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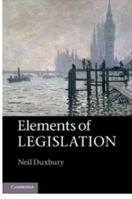
Book Review - 'The Elements of Legislation' by Neil Duxbury

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Law and Politics Book Review



by Neil Duxbury. Cambridge: Cambridge University Press, 2013. 262pp. Hardback \$95.00/£60.00 ISBN: 9781107021877. Paperback \$45.00/£29.00 ISBN: 9781107606081.

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As politicians in the United Kingdom consider exiting the EU and the citizens of Scotland ponder their political future in the U.K., potential developments over the coming years could result in monumental changes within the constitutional structure of the United Kingdom. Further, the emergence of the U.K. Supreme Court in recent years has led some to contend that judicial review is becoming stronger and the long-established doctrine of parliamentary supremacy, weaker. Should this be the case, it would mark a decisive constitutional turn in the oldest of common law jurisdictions. For a state that is already wary of Americanization, the assertion that legislation may be subject to increased scrutiny by the courts carries more than symbolic undertones.

In *Elements of Legislation*, Neil Duxbury delivers insightful analysis of three major issues surrounding legislation: enacted and judge-made law; the jurisprudence of statutes; and the interpretation of statutes. The text is clear, concise, and engaging, and Duxbury's ideas and analysis elegantly elucidate the difficult concepts associated with statutes and statutory interpretation. The book advocates legislation and legislatures in a Jeremy Waldron-like fashion, except that Waldron largely argues from more of a normative perspective and Duxbury is arguing from a more technical perspective. While the text may not be as comprehensive and thorough as Eskridge's *Dynamic Statutory Interpretation*, it certainly belongs on the same shelf as recent texts in the same vein, such as Solan's *The Language of Statutes*. Additionally, while Duxbury examines issues surrounding legislation primarily from a British perspective, he does a laudable job of including American perspectives throughout. Many citations are from American law reviews and other legal resources, and Duxbury's use of these materials comprises a text that is fit for use both at home and across the pond.

Early on Duxbury establishes the distinguishing characteristics of statutory law compared to judge-made law (pp.12-18). These are essential to his quest, because the essence of the book revolves around distinguishing between the two. In fact, the differences are good to rehash here, as sometimes they get lost in the discussion of statutes and statutory interpretation:

- Legislatures control their lawmaking functions in a way that courts do not
- Judicial decisions are deciding the facts of the case before it, and [*341] usually the decision revolves around the these
- Legislatures actively pass the laws they make
- Legislation is more suited to drawing arbitrary yet clear lines for policies
- Statute law is not precedent-driven; it is reform-oriented
- Statute law is intentionally made
- Statutes are formulated with the intention that they be interpreted

The book next focuses on legislative v. judicial supremacy. In Britain, the legislative and judicial functions have not always been separate. For many years judges were the ones preparing statutes, and therefore they did not engage in much interpreting. The interpreting process only came about once judges were separated from their bill drafting functions. The 1500s were important in establishing a central part of British constitutional law: parliamentary supremacy. It was here that royalists and parliamentarians came to the agreement that once laws

were enacted, judges had “no power to challenge the validity of those laws” (p.28). But the judiciary retained the power of overturning statutes that were absurd or repugnant. This remains one of the central differences between the U.S. and U.K., as laws in the former are subject to heightened judicial review, and judges can and do challenge the validity of Congressional enactments, as established in *Marbury v. Madison*. An 18th Century quotation by Blackstone portrays the difference, as he notes that, “if the parliament will positively enact a thing to be done which is unreasonable, I know of no power that can control it ... for ... to set the judicial power above that of the legislature ... would be subversive of all government” (pp.30-31). Since the 17th century judicial review has been a settled issue in the U.K.: judges could do little beyond accepting what is contained in a statute, and parliament remains the only body that can enact statutory changes. By the early 18th century it “became well-nigh impossible to take the idea of judicial review of statutory validity seriously” (p.32). Even now, in sharp contrast to the U.S., a U.K. judge cannot deem an act unconstitutional per se, but they can issue a declaration of incompatibility. If such a declaration is made, then the law remains on the books until parliament determines when and how the law is to be changed or amended.

