2009

Book Review: Index to Legal Citations and Abbreviations, 3rd ed.

Duncan E. Alford

University of South Carolina - Columbia, alfordd@law.sc.edu

Follow this and additional works at: https://scholarcommons.sc.edu/law_facpub

Part of the Legal Writing and Research Commons

Recommended Citation


This Book Review is brought to you by the Law School at Scholar Commons. It has been accepted for inclusion in Faculty Publications by an authorized administrator of Scholar Commons. For more information, please contact dillarda@mailbox.sc.edu.
Donald Raistrick has authored a third edition of his very helpful reference work, Index to Legal Citations and Abbreviations. This new edition contains 34,000 entries, 9,000 more than the previous second edition issued fifteen years ago.¹

This reference work lists in alphabetical order abbreviations and citations to legal and law related works. The book is not a citation guide. Instead, it reflects the actual usage of abbreviations. As the author says, he includes both “unfavored and incorrect” usage.

Abbreviations and citations to law related subjects, such as government, police, probation service, and social work, are included in this edition. The inclusion of these additional subjects is likely because of the author’s long service with the British government, from which he recently retired as Head, Knowledge and Information Resources Branch, Department for Constitutional Affairs.² The index includes sources from the United Kingdom, Ireland, Commonwealth countries, and the United States of America.

The author has retained the same arrangement as in the second edition, that is, a word-by-word ordering of the entries. This type of ordering, rather than a strict letter-by-letter alphabetization, allows entries to be grouped by root and therefore allows related terms to be listed together. While this ordering takes a little getting used to, the author clearly states his method and reasoning in the preface.³

The author gives parallel references to an abbreviation where appropriate, for example, Regina, Register, Registered, Registrar, Registration, Registry, and Regulation are all listed as possible meanings for “Reg.” Raistrick has also expanded the number of entries significantly. A

² Author interview of Donald Raistrick, GlobaLaw Quarterly 8 (Quarter One 2009).
³ Index to Legal Citations and Abbreviations, at viii.
quick spot-check for materials from less commonly researched countries indicates that the third edition lists 17 entries for Nigerian legal publications as opposed to the second edition’s 13 entries. The third edition includes five entries for Ghanaian legal publications as opposed to the two entries included in the second edition.

I recommend the Index to Legal Citations and Abbreviations for all academic law libraries, libraries with significant United Kingdom or Commonwealth law collections, and libraries that serve patrons with research interests in the law of the United Kingdom or the Commonwealth.

Duncan Alford
Associate Dean and Director of the Law Library
University of South Carolina School of Law
Columbia, S.C. USA

**The Coherence of EU Law: The Search for Unity in Divergent Concepts.**

The publication of this work in 2007 as a one-volume compendium of international and comparative law opens the entire field of international humanitarian law and customary practice of states to a new generation of law students and scholars. It belongs on the shelves of all major law libraries, whether in an academic, private, or governmental setting. This compendium is the formalized analysis of the three volume seminal work entitled *Customary International Humanitarian Law* ("the Study") by Jean-Marie Henckaerts and Louise Doswald-Beck. The title under review began as a discussion among experts at the British Institute of International Law during 2005-2006. While the title does not pretend to be the final analysis on the field of international humanitarian law, it is unique in several important ways that make it stand apart in this complex field of law.

First, the book is divided into four principal sections containing essays written by very important, mostly British scholars and practitioners in the field of international humanitarian law. Regretfully, the list of experts is devoid of career diplomats who could shed more light on the customary practice of states. The goal in the first portion of the book is to scrutinize select individual rules as laid out in the Study, as well as critique the applied methodology of the Study. The first principal section of the book struggles to answer the question of how international customary law is formed. The answer is found in the first three chapters where the practical application of
the methodology, including the sources of state practice and their treatment, are covered in some depth.

The second part of the book deals with two subjects necessary for any review of international humanitarian law and customary state practices: the status of armed conflicts and the status of combatants. Chapter 4 discusses the existence of armed conflict in terms of it becoming an international and regional issue. The chapter helps to fill a gap left in the Study, where this issue was not addressed. Another important chapter in the second part of the book is Chapter 5, which discusses in detail the status of combatants, a theme which is found throughout the rules examined in the Study.

The third part of the book deals with rules on targeting, the natural environment, specific methods of warfare, weapons, fundamental rights, the displacement of persons, and prisoners of war. In addition, the rules of enforcement and implementation are covered. Particular care is paid to rules considered to be controversial by the expert contributors. Rules 109-117 concerning the wounded, sick, and shipwrecked are regarded as uncontroversial, because they are deemed well covered by the Study and hence are not discussed. The concluding chapter emphasizes the complexity of international customary law as well as the fact that there is no uniform view about the value and international standing of all rules among experts. The individual authors agree, however, that the Study has enhanced the overall understanding of this area of law.

