xxv + 618 pp. Softcover: €49.99].

The historical surveys of common law legal theory provided by volumes 8 and 11 of Springer's multi-volume *Treatise of Legal Philosophy and General Jurisprudence* have now been published in paperback, at a price which makes them more accessible to a wider readership. Michael Lobban takes us from the seventeenth century through to the dawn of the twentieth, and Gerald Postema surveys developments in the twentieth century. Significantly, the latter volume is well over double the length of the former, attesting to the explosion of theoretical reflection in the common law world over the last century. Postema mentions (at p xxv) that the book took him ten years to write and even in that period the pace of change was such that received ideas became a moving target.

As for Lobban's task, it might be thought his problem was rather to identify a common law legal theory, or philosophy of law, across these centuries, particularly when the book's stated purview (at p ix) is limited to the work of jurists and legal philosophers as opposed to perspectives on law from general philosophy. Although academic reflection on law by jurists always occupied a central place in the life of the law for civilian systems, as Raoul van Caenegem clearly explained in his *Judges, Legislators and Professors* (1987), there were political and historical reasons why this was not the case for the English common law.

Indeed, it is revealing that when Postema offers some concluding thoughts on the prospects for Anglophone legal philosophy, he finds the early vision for jurisprudence articulated as *vera philosophia* (true philosophy) expounded by Guillaume Budé and other continental jurists, with only an accidental dictum from Coke in support (at p 577). Motivated by this vision, Postema considers the contemporary situation as involving (at p 583):

> [R]oom, and perhaps also an increasing sense of the need, for a genuinely philosophical jurisprudence, one that is not only sensitive to legal practice, but also deeply rooted in the history of philosophical reflection on the place of law in human social life.

This noble vision for jurisprudence is contrasted with a narrow perspective on law that is limited to blinkered professionalism, in Postema's language, translating the perspective of the *iurisperiti* (those merely learned in the law—unthinking lawyers) as denounced by Budé (at pp 577, 578).

However, it is clear that the virtues of such a jurisprudence are equally distinct from an elevated philosophy that is incapable of informing practical issues. As further explained in Donald Kelley's article in the Journal of the History of Philosophy, "Vera Philosophia: The Philosophical Significance of Renaissance Jurisprudence" (1976), which Postema draws from, the early continental jurists were confident that jurisprudence was superior to mere philosophy, as well as to mere professionalism. In the words of Louis le Caron, quoted by Kelley, "true philosophy is contained in the books of law and not in the useless and inarticulate libraries of philosophers, who in effect are men of great learning but incompetent in public affairs" (at p 270).

Returning to Lobban's task, or the vision for legal philosophy in the common law world between 1600 and 1900, the author divides his period into a number of ages, each marked by particular influences, commencing with The Age of Bracton and finishing with The Age of Maine and Holmes. However, the influences in these ages are not restricted to the personal influences of individual writers. Different ages throw up different political or governmental struggles which influence the problems that common law theory has to grapple with. Over much of the three centuries in question, these issues revolved around the appropriate understanding of the relationships between the King, Parliament, the Courts, and the People which could be bolstered by a supportive understanding of the common law or of law more generally. Lobban displays an incisive understanding of the subject matter, relating authors' reflections on law to the particular outcome favoured by the author for a contemporary political struggle. So, for example, we find Blackstone beset with difficulties in proposing an understanding of law that could give an appropriate account of the Glorious Revolution of 1688-89 (at pp 95-99).

Occasionally, the struggles motivating the propounded view of law spring from narrower, self-serving interests, as occurred during the battle between the courts of common law and equity (ch 2.4). As Lobban points out, alongside the personal rivalry there was a fundamental disagreement on the nature of law: "equity and common lawyers had different notions of legal reasoning" (at p 54).

The link between understanding of law and political struggle is sharply illustrated when the scene is moved across the Atlantic to the newly independent America (ch 5). For obvious reasons, a natural law notion of law devoid of any taint of the English common law was favoured by Adams and Jefferson (at pp 129, 130). However, a common law understanding was subsequently used to support Marshall's federalist jurisprudence (at p 145).

That is not to say that the whole of common law theory in this period was caught up with partisan explanations of political struggles, but even where wider reflection was attempted it was preoccupied with the nature of the common law more than the nature of law. To return to Blackstone, Lobban provides us with a nuanced study of the positivist influences on Blackstone's thought (at pp 99-102), far outweighing the natural law sympathies with which he is generally associated, and shows how these were turned in support of Blackstone's attempted justification of the common law. The attempt is ultimately assessed to be a failure by Lobban (at p 110). However, if this is correctly represented as a failure that draws on positivism, then Bentham's distaste for his teacher Blackstone should not be regarded merely as an early positivist revolt against natural law but far more significantly as a denunciation of the judicial licence permitted by (the positivist phenomenon of) the common law (at pp 155, 162-167). The subsequent course of the dominant legal positivism versus natural law debate in more recent jurisprudence lost sight of this point, with the positivists marginalising legal reasoning or excluding it from their understanding of law (a point, as we shall see, picked up by Postema).

Seeking a jurisprudence less directly connected to contemporary political struggles, crises of government, or parochial concerns with the common law, brings us to Lobban's treatment (ch 4.5-4.7) of the authors from the Scottish Enlightenment (tenuous candidates for the common law world) and the more stable times of the nineteenth (or late nineteenth) century on both sides of the Atlantic. Here are to be

found authors open to general reflection on the nature of law. In the case of Bentham and Austin (ch 6) with their respective zeal for radical codification, or, at least, enthusiasm for reform, there was no preoccupation with a theoretical justification of the common law. In the case of Holmes (ch 7), an early assumption that law served the common interests of the community gave way to the more sceptical view that law involved a choice between rival social desires (at pp 220, 223).

