

—————BOOK NOTE—————

D. Rhidian Thomas, ed., *Legal Issues Relating to Time Charterparties* (London, U.K.: Informa, 2008), pp. xi, 378.

Two important texts on time charters under English maritime law have appeared almost simultaneously and the event immediately causes the maritime establishment (i.e., shipowners, charterers, stevedores, operators, shippers, receivers, merchants, agents, lawyers, judges etc.), and of course the academics, last but not least, (especially in our own minds) to ask, *Which is the better text—i.e., the more accurate, the more practical, the more useful?*

The first text, *Legal Issues Relating to Time Charterparties*¹, is reviewed here. The second text is the compendious sixth edition of *Time Charters*². The short answer to the question *Which is the better text?* is that each fulfills a useful, necessary, and different purpose, so that the texts complement each other and their sum standing together is far greater than their sum standing alone.

Legal Issues consists of sixteen essays by sixteen legal experts who explored particular problems relating to time charterparties at a colloquium in Swansea, Wales, on 11 and 12 July 2007. The sixth edition of *Time Charters*, on the other hand, is a detailed legal examination (from stem to stern) of time charterparties under English law.

The United Kingdom is fortunate to have both studies to explain its time chartering law. Similarly the world's shipping industry is fortunate to have English time charter law extended beyond the boundaries of the United Kingdom, by means of choice of law, choice of jurisdiction, and choice of arbitration clauses as elucidated by these two texts.

At this point, I leave *Time Charters* to its readers, wish them *bon voyage et bonne lecture*, and turn my attention to *Legal Issues*.

The stage for *Legal Issues* is set in a perceptive “Foreword” by Sir Anthony Evans, former Judge of the Court of Appeal and now Chief Justice of the DIFC Courts in Dubai, U.A.E. He notes how “conferences and semi-

¹ D. Rhidian Thomas, *Legal Issues Relating to Time Charterparties* (London, U.K.: Informa, 2008) [*Legal Issues*].

² Terence Coghlin *et al.*, eds., *Time Charters*, 6th ed. (London, U.K.: Informa, 2008) [*Time Charters*].

nars like this colloquium ... mingle practical experience with the fruits of top-level legal thinking and research.”³

Rhidian Thomas follows in a very useful “Preface”, wherein he adroitly defines and explains the central importance of the time charterparty to maritime law. “[It] rarely exists in isolation,” because it is the father of “sub-time and sub-voyage charterparties,” and is connected to “bills of lading, waybills and delivery orders.”⁴ He adds, “In turn, it may itself be created under a bareboat (demise) charterparty.”⁵ Thereafter, the sixteen experts (including Thomas) present the special topic of their expertise.

Time and space do not permit a detailed discussion of the sixteen essays, but a convincing explanation can be made of how essays in general contribute very beneficially to the understanding of the law of charterparties as presented in a single, detailed, and all-inclusive book such as *Legal Issues*.

A major advantage of a collection of essays is that each essayist chooses the subject of which he is an expert, and then allows himself free rein to cover the issues carefully. Thus we find Grant Hunter, the acknowledged authority on BIMCO forms, conducting a comparison of the three major BIMCO charterparties: BALTIME 1939 (as revised in 2001), NYPE 93, and GENTIME.⁶

Other essayists ask a question as their main theme, and then answer it. For example, see Dr. Baris Soyer’s essay, “Constructing Terms in Time Charterparties – Beginning of a New Era or Business as Usual?”⁷ Or see Andrew Tettenborn’s chapter, “Assignees of Hire: How Far Can They Ignore Charterers’ Claims Against Owners?” Or see Richard Williams, who cuts quickly to the bone and addresses the question “What is a Lien?”—a subject not everyone can agree upon. A most provocative question is posed by Mark Hamsher, who asks, *Is the approach of the judges in Hongkong Fir still valid today?*⁸ Or see David Foxtan’s essay “Indemnities in Time Charters”⁹ in which he skilfully leads his witness (the reader) to the an-

³ *Legal Issues*, *supra* note 1 at vi.

⁴ *Ibid.* at vii.

⁵ *Ibid.*

⁶ See Grant Hunter, “Standard Forms – The BIMCO Experience” in *Legal Issues*, *supra* note 1, 1.

⁷ Baris Soyer, “Constructing Terms in Time Charterparties – Beginning of a New Era or Business as Usual?” in *Legal Issues*, *supra* note 1, 17.

⁸ Mark Hamsher, “Seaworthiness and the *Hongkong Fir* Decision” in *Legal Issues*, *supra* note 1, 83.

⁹ David Foxtan, “Indemnities in Time Charters” in *Legal Issues*, *supra* note 1, 93.

swer he is looking for, no doubt relying on his experience as a barrister conducting cross-examinations in court.