Although this book is only intended as a complement to the Customary International Humanitarian Law, its analytical detail sets it apart from traditional companion titles. It provides a context to the rules it addresses, usually in the form of a discussion of the relevant treaty law and relevant state practice. For example, chapter 15, which deals with war crimes, highlights the lack of adequate discussion about individual criminal responsibility of the accused under Rule 156. Charles Garraway, the author of the chapter, expertly draws not only on an ICTY decision but also on the apparent inconsistency between international conventions and state practices ignored in the Study to further explain Rule 156. The essay contributors also incorporate fresh American case law decided after the publication of the Customary International Humanitarian Law. This demonstrates the compendium's commitment to further expand international humanitarian law beyond the reaches of the Study. This feature is especially important to all American law students who will benefit from a critical analysis that blends traditional American case law with international conventions and non-binding international case law.

Finally, this work clearly distances itself from other companion pieces that generally end up lauding the main work by staying objective about the influence of Customary International Humanitarian Law on customary
humanitarian international law. Academic commentary on the Study has been also already made its published rounds in a variety of journals specializing in international law, defense reports, and human rights studies around the world including the United Kingdom, Australia, Germany, China, and the United States. This book is a critical scrutiny of the Study, and it clarifies both the existence of customary law as well as it furthers the debate of state practice in international humanitarian law. The contributors’ work implies that this compendium will be a catalyst to further works on this area of law and will represent a contribution to any future editions of the Study.

Dragomir Cosanici
Associate Vice Chancellor for Information Services and Library Director
LSU Law Center
Baton Rouge, LA USA


This book is the updated, revised version, with a slightly changed title, of The Handbook of Humanitarian Law in Armed Conflict (1995), which is one of the most authoritative, frequently-cited works in this field. The revised version will not disappoint those familiar with the thorough presentation of material and scholarship of its predecessor. In the introduction, Dr. Dieter Fleck, who edited both this and the earlier version, states the serious purpose of this book, writing that it is “designed to support state practice and jurisprudence, academic studies, and legal instructions for armed forces.” Even a quick look at the footnotes and bibliography shows the extent of the updating, with some new material from as late as 2007. While the earlier volume was closely linked to the Joint Service Regulations of the German Armed Forces, this book is no longer tied to any one nation’s policies. For example, there are frequent references to the U.S. Naval Manual (1997) and the UK Manual (2004) in appropriate chapters.

---

The book’s fourteen chapters include twelve which have the same titles as in the previous edition. The two new chapters, “The law of Non-International Armed Conflicts” (Chapter 12) and “International Peace Operations” (Chapter 13), reflect the importance of humanitarian law in these areas. The chapters are written by different authors, some of them new to the present work. Most are academics, but some also have impressive backgrounds in practice. For example, the editor, Dr. Dieter Fleck (chapters 12 and 14) was formerly Director of International Agreements and Policy in the Federal Defense Ministry of Germany; Dr. Hans-Peter Gasser, (chapter 5), was Senior Legal Advisor, International Committee of the Red Cross and Editor of the International Review of the Red Cross; and Prof. Knut Ipsen (chapter 3) is former President of the German Red Cross.

All of the chapters provide a general introduction to their topic. This background information together with the overview provided by Prof. Christopher Greenwood in the book’s first two chapters make for fascinating reading in the rich history of international humanitarian law. Except for chapter 13 on international peace operations, which does not refer to the Conventions, all of the chapters provide the reader with a thorough grounding in the relevant rules from the Geneva and other conventions, the principles based on those provisions, extensive analysis, and generous references to sources, including decisions from national and international courts, military manuals, reports of official and non-official bodies, academic writings, and state practice. As in the prior version, in this edition particularly important information is printed in bold letters and numbered consecutively throughout a chapter, which makes for easy cross-referral by one author to a specific section in another chapter. These bold-letter statements often set out basic definitions or principles followed by the citations to the appropriate convention or conventions. Just reading these bold-letter statements gives quick access to the main points of each topic. For example, the chapter on protection of civilians contains a bold-letter statement beginning with “civilians who do not take part in hostilities shall be protected and respected” followed by citations from Geneva Convention IV and the Hague convention.

Obviously, the inclusion of recent material accounts for the main difference between this edition and the earlier version of the book. However,
even chapters in which not much recent material has been added have been revised. For example, the shortest chapter, on protection of religious personnel, was only seven pages in the 1995 version and had virtually no commentary to the rules it set out. The same chapter in this edition, by a different author, has fourteen pages and much commentary.