In Lobban's view, none of these reflections (including Kames' enlightenment ambition to incorporate an understanding of law within a grander moral theory, and Maine's efforts to understand law as a process of historical development) succeeded in "the grand aim of jurists to develop an overarching theory of law which could explain and make sense of doctrine" (at p 222). In portraying this as "retreat[ing] from the grand ambitions which had driven common law jurists for three centuries" (at p 223), Lobban is perhaps overstating the ambitions that he has previously chronicled, found in work that was frequently skewed by partisan interest and constrained by the imperative of reacting to current events.

The bridge between these two volumes is provided by Austin's jurisprudence. This is regarded by Postema as the culmination of earlier common law theorising (at p xxiv) and the starting point (at p 42) for the "two distinct streams of Anglophone legal theorizing in the twentieth century" (at p xxi) whose sources he identifies as Holmes and Hart. After a Prologue which covers the period between Austin and Hart (ch 1) and treatment of Holmes (ch 2), the two principal parts of Postema's book are devoted to the respective legacies of Holmes and Hart. From Holmes are taken to flow American Legal Realism (ch 3), Economic Approaches (ch 5) and Critical Approaches (ch 6), along with Fuller and Hayek (ch 4). From Hart (ch 7) flow, notably, MacCormick and Raz (ch 8), Dworkin (ch 9), and Finnis and Waldron (ch 12). Postema also places within the Hartian stream, a number of thematic developments within legal theory, covering incorporation of morality by law (ch 10) and the role of conventions (ch 11). It is clear that the legacies or streams, as Postema styles them, should be taken broadly to include theoretical reactions against their respective sources as well as linear developments from them. However, he notes a distinction in character between them, with those in the Hartian legacy "proceeding in a disciplined way through a common philosophical agenda", whereas there is in "Holmes's legacy no common agenda and no agreement on method or approach" (at p xxiii).

This brief outline of the chapters fails to do justice to the detailed learning and discerning treatment Postema brings to his subject matter. Each of the chapters itself displays and contributes to the "critical" character Postema attributes to twentieth-century jurisprudence, involving a "dialectic of arguments" (at p xxii). The extent of his own grasp of the material is sometimes betrayed by the deft, even casual, nature of his commentary. For example, noting that Hart "systematically articulated" Salmond's view "with only the barest acknowledgement of Salmond" (at p 4), and that Salmond's own ideas might have been more fully developed if subsequent editions of his work had been undertaken by editors competent to do so (at p 25). Or, that "Hohfeld was silent about combinatorial principles" (at p 106). Or, that Unger's "argument against the 'formalism' of 'modern legal theory' presupposes the possibility of (ultimate) *rational* determinacy of law"—and adding, "[h]owever, it takes a resolutely rationalist mind to resist the temptations to skepticism lying

around every corner of Unger's argument. Many of his colleagues succumbed." (at pp 230, 231) Or, his dropping the observation that there is an important distinction between an "intra-systemic role of principles" and "appeals to extra-legal principles" in a discussion of how Raz's approach to legal reasoning followed Hart in placing it "beyond the pale of his jurisprudence" (at p 385). Or, his summary on the developments to Hart's conventionalist understanding of law, in finding that "the concept of conventions has been shown to have greater explanatory power, than had been widely assumed", noting this to be "an important theoretical development", while questioning "whether this deeper understanding of the potential rational and moral dimensions of conventions advances significantly our understanding of law" (at p 545).

Postema's final verdict on his century of legal philosophy differs from Lobban's rather disappointed reflection on a failure to make sense of law and legal doctrine at the end of his three centuries. In his Concluding Note, Postema hesitates on the brink of finding that the two streams of twentieth-century jurisprudence have reached "the last stage of a process of intellectual disintegration" (at p 583). He steps back to conclude that the diversity of approaches on offer provides hope of a return to the Renaissance ideal of a *vera philosophia* cited earlier in this review, or at least an approximation to that ideal (at p 583).

It is difficult to calibrate the precise measure of Postema's optimism. His celebration of diversity is, after all, accompanied by an increasing sense of need for "a genuinely philosophical jurisprudence" (at p 583). Does this need reflect panic at the prospect of a disintegration into chaos, or confidence that sufficient diversity has been attained to deliver an effective synthesis? Across the two volumes, there is sufficient material to provide grounds for doubt that an eradication can be achieved of the tensions between theoretical aspirations and doctrinal illumination, between established common law practice and broader philosophical inquiry, between political or other partisan viewpoint and impartial technical insight—in short, that jurisprudence amounts to that true philosophy that holds its ground between mere professionalism and mere philosophy, informing our understanding of law with what Postema describes as an "appreciation of the complex practical dimensions of social life" (at p 583).

Optimism or pessimism over the realisation of a jurisprudential ideal is a matter for personal temperament and inclination, but the efforts in the common law world across four centuries to engage in theoretical reflection over law and law's deeper connection to the fulfilment of social life amount to compelling evidence in reaching the conclusion that law cannot be reduced to an unreflective practice of lawyers. Every thinking lawyer should be informed and stimulated by these books, and as for the *iurisperiti*, any unthinking lawyers should acquire them in order to stimulate thought.

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