Some essayists even have the courage to present a conclusion at the end of their essays. See Howard Bennett's "Safe Port Clauses"¹⁰ or Yvonne Baatz's "Clauses Paramount in Time Charters"¹¹, or Andrew Taylor's "Damages for Breach of Time Charter: Some Recent Developments", where the author concludes that awarding damages in each time charterparty case is very subjective, being "based on what the court considers to be fair" in the circumstances.¹²

Courageous conclusions are also drawn by Theodora Nikaki in an essay about the allocation of cargo claims,¹³ Christopher Hancock in his chapter on slot charters,¹⁴ Keith Michel in his piece on war, terror, piracy, and frustration,¹⁵ and John D. Kimball in "Termination of Rights under Time Charters".¹⁶

Finally, Francis Reynolds, the unofficial Dean of English maritime law essayists, obeys his own essay rules and delivers a very selective but elegant dissertation on the subject he knows best: charterparties and bills of lading.¹⁷

The essay form thus allows the author to be discursive, bringing in history, personal experiences and even wit. There can be no excuse for an essayist being dull or ponderous and this collection of essays does not fall into that trap.

Certainly, *Legal Issues* establishes that reasoned essays on charterparty subjects are a valuable complement to a detailed, general text such as *Time Charters*. Questions, however, will no doubt be asked in the future, when a second edition of *Legal Issues* is planned. For example, to

¹⁰ Howard Bennett, "Safe Port Clauses" in *Legal Issues*, *supra* note 1, 47.

¹¹ Yvonne Baatz, "Clauses Paramount in Time Charters" in *Legal Issues*, *supra* note 1, 177.

¹² Andrew Taylor, "Damages for Breach of Time Charter: Some Recent Developments" in *Legal Issues*, *supra* note 1, 257 at 267.

¹³ Theodora Nikaki, "The Allocation of Cargo Claims between Owners and Charterers in NYPE Charterparties" in *Legal Issues*, *supra* note 1, 225.

¹⁴ Christopher Hancock, "Containerisation, Slot Charters, and the Law" in *Legal Issues*, *supra* note 1, 247.

¹⁵ Keith Michel, "War, Terror, Piracy and Frustration in a Time Charter Context" in *Legal Issues*, *supra* note 1, 199.

¹⁶ John D. Kimball, "Termination of Rights under Time Charters" in *Legal Issues*, *supra* note 1, 215.

¹⁷ See Francis Reynolds, "Time Charterparties and Bills of Lading" in *Legal Issues*, *supra* note 1, 161.

what degree, with the passage of time, will the contributing essayists be obliged by the editor to partially modify their views? And will any essays in the first edition have become completely redundant?

Again, to the readers of *Legal Issues* and, in this case, to the essayists as well, *bon voyage et bonne lecture*.

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—————BOOK NOTE—————

R.W. Kostal, *A Jurisprudence of Power: Victorian Empire and the Rule of Law* (Oxford and New York: Oxford University Press, 2008), pp. xiii, 529.

First published in hardback in 2005, reprinted in 2006, and first published in paperback in 2008, R.W. Kostal's *A Jurisprudence of Power: Victorian Empire and the Rule of Law*¹⁸ is usefully contrasted with other recent works on the rule of law such as Brian Z. Tamanaha's *On the Rule of Law: History, Politics, Theory*.¹⁹ As opposed to covering thousands of years as well as the politics and theory of the rule of law in 180 pages, Kostal, a historian and professor of law at the University of Western Ontario, and author of *Law and English Railway Capitalism, 1825–1875*,²⁰ spends 529 pages (comprising an introduction, seven chapters, an epilogue, a conclusion, and an appendix) focusing on one historical episode spanning less than a decade.

A Jurisprudence of Power provides an extensive treatment grounded in primary sources, including journalistic ones, of “the prolonged conflict that arose in England over the suppression of the Morant Bay uprising in Jamaica” in October 1865, when “a crowd of black men and women attacked and burned” a courthouse.²¹ Its suppression involved the proclamation of martial law by then Governor of Jamaica, Edward John Eyre, and the “killing and torturing [of] hundreds of black Jamaicans—that is to say, British subjects.”²² The prolonged conflict that arose in England cen-

¹⁸ R.W. Kostal, *A Jurisprudence of Power: Victorian Empire and the Rule of Law* (Oxford and New York: Oxford University Press, 2008) [*A Jurisprudence of Power*].

¹⁹ Brian Z. Tamanaha, *On the Rule of Law: History, Politics, Theory* (Cambridge: Cambridge University Press, 2004).

²⁰ R.W. Kostal, *Law and English Railway Capitalism, 1825–1875* (Oxford: Clarendon Press, 1994).