Because the book includes a wealth of references to and commentary on contemporary issues, it brings home how relevant international humanitarian law is today’s world. Words and phrases made familiar from newspaper accounts occur throughout the book. For example, the chapter on protection of prisoners of war explains the status of “embedded journalists” should they be captured and an entirely new section on “civilian contractors” was added to the chapter on combatants and non-combatants. There are also numerous examples from post-1995 armed conflicts, for example the NATO bombing of Serbian radio and television stations in 1999 in the chapter on methods and means of combat and the controversial transport of goods across neutral territory to aid U.S.-British forces in Iraq in 2003 in the chapter on neutrality. Many new treaties are also discussed, particularly in the chapter on methods and means of combat. Among them are the Land Mines Convention (1999), which established a comprehensive ban on anti-personnel mines, and the Protocol on the Explosive Remnants of War (2003), which aims to reduce civilian casualties and to minimize the socio-economic consequences caused by explosive munitions that remain after the end of armed conflicts. Decisions related to international humanitarian law from various courts, including the International Court of Justice, Supreme Court of the United States, Supreme Court of Israel, and the International Tribunal of Yugoslavia are also referred to or analyzed in various chapters.

In the chapter on the enforcement of international humanitarian law, Dr. Dieter Fleck and Prof. Rüdiger Wolfrum explain that the Statute of the International Criminal Court (1998) codifies the grave breaches contained in the Geneva Conventions with a precision that had been lacking in regard to war crimes in various national codes. The authors point out that recent rulings by the International Criminal Tribunal for Yugoslavia and the International Criminal Tribunal for Rwanda help to clarify definitions of crimes and to align norms applicable to both international and non-international conflicts. In addition, the vital role of customary law as underpinning and supplementing the written law of the conventions and treaties is a theme running throughout the book, and the complex relationship between human rights and humanitarian law, including the lex specialis principle, is also brought out in many of the articles.

The book’s Annex of Distinctive Emblems, Table of Abbreviations, Table of International Instruments, and Table of Judgments and Decisions are very useful to the reader. The 28-page bibliography lists not only earlier
important works but those many valuable publications that have appeared since 1995. This includes the important Customary International Humanitarian Law (2005), published under the auspices of the International Committee of the Red Cross, edited by Jean-Marie Henckaerts and Louise Doswald-Beck, (Cambridge University Press), which sets out in a systematic fashion all the rules that constitute customary international humanitarian law. Reflecting technological progress, the San Remo Manual (1994), which is very relevant to the chapters dealing with neutrality and armed conflict at sea is listed not only with its bibliographic information, as in the 1995 edition, but also with its electronic address, making it accessible on-line.

Some typographical errors, for example, no spacing in a long, bold-letter sentence (p.154) and a few minor spelling mistakes ("there" rather than "their), do not really detract from this comprehensive, scholarly, and very interesting book. It will be useful both to novices in learning about the development and basic principles of international humanitarian law and to those already familiar with the field who want to explore sophisticated interpretations of those principles as applied to actual events. This book is therefore highly recommended for academic law libraries.

Lucy Cox
Reference and International/Foreign Law Librarian
Rutgers University Law Library
Camden, NJ USA


In this collection of four essays, originally published in 1963, Asaf A.A. Fyzee1 sets out, in part, to reveal Islam as a religion wedded to reason, tolerance, compassion, and non-violence. Today, says Saiyid Hamid2 in his introduction that sets the context for the reissue, "[t]he need for such understanding has become all the more pressing in the West because of the devastation of Iraq and Afghanistan, the confrontation with Iran, and the unending acts of terrorism triggered by conflict.”

Collectively, the essays argue for a reinterpretation of Islam and Islamic jurisprudence based on a study of history, science, and comparative religion and philosophy. The first chapter characterizes Islam as a religion of reason and tolerance, with a dynamic history that includes the founding of modern science, mathematics, and architecture. Fyzee also establishes Islam's connections with other great religious traditions, Judaism and Christianity in
particular. The next two chapters look at the fusion of law and religion in historical Islam. Fyzee argues that Islam has become static; this is antithetical to the progressive thrust and spirit of inquiry inherent in the message of the Prophet. As a result, Islamic law remains "backward," having failed to absorb the lessons of history or to evolve with shifting patterns of human civilizations and economic structures. Building upon the first three chapters, the final essay argues that Islam must embrace its dynamic heritage, and, through careful study and analysis, begin to thrive in the modern world. The key to such a development is a reinterpretation and revitalization of Islamic law in light of modern democracy, modern positive law, the social and natural sciences, and human experience. Such an evolution can take place, Fyzee contends, without sacrificing the fundamental spirit of Islam.

