1985

Book Review. International Encyclopedia of Comparative Law, Vol. XVI, Ch.4: Types of Relief Available by Arwed Blomeyer

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infers from these provisions that the law does not indicate "which laws" will be applied to non-Catholics (p. 26). The Petrine privilege, good under the new Code as under the 1917 Code, is to the contrary. The privilege purports to permit the Pope to dissolve any nonsacramental marriage "in favor of the faith" of a Catholic party. The dissolution operates on the marriages of unbelievers. Where does the Pope derive jurisdiction to dissolve the marriages of the unbaptized? Is the canon law really wedded to Unam Sanctam and Boniface VIII's view that "every human creature" is subject to the Pope? If the Pope does not have jurisdiction over unbelievers who may not have even heard of him, what is he doing when he purports to terminate their marriages? Is he licensing bigamy for the Catholic party? Is he acknowledging the force of the civil divorce that normally precedes his dispensing act? These questions were worth raising even in the overview attempted by the Encyclopedia.


Reviewed by Bryant Garth*

The subject of judicial remedies is explored in appropriately systematic and encyclopedic fashion in Professor Blomeyer's recent contribution to the steadily expanding International Encyclopedia of Comparative Law. Blomeyer locates the topic in its full procedural setting and details the approaches of the basic legal families; this approach results in a valuable tool for research and comparative understanding. It also appears that the author has achieved a remarkable degree of accuracy.¹ In short, for those interested in the specifics of repressive remedies, preventive remedies, and even the judicial remedies of the defendant, there is a wealth of useful information in this chapter.

It may be unfair to ask for more from the author, but the Encyclopedia also offers a possibility to take a fresh look, with the aid of comparative materials, at a subject of some current interest. Beyond all the detail, therefore, is the question of what one learns generally from reading this chapter from start to finish. What does it tell us about the major themes in the subject of judicial remedies?

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¹ I could detect from the U.S. point of view only inaccuracies caused by recent changes in the law; for example, it was apparently impossible to incorporate Schaffer v. Heitner fully into the discussion, and one finds in the text a view of res judicata that today would find little support in U.S. jurisdictions. See p. 16.
Blomeyer is not prone to generalize very much, but at times he does formulate some rather interesting conclusions and insights. For example, he works through several of the doctrinal debates among legal scholars, contrasting views from major legal families and suggesting an appropriate resolution in light of the comparative analysis. Thus, I enjoyed the exposition of the rather formalistic debates about the meaning of a “right of action”, which culminates in a relatively straightforward and tame conclusion:

The citizen has an individual right to legal protection if he has a right to claim damages for judicial impropriety in the making of a decision. Otherwise he enjoys merely a beneficial position derived from the legal protection granted by law.²

If that is all the right of action means today, one naturally asks what practical difference this debate really makes. To his credit Blomeyer is capable of stepping outside the formalistic debates and providing a response: “On the whole, therefore, the right of action does not have the practical importance to justify such a lasting debate.”³ We thus get a nice mixture of complex legal argument and a skeptical evaluation of what it really proves. That tone characterizes most of the comparative conclusions found in this chapter.⁴

The reader has to work harder, however, to reap the benefits of the author’s insights on broader trends that may be emerging in this field. It is clear that the power to enforce judicial remedies has grown recently in many jurisdictions, most notably in France; the stark contrast, emphasized some thirty years ago by Alexander Pekelis between the Anglo-American contempt power and the lack of such power in “Latin” countries⁵ no longer exists.⁶ Most countries have moved away from a situation where a specific remedy could be ordered but not as a practical matter compelled. Judicial power to go beyond the mere pronouncement of rights and theoretical remedies can add significantly to the role of courts.

There may be another contrast today, however, which relates to the manner in which courts exercise their power. In the United States, as numerous recent commentators have emphasized, the affirmative injunction is the centerpiece of novel litigation aimed primarily at controlling the large bureaucracies which tend to neglect certain fundamental, even constitutional, values.⁷ These injunctions go beyond

³. P. 14.
⁴. See also the discussion, for example, of the requirement of a need for judicial relief: “As a general prerequisite to filing an action, this need for judicial relief is, significantly, unknown to ANGLO-AMERICAN legal theory and for good reason.” P. 20.
⁵. Pekelis, Law and Social Action (1950).
ordering the performance or cessation of a particular act. They involve complex arrangements to regulate even the details of a bureaucracy such as a prison, school, or mental institution. The formation of the remedy is analogous more to negotiation and administration than traditional adjudication. Is this an American anomaly or a reflection, even if in exaggerated form, of a more general trend toward an expansion of judicial power to oversee the implementation of public values in new regulatory settings? This chapter does not consider the impact of developments such as judicial review on the laws and approaches to judicial remedies, but there are some hints worth noting.

In the section on preventive remedies, Blomeyer notes:

In recent years, the circumstances under which injunctive relief may issue appear to have grown considerably. The rubrics of "consumer protection" and "environmental protection" refer to new dangers, against which the affected citizen may be able to claim injunctive relief.\(^8\)

Given that, as Professor Blomeyer points out, injunctive relief leads to some kind of balancing of interests to decide the appropriate relief, we are witnessing an apparent growth in this more or less political form of regulation by the judiciary even in countries known for their emphasis on the separation of powers.

No examples emerge comparable to the U.S. "structural decree", but it will be interesting to see if recent emphases on new consumer and constitutional rights lead in the direction found in the United States. It is difficult to imagine career judges on the Continent—who decide all but the constitutional cases entrusted to special courts composed of persons of greater political experience—assuming the striking posture of federal district courts accustomed by experience and temperament to playing a more overt political role. And if the U.S. "lead" is not followed, does this mean that the proverbial "gap" in enforcement will necessarily be greater elsewhere, or that substitutes at least as effective can be found in other countries through more traditional political and bureaucratic processes? Does Sweden, for example, avoid such a reliance on courts?

All we can do now is speculate about whether the current trend in the United States is an idiosyncratic accident or a reflection of lasting social and political trends likely to be found in countries of comparable social and economic development.\(^9\) This chapter can fuel speculation in either direction, which in turn could bolster arguments for or against more power to the courts. The systematic research in the chapter will in either case provide a starting point from which future trends can be assessed.

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8. P. 54.