²¹ *A Jurisprudence of Power*, *supra* note 1 at 1.

²² *Ibid.*

tred on the propriety and legality of the killing and torture. It was tied, in some measure, to conflicting understandings of martial law and of a colonial indemnity act,²³ but also to a broader concern that “[a] sprawling empire of non-white, non-Christian peoples could not be safely governed within a scrupulous constitutional framework.”²⁴ The conflict in England was also closely tied to the activities of the Jamaica Committee, a “grand coalition of Christian activists and secular liberals”²⁵ whose “*raison d’être* ... was to defend a liberal jurisprudence of power.”²⁶ Their efforts to criminally prosecute Eyre and others brought to the fore the “contradictions thrown up by law and imperialism,”²⁷ and raised the question of whether there could be “such [a] thing as a liberal empire.”²⁸ Kostal’s pairing of law and liberalism, not at all unusual,²⁹ invites a reading of his work alongside that of Uday Singh Mehta’s *Liberalism and Empire: A Study in Nineteenth-Century British Liberal Thought*.³⁰ Mehta’s book notably includes a treatment of John Stuart Mill, who became a central actor in the Jamaica Committee and therefore in Kostal’s story.

Kostal devotes his efforts to attending to, mapping out, and thematizing the English preoccupation with legality as manifested in, but also as constitutive of, the Jamaica controversy. Throughout his book, Kostal aims “to show how legal ways of seeing and doing were central features of English political discourse and conflict.”³¹ He aims in part to provide a corrective to previous historical accounts of the Jamaica controversy which “failed to apprehend that the Jamaica affair was understood, described, and contested largely in terms of legal language and procedures.”³² Kostal’s book narrates and reconstructs one historical episode closely tied to what Judith N. Shklar has famously called legalism, “the ethical attitude that holds moral conduct to be a matter of rule following, and moral relationships to consist of duties and rights determined by

²³ *Ibid.* at 11.

²⁴ *Ibid.* at 68.

²⁵ *Ibid.* at 15.

²⁶ *Ibid.* at 473.

²⁷ *Ibid.* at 485-86.

²⁸ *Ibid.* at 486.

²⁹ With respect to Canadian legal history, see e.g. Robert C. Vipond, *Liberty and Community: Canadian Federalism and the Failure of the Constitution* (Albany: State University of New York, 1991), (see especially c. 5, “Provincial Autonomy and the Rule of Law” at 113). See also the work of Richard Risk.

³⁰ Uday Singh Mehta, *Liberalism and Empire: A Study in Nineteenth-Century British Liberal Thought* (Chicago, University of Chicago Press, 1999).

³¹ *A Jurisprudence of Power*, *supra* note 1 at 464.

³² *Ibid.* at 2.

rules”³³ and of which “[t]he court of law and the trial according to law are the social paradigms, the perfection, the very epitome.”³⁴

Kostal’s twenty-two page introduction sets forth the Morant Bay uprising, its suppression, and the formation of the Jamaica Committee. He ties the uprising at the courthouse to a racist local justice and situates it against British Jamaica’s history and constitution, particularly its history of slavery and slave insurrection. He also draws attention to the suppression’s most famous victim, a “coloured landowner-politician, George Gordon,”³⁵ who had been a prominent advocate of reforms but of whom it had not been alleged that he “had been directly involved in acts of violence.”³⁶ Even though he surrendered voluntarily when charged with high treason and sedition, he was removed “from the civilian jurisdiction of Kingston for trial by a military tribunal at Morant Bay.”³⁷ He was “[d]enied access to a lawyer, and most other vestiges of civilian criminal justice,”³⁸ and was ultimately sentenced to execution and hanged.

Kostal finds “unremarkable” that “[t]he insecurity of whites had always been the central premiss of public law and planning in the colony” but finds “[m]ore intriguing” that “Jamaica’s colonial officials ... in the face of dire public emergency, were also preoccupied with legality.”³⁹ This preoccupation, Kostal explains, also characterized Eyre’s response to the rebellion and his turn to legal advice and to martial law. Nevertheless, “[t]he definition of martial law was one vexed question, the nature of the legal authority to proclaim martial law another.”⁴⁰ The preoccupation with legality coupled with martial law’s unsettled character are inseparable and dominant themes in Kostal’s account and reflect the title of his work.

Kostal begins the principal part of his narrative by tracing the transformation of the Jamaica affair into a historical episode of legalism and ends by pointing to some of the limits of this legalism. The first chapter, “‘The Country of Law’: Reconstructing the Morant Bay Uprising in England”, shows how “[i]n the space of just more than two weeks,” beginning in the first week of November 1865, “the Jamaica affair had been transformed from a narrative about the salvation of Jamaican colonists into a

³³ Judith N. Shklar, *Legalism: Law, Morals, and Political Trials* (Cambridge, Mass.: Harvard University Press, 1964) at 1.