The first essay, “The Essence of Islam” focuses on the Tarjuman u’l-Qur’an, a translation and interpretation of the Koran in Urdu written by Maulan Abul Kalam Azad (1888-1958), an early twentieth century Urdu scholar. Fyzee follows in particular Azad's interpretation of the first chapter of the Koran, The Fatiha, which explains the three attributes of God: rububiyya, rahma, and 'adala. Rububiyya (providence) entails that God created the world with purpose, in right order and measure, and gave "guidance" to all created things. That is, once God creates, He provides for the material needs of His creatures, and then furnishes moral guidance by means of revelations given to His Messengers (Muhammad, Moses, Jesus, etc). With respect to the attribute rahma (mercy), because God by His very nature is mercy, love, and kindness, it follows that those who worship God must act in like manner towards their fellows. The attribute 'adala (justice) indicates that God's rewards and punishments follow directly and logically from every human action; people need not live in fear of a God who acts on whims. Taken together, these three attributes entail that God is reasonable, and as such, Islam is a religion steeped in a spirit of reason and inquiry. True faith, Fyzee argues, leads to the revelation that “God Is One” and to an ethics that consists of correct belief (about God's three attributes) and right action; these principles are universal and it matters not through which religion one follows them.

The second essay, “Law and Religion in Islam,” examines the relationship between Islamic law and faith through an analysis of three historical texts: “The Prophet's Last Sermon,” “Omar's Instructions to the Cadi,” and “The Testament of Ali.” These texts demonstrate, Fyzee argues, that Islam has historically held civil law (fiqh) to be inextricably entwined with religious belief and practice (shari'a). Fyzee explains civil law in Islam as having two parts: the roots (usal) and the branches (furū). The “roots,” which are the “first principles,” concern true interpretation of the Koranic verses, while the “branches” are derived logically from an application of the principles prescribed in the “roots.” The essential point is that, in Islam, the
civil law in both its parts has traditionally been understood as God-made; the law exists prior to the State and would exist even if the State did not. Thus, ultimately, obedience is due to God alone. In Fyzee's eyes, the problem with this fusion of law, ethics, and religion is that the essential elements of each cannot be distinguished, and therefore, progress becomes difficult if not impossible. Islamic law, he says, has become "unprogressive, stagnant and petrified" under the confines of religious teachings. The chapter ends with a few brief suggestions on how to move Islamic jurisprudence (both the "roots" and the "branches") forward: by separating the law through careful analysis from its religious roots, by making the law relevant for modern people where possible, and by eliminating particular rules where no longer applicable.

In the third chapter, "Islamic Law and Theology in India," Fyzee takes his argument a step further, advocating not only for separation of civil law (fiqh) and religious teaching (shari'a), but for a studied consideration of circumstances in which both fiqh and shari'a may have to give way to the secular law of the State. He begins by examining the history of Islamic rule and law in India. In medieval India, Muslim kings were able to uphold a distinction between Islamic and secular law by applying Islamic law only to their Muslim subjects; to their Hindu subjects they applied Hindu law. Is such a distinction, Fyzee asks, possible in the modern world? He surveys the positions of prominent Islamic political figures, theologians, and philosophers as well as various Islamic schools of thought dominant in India, concluding that it is both undesirable and impossible to preserve Islamic law (both fiqh and shari'a) in the face of modern development. Ultimately, Fyzee holds that the transformation of Islamic law is both necessary and beneficial for progress; religious law should be modified if and when secular law proves more fit for modern reality, e.g., marriage laws or laws for women's rights. Such modifications do not dishonor the essential truth of Islam. "[C]ertain portions of the shari'a," he argues, "constitute only an outer crust which encloses a kernel - the central core of Islam - which can be preserved intact only by re-interpretation and restatement in every age and in every epoch of civilization."

In the final essay, "The Reinterpretation of Islam," Fyzee passionately advocates for a form of "Protestant" Islam that preserves the eternal heart of Islam and the essence of fiqh and shari'a, while remaining dynamic and progressive with respect to the interpretation of Islamic laws. "Religion is unchangeable in its innermost kernel," says Fyzee, "[b]ut laws differ from country to country, from time to time. They must ever seek to conform to the changing pattern of society." Reinterpretation of Islamic law must be undertaken in light of human experience and historical-critical analysis, as well as lessons from the study of comparative religion, contemporary philosophy, ethics, psychology, twentieth century democracy, and even the
modern sciences. The limitations of language, social context, and time are ever present, Fyzee argues, and the words of the Koran cannot be uncritically removed from their historical context to the circumstances of the modern world. Without such a reinterpretation, he contends, Islam's "traditional form may be lost beyond retrieval."