Often thought of as merely a judicial art, the study of jurisprudence has largely revolved around judges. However, Duxbury engages in discussion around legisprudence (i.e. the study of the jurisprudence of legislation). In doing this he boldly criticizes Dworkin’s *Law’s Empire*, stating that something is “amiss when one of the most carefully developed jurisprudential projects of the past four decades is dedicated principally to the matter of what makes for good judicial decision making and devotes comparatively slight attention to the question of what makes for good statute making” (pp.69-70). Similarly, American legal culture and especially the highly influential legal realism movement largely focused on judicial, not legislative, activity. And while jurisprudence already contains a more focused and established area of study, legisprudence is still establishing its identity (it can sometimes look more akin to political science and democratic decision-making than to positivism and natural law). This is likely to turn off [*342] some of those who find it difficult to step out of the traditional jurisprudential mindset. Once this is done, however, the picture regarding statutes, and especially the interpretation of those laws, becomes much more engaging.

Duxbury furthers the Jeremy Waldron notion that legislatures are more adept at determining the constitutionality of laws than courts. Here he states that “[n]ot only are courts as likely as legislatures to be beset by internal disagreement, but legislatures are, compared with courts, better structured to handle such disagreement” (p. 75). The strongest reason for questioning why courts should be assumed better guardians of individual rights is that of size: large, diverse groups are likely to make more intelligent decisions than even the smartest of individuals. This large, diverse group is what courts lack and what legislatures carry in abundance. Statute law is provided democratic legitimacy because of the due process standards it encounters before enactment at the hands of this diverse group. This discussion boils down to how much power the Westminster Parliament and the Supreme Court have in contemporary Britain, and here Duxbury notes that much of the evidence is speculative: there remains no evidence that the Supreme Court has wielded any more power than the Law Lords did.

Legislative intention is next discussed, and in a clear jab at textualists Duxbury declares that, “[n]or is it trivial, however, to point out that the idea of the legislature exercising collective agency cannot simply be shrugged off as mystical nonsense” (p.103). He further notes that “a proper account of statutory interpretation is inconceivable absent the presupposition that intentions can be ascribed to legislatures” (ibid). That being said, intention can be taken into account, but many precautions should also be acknowledged. The fact that legislatures are groups and not individuals, that laws are written and interpreted at different periods, and that judges are within their rights to use various interpretative techniques supporting statutory meaning, certainly complicates the process. Duxbury adds, however, that it is “a little too strict” to say that plain meaning should always trump legislative intention (p.109).

In addition to examining other interpretative rules and canons, the book also explains the curious evolution of the exclusionary rule in the U.K. Until recently, using legislative history to interpret a statute was inadmissible in the British courts. Conversely, in 1892 the US Supreme Court declared in *Holy Trinity Church v. United States* that legislative history could be utilized to ascertain the meaning of statutory language. It took the House of Lords over a century to determine the same thing in *Pepper v. Hart*. However, Duxbury notes that the exclusionary rule may live on in the U.K.: even though the majority in *Pepper* made it clear that legislative history should be used sparingly, judges have continued to rein in the ruling. Essentially only one situation merits legislative history being

used in British courts: “that in which a court ought to be estopped from interpreting a statute in favour of one party because clear statements on the parliamentary record led the other party to reasonably to believe, and detrimentally to act on the assumption, that the statute yielded a contrary interpretation” (p.215). [*343]

Finally, Section 3 of the Human Rights Act (HRA) 1998 is examined in light of current interpretation standards. Section 3 “requires that UK courts, so far as is possible, interpret and apply primary and subordinate legislation in a manner compatible with Convention rights – so that domestic statutes might accord, in other words, with parliament’s intention to incorporate the ECHR (European Convention of Human Rights) into domestic law” (p.233). Duxbury concludes that the operation of Section 3 allows for courts to place an interpretation that may come as a surprise to lawmakers that enacted the legislation. In essence, actual or presumed intentions, which Duxbury favors throughout his text as a reasonable interpretative principle (if performed with caution and in proper context), are not “as significant or valuable as they once were” (p.240). In the already tense U.K./EU relationship, Duxbury’s conclusions strike a rather dissonant chord: that the intentions of parliamentarians do not carry the same significance they previously did. Ultimately, a jurisdiction that relies on parliamentary supremacy may not take well to such developments.

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