³⁴ *Ibid.* at 2.

³⁵ *A Jurisprudence of Power*, *supra* note 1 at 13.

³⁶ *Ibid.* at 14.

³⁷ *Ibid.*

³⁸ *Ibid.*

³⁹ *Ibid.* at 7.

⁴⁰ *Ibid.* at 10.

narrative about the destruction of the English constitution.”⁴¹ The last chapter, “‘The Most Law-Loving People in the World’: The Denouement of the Jamaican Litigation”, ends with the following two sentences: “The courtroom, it was commonly thought, was a ‘sphere that ought to be free from all disturbance.’ The Jamaica affair had done much to dispel this myth.”⁴²

The seven chapters as a whole narrate the Jamaica affair, focusing in particular on the Jamaica Committee’s attempts to criminally prosecute Eyre, who became “the living embodiment of the argument for (and against) martial law,”⁴³ for the murder of Gordon. “The paradox of the Jamaica affair,” Kostal shows using the Gordon case as an example, “is that it so quickly stopped being about Jamaica and Jamaicans.”⁴⁴ In part because of the leadership of John Stuart Mill and in part because of surrounding circumstances, by the end of 1866, the Jamaica affair had turned into “a dispute about the civil liberties of Englishmen at home.”⁴⁵ It “was no longer about the violence done to a hapless black peasantry. It was now mainly about the violence done to the laws of England.”⁴⁶ Kostal charts the Committee’s attempts to attain “[i]ts single and unwavering goal,” “to provide an occasion for a high court judge—an unelected official—to vindicate what was viewed as the country’s ‘true’ constitution.”⁴⁷ Kostal writes, “More specifically, the Committee wanted to provide an opportunity (in the form of a criminal case) for a high court judge to pronounce that the summary arrest, court martial, and execution of civilians was illegal even when done under the banner of martial law.”⁴⁸ Ultimately, while “the Jamaica Committee failed to achieve a decisive legal precedent about the law of martial law,” it “succeeded in causing the English governing class to confront the contradiction between the love of power and the love of law.”⁴⁹ The Epilogue turns to civil litigation against Eyre after the Jamaica Committee abandoned the strategy of (private) criminal prosecution.

⁴¹ *Ibid.* at 37.

⁴² *Ibid.* at 431.

⁴³ *Ibid.* at 271.

⁴⁴ *Ibid.* at 190.

⁴⁵ *Ibid.*

⁴⁶ *Ibid.* Compare with Valverde’s reading of *R. v. Butler* ([1992] 1 S.C.R. 452, 89 D.L.R. (4th) 449) in which she highlights the Supreme Court of Canada’s transformation of the Canadian *Charter* itself into “a new potential victim of pornography”: Marianna Valverde, *Law’s Dream of a Common Knowledge* (Princeton, Princeton University Press, 2003) at 38.

⁴⁷ *A Jurisprudence of Power*, *supra* note 1 at 372.

⁴⁸ *Ibid.*

⁴⁹ *Ibid.* at 19.

In his conclusion, Kostal remarks:

If the legal system had failed to deliver a decisive answer to the contradictions thrown up by law and imperialism, it was because they could not be answered decisively, not, at least by citing legal authorities. The constitutional law of England was not so much a fixed body of precedents as a deep reservoir of public conscience, one roiled by powerful cross-currents.

If it seems obvious that all constitutions, even those that have been arranged systematically, are dynamic and contestable, this point was not obvious to the main protagonists of the Jamaica affair. Even Mill, the enormously erudite leader of the Jamaica Committee, advanced a strangely naive view of constitutional law and interpretation. Throughout the duration of the Jamaica controversy Mill spoke of “great legal and constitutional principles” as if they were rules of arithmetic.⁵⁰

The tendency to see legal and constitutional principles as rules of arithmetic is symptomatic of a legalism that forecloses the possibility of “an approach suitable to law as an historical phenomenon.”⁵¹ Kostal’s book is an extended invitation to not take for granted the turns to rules, lawyers, and courts. Kostal invites us to see these turns as *political* ones tied to historically situated ways of thinking and doing. As the *McGill Law Journal’s* special issue on the fiftieth anniversary of *Roncarelli v. Duplessis* should remind us,⁵² one of the dangers of abstractly celebrating the rule of law and its various moments of triumph is the neglect of our history.

Mark Antaki

⁵⁰ *Ibid.* at 485-86.

⁵¹ Shklar, *supra* note 16 at 3.

⁵² This special issue is forthcoming in (2010) 55 McGill L.J.