A Modern Approach to Islam argues for a liberal understanding of Islam that will, in all likelihood, be quite palatable to readers in the West. The essays offer an honest, well-reasoned and passionate account of Fyzee hopes for the evolution of his faith as it engages with modern values. It should be noted at this point that Hamid's introduction is a great asset to the book, not only for summarizing and placing Fyzee's argument in its historical and modern context, but also for its criticism. Hamid seems to be right on the mark when criticizing Fyzee for his radical and perhaps too facile separation of "the central core of Islam" from its laws. Hamid's contention that Fyzee's agenda, i.e., a harmonization of world religious traditions in light of modern thought, may have led him to focus on Azad to the exclusion of other preeminent Muslim scholars also seems fair. Fyzee himself says that he has chosen Azad's translation of the Koran to guide him in distilling the essence of Islam in part because Azad has an ecumenical outlook, a firm grounding in comparative religion, a familiarity with "modern thought," and because "he was greatly influenced by the philosophy of Mahatma Gandhi, and ... was entirely opposed to the creation of Pakistan ...". These may or may not be worthy reasons for Fyzee's emphasis on Azad, but they reveal his underlying assumptions about what values must be weighted most heavily when thinking about the past and future of his faith.

One might also ask, under Fyzee's model of reinterpretation, who is it that will determine which values form the core of Islam? Who will ultimately determine which laws of fiqh and shari'a are disposable and which are not? What will the criteria be? One can reasonably infer from this collection of essays that Fyzee believes the final arbiter will be the modern scholar, educated according to the principles of the West. Fyzee may be correct in his view that Islam and Islamic jurisprudence is in need of reinterpretation, but he fails to explain at any length why he feels that Western values deserve such precedence.

On a stylistic note, the first three essays are not always clearly or concisely argued. The thesis for each of these chapters does not become evident until several pages in, and the details at times serve to confuse the argument. He often, for example, spends many pages defining words and expounding on historical documents that are tangential to the point he is making. Happily, the fourth essay is clear, passionate, and to the point.

Despite these possible shortcomings, however, A Modern Approach to Islam is an informative read for those interested in learning about the
historical relationship between Islamic faith and law, and about one possible approach as to how that relationship might be lived out in the modern world. The book has excellent name and subject indexes, and a useful index of Koranic verses. Fyzee's collection will be of interest to students and scholars of law and religion, and a worthwhile addition to any library seeking to build its "faith and law" collection.

Sunil Rao
Foreign Law Librarian
UW Madison Law Library
Madison, WI USA


This book began its life as the author's dissertation at Leiden University's law faculty. It is a welcome addition to the literature of post-colonial studies, because it analyzes many different status arrangements around the world, from the South Pacific to the Arctic. That said, it is one of the few books in English to deal comprehensively with the politico-legal system of the Dutch Caribbean.

The Dutch Caribbean islands are the rump of a vast trading empire that once stretched from the Low Countries to Brazil, and the Cape of Good Hope to the Indonesian archipelago. These six islands, Aruba, Bonaire, Curaçao, Saba, Sint Eustatius and Sint Maarten, have been associated with the Netherlands since the early 17th century. The first three lie off the coast of Venezuela, while the last three are at the northern end of the Lesser Antilles, near Puerto Rico. Willemstad, Curaçao, is the islands' largest city, and the capital of the Netherlands Antilles. Although Dutch is the official language in all the islands, the vernacular of Aruba, Bonaire and Curaçao is Papiamento, a Portuguese creole. English is the mother tongue of the residents of Saba, Sint Eustatius and Sint Maarten. Curaçao's population is the largest and approaches 190,000; Saba's, the smallest, is below 1500.

6 Half the island is Dutch-administered. The other half is French-administered and called Saint-Martin.

Most of the people of all the islands are of African descent, with Curaçao’s African-derived population the highest as a percentage of the total. In contrast, Aruba has a large mestizo population, and nearly half of Saba’s population is white.

The islands were first administered by a chartered trading company and from 1813 by the Dutch state. In the 1922 Dutch constitution they were no longer referred to as koloniën (colonies), and in 1948 the islands’ voters exercised universal suffrage for the first time. In 1954, the Dutch constitution underwent a revision that led to a charter creating the “Tripartite Kingdom.” Under this arrangement, three constituents, the Netherlands, the Netherlands Antilles, and Surinam, were supposedly coequal in matters relating to the kingdom as a whole, and autonomous locally. Surinam achieved full independence in 1975, and Aruba left the Netherlands Antilles federation in 1986 but retained its status as a self-governing territory. In effect, Surinam withdrew from the kingdom and a decade later Aruba took its place.

Dr. Hillebrink’s study begins with an assessment of Article 73 of the United Nations Charter. That article, which was later given authoritative interpretation by General Assembly Resolution 1541, addresses all manner of dependent polities, or in U.N. parlance Non-Self-Governing Territories (N.S.G.T.). At the U.N.’s founding, four European states — the United Kingdom, France, Portugal and the Netherlands — were responsible for hundreds of millions of subject peoples, and Article 73 was drafted to provide guidance in the decolonization process. The General Assembly has set great store by the notion of national self-determination, which meant that other political arrangements could be established short of full independence provided the subject peoples had freely chosen their condition. At the same time, the General Assembly has looked askance at attempts to incorporate erstwhile colonies into the mother country in a way that also severely prejudices the local populations. Ultimately, though, it became apparent to the U.N. Member States that not every N.S.G.T. would become fully independent. Indeed, it was feared that the smallness, remoteness and poverty of many of them would undermine the U.N.’s universal mission, which at the least required that members be solvent and have interests beyond their own borders.

Dr. Hillebrink’s starting point for the Dutch Caribbean is the 1954 Kingdom Charter. He sees it as one mode among several that the colonial powers used to grant a right of self-determination in line with U.N. standards. The French had already given their Caribbean territories departmental status, and by the 1960s the British had turned most of their West Indian islands into autonomous Associated States of the U.K. Dr. Hillebrink notes that the distinctions are worthy of study, because the French option was to give their possessions equal standing with the mainland, whereas successive British
governments saw the concession of local autonomy as a way to speed independence. The Dutch model suggests a middle ground. Dr. Hillebrink sees the Dutch islands as occupying a gray area in terms of constitutional character: not fully autonomous domestically because the Netherlands has reserved the right to interpose in enumerated local matters, nor part of a Belgian-style ensemble fédératif, because the islands’ ability to influence kingdom matters, from foreign affairs to the European Union’s Common Agricultural Policy, has been found wanting. He tends to see the status of the Netherlands Antilles and Aruba as closer to Puerto Rico’s status vis-à-vis the United States: a sui generis constitutional arrangement embracing free association, but one that precludes international legal personality. He thus questions whether in either case the territories can be seen as having the “full measure of self-government” that Resolution 1541 demands, but he also recognizes independence would be readily granted by the Netherlands and the U.S. if the Antilleans and Puerto Ricans expressed such a wish.\(^8\)

Cracks in the Antillean federation were apparent from the late 1970s, when Aruba began lobbying for a separate status within the kingdom. The Arubans felt their political and economic situation would be enhanced once they circumvented a supposedly intransient Antillean parliament and bureaucracy dominated by Curagao.\(^9\) By 1986 the new status had been implemented, with the Netherlands seeing it as a transitional stage to full independence by 1996. The problem, however, was that the Arubans themselves expressed no desire for independence, and argued moreover that pushing full sovereignty on the island undermined the electorate’s clearly stated status preference. This, in turn, set into motion a series of referenda on the other islands that only ended in 2009.\(^10\)

Dr. Hillebrink notes the tension between the self-determination rights the U.N. requires and the reality that the metropole does not have to grant exactly what a dependent territory may want. For example, dependent territories may well be protected from a compelled independence, but a presumptive desire for integration with the mother country won’t necessarily be conceded. As Puerto Rican advocates of integration with the U.S. have

\(^8\) The independence option polls under 5% in the Dutch Caribbean. Curacao’s pro-independence faction is a talking shop dominated by a few intellectuals. Sint Maarten’s is associated with a single individual, poet Harold Lake. Despite his politics, he was knighted in 2004.

\(^9\) Premier Juancho Evertsz foresaw the demise of the Antillean federation using some creative arithmetic: Zes min één is nul (“six minus one equals zero”).

\(^10\) In May 2009, 52% of Curacaonahaars voted for their own separate status, effectively ending the Netherlands Antilles federation. See e.g. “Verdeeld Curacao stemt voor akkoord” in De Telegraaf of May 21, 2009.
learned, Congress could still reject Puerto Rico as a 51st state even if a clear majority on the island votes for statehood.

Despite the six islands’ statutory autonomy, the Netherlands has intervened locally. In May 1969, a labor dispute at Willemstad’s Shell oil refinery spilled over into the general population, resulting in rioting, looting, and arson. Order was restored when 300 Dutch marines were flown in to secure the streets.\textsuperscript{11} Less dramatically, continual evidence of financial fraud and mismanagement in the Dutch Caribbean has led to increased metropolitan oversight and intervention. Most recently, authorities in the Netherlands acted on a request from Berlin-based Transparency International to assess corruption levels on Aruba, but they didn’t coordinate sufficiently with the Aruban government, especially with the public prosecutor’s office.\textsuperscript{12} Dr. Hillebrink points out that the Netherlands is constitutionally obliged to maintain public order in the realm, and the events of May 1969 had plainly proved too much for the local police force. He also notes that the Netherlands is a signatory to different instruments meant to combat money laundering and other corrupt practices, and international law is clear that a metropolitan country may not shirk its treaty responsibilities by using the excuse of a dependent territory’s autonomy in home affairs. Still, Dr. Hillebrink is astute enough to realize that such interventions by the Netherlands tend to undermine its claim that the Caribbean lands are completely self-governing. Indeed, when white military personnel point carbines at local civilians, or when the institutions of an elected government are bypassed willy-nilly, the casual observer is apt to see only neocolonial meddling.

The Netherlands Antilles as a polity began in 1954 with great promise, as it was thought that local control would lead to engaged voters, good government, and realistic development plans. However, the electorate was often more interested in a politician’s personality as well as his ability to dole out favors than his program. The outcome has been a half-century of patronage, cronyism, and capriciousness.\textsuperscript{13} It is thus sometimes a mistake to assume that greater autonomy leads to greater democracy,\textsuperscript{14} and Dr. Hillebrink himself notes that the Netherlands has the residual power of guaranteeing human rights, good government, and legal certainty throughout the region.

\textsuperscript{11} See e.g. John Leerdam’s fascinating 1995 documentary 30 mei 1969 (Gritu di un pueblo).
\textsuperscript{12} See e.g. “Corruptieonderzoek was stap te ver” in the Amigoe of May 17, 2009.
\textsuperscript{13} Another Leiden doctoral conferee, Surinam-born Dennis Rosheuvel, addressed the style of governance suitable for the Dutch Caribbean, quite apart from its constitutional configuration. See “Bestuur op maat voor de Antillen” in the Staatscourant of June 6, 2005.
\textsuperscript{14} I’m indebted to Profs. Jacques Gourgue (Port-au-Prince) and Mark Kirton (Port of Spain) for this insight.
the kingdom. However, the Netherlands does not have the constitutional mandate to dismiss an Antillean or Aruban government, as the British recently did in the Turks and Caicos Islands.\(^5\)

Luckily, the Antilleans’ dissatisfaction with their status, and a decade of referenda, gave various Dutch governments an opening: they could begin to exert influence over the process, especially since the Netherlands Antilles had run up an astonishing public debt. By 2005, all the parties had agreed that the federation would be wound up. Sint Maartenaars voted for a separate status similar to Aruba’s. Sint Eustatius, Saba, and Bonaire, wanting closer integration with the mother country, opted for a status resembling a gemeente (municipality) in the Netherlands. Curaçao, the last to hold a referendum, also chose the Aruban option. With respect to all the islands, the Netherlands would exercise more oversight to ensure sounder local finances and better due process, as well as assume 70% of the approximately €2 billion in Antillean debt.\(^6\) Many Antilleans rankled at the thought, seeing it as a step backward and a concession of sovereignty. In this they are probably right. However, when others pay the bills, they become part of the decision-making process. Or as the Dutch say, wie betaalt, bepaalt.

Dr. Hillebrink is an advisor on constitutional matters in the Dutch Ministry of Home Affairs and Kingdom Relations, and he therefore draws upon real-world experience to round out his scholarship.\(^7\) Asser Press is an adjunct to the Asser Instituut, a leading academic research institution in international law. They publish books to the highest standards, both in terms of content and presentation. Asser Press’s Dutch-language titles are sold directly, but titles in English are available through Cambridge University Press, which acts as Asser’s general sales agent worldwide.

Scott Rasmussen\(^8\)
San Fransisco, CA USA

---


\(^{17}\) For an overview of the constitutional history of the islands, see Dr. Alejandro Paula’s article “Hoofdmomenten uit de staatkundige geschiedenis van de Nederlandse Antillen (1865–1986)” in Lantèrnu No. 9. Willemstad: Archivo Nashonal di Antiya Hulandes, 1989.

\(^{18}\) Mr. Rasmussen is a legal editor, and translator of Dutch and Spanish. He has traveled to nearly every independent country and dependent territory in the Caribbean Basin.
The Employee Retirement Income Security Act of 1974 (ERISA), a massively elaborate statutory edifice of US federal tax and labor laws, was enacted to establish a uniform body of rules for the protection of workers' pensions and welfare benefits. Over the years it has been amended many times, but not so as to render it less unwieldy. Its complexities of execution and enforcement, demanding actuarial expertise and a flair for navigating the Byzantine byways of the Internal Revenue Code, would not at a glance appear amenable to concise analysis or commentary. Yet Prof. Zelinsky has in fewer than 200 pages produced a lucid assessment of the law's contributions to a steady shift in popularity since the advent of ERISA from defined benefit (DB) plans, which largely assure workers a predictable health or post-retirement income benefit, to defined contribution (DC) plans and their ilk, also known as individual accounts, which invite workers to make their own investment choices and live with the results, for better or worse.

Zelinsky's thesis is twofold. First, although the shift occurred incrementally and mostly unintentionally, in the aggregate its progress has proven revolutionary, a nearly complete, if yet ongoing, upturning and replacement of one retirement regime by another. Second, there will be no turning back, despite demonstrable advantages of the old DB regime. The DC and individual account revolution will only continue to advance. The Origins of the Ownership Society goes a long way toward persuasively supporting these assertions, although not without some confusion and begged questions. Nevertheless, it is hard to imagine a more incisive discussion of policies respecting pension and benefit plans suitable for both experts and newcomers to the subject.

The book is simply organized. An introductory chapter distinguishes the DB and DC varieties of plans, followed by a chapter explaining the significance to employers and employees of the differences. The three following chapters respectively address: 1) the legislative and regulatory history of ERISA and the expanding varieties of investment options emerging within its purview, a function of economic changes and increased marketing of financial services; 2) an account of unintended consequences and circumstances that contributed to or resulted from the increasing acceptance of the DC model, as contrasted with the seemingly paradoxical rejection of the promotion by Pres. George W. Bush of a system of individual accounts for Social Security (this chapter being a source of much of the confusion, discussed further below); and 3) the implications for tax policy controversies
of the DC revolution. With respect to the latter chapter, Zelinsky broaches a related controversy over whether the deductions, exemptions, and exclusions afforded by qualified retirement and welfare plans constitute "tax expenditures." Zelinsky associates himself with the minority position in the controversy, holding that the tax advantages to qualified plans are not per se expenditures or subsidies, but normatively reasonable mechanisms for taxing consumption, rather than income.

A sixth chapter looks ahead to the future of DC and individual accounts in the context of a tax policy presumed to be largely similar to the present policy. Zelinsky considers the encroachment of the model into the public sector, currently the steadfast hold-out among traditional DB model proponents, and predicts the evolution of new variations of individual account offerings in health care. In his final chapter, he proposes a program for prudent adoption of the DC paradigm. His prescriptions range from a sweeping, "Do No Harm," i.e., avoid overregulation with respect to, for example, mandatory investment education for individuals, to more specific revisions, such as requiring an opt-out default for 401(k) plans and a ten percent limit on employer stock held by DC plans (an overdue response to the Enron debacle).

It bears mentioning that the title and subtitle of the book are somewhat misleading. The real focus of discussion has more to do with a present culmination of the evolution of retirement and benefit plan regulation than with "origins" in a historical sense. Zelinsky is primarily interested in depicting options for retirement planning available today, not thirty years ago, and he wants to recommend sensible directions for policy in light of the DC model's persistence. For genuine historical analysis focused on the enactment of ERISA, readers should consult James Wooten's *The Employment Retirement Income Security Act of 1974: A Political History*,¹ which Zelinsky cites approvingly.

Moreover, the subtitle oversimplifies Zelinsky's frequently proffered account of the decline of DB plans and growth of DC plans in terms of American economic, demographic, and cultural factors. According to this account, America changed the DC (and, ipso facto, the DB) paradigm at least as emphatically as the DC changed America. For example, in his third chapter ("How Did It Happen?") Zelinsky gestures to "the economic and demographic forces that in the 1960s and 1970s eroded these once-dominant [DB] pension plans and thereby set the stage for the emergence of the defined contribution paradigm." (p.33) The shifting landscape of mainstream working America, by these lights, facilitated the rise of the DC. But later in the chapter he enumerates evidence of the reverse dynamic, triggered by the advent of

ERISA and its “critical role in acclimating Americans to the notion of tax-advantaged individual accounts.” (p.38, footnote omitted) Additional examples of mutually reinforcing causes and effects could be drawn from throughout the book, the point of which would be merely to highlight the nuanced, inclusive analysis Zelinsky brings to bear upon a complex situation.

The chief utility of Zelinsky’s book, then, is not its historical account, nor its intimations of a causal chain of factors to explain the widespread acceptance of individual accounts. These aspects are ancillary to its real value, which subsists in Zelinsky’s pragmatic acceptance of a situation that seems unlikely to reverse course soon, and his account of circumstances that betoken the unlikelihood. It is, in other words, a prospectively oriented book, one which confronts the vulnerability of retiree financial security within a regime that is nevertheless politically resistant to change. It is clear that Zelinsky himself laments the flagging strength and ultimate demise of the DB model under the pressures exerted by the competing DC model and its advocates: “We have taken for granted that others find as compelling as we do the desirability of defined benefit plans which allocate investment, funding and longevity risks to employers.” (p.103) But Zelinsky is not a proponent of a utopian undoing of the revolution, for he recognizes benefits of both DB and DC plans. He might prefer a regime in which DB would remain a viable option, rendered suitably flexible to afford cost-efficiency to employers who choose to offer them, yet sufficiently regulated to assure employee financial security. As matters stand today, however, under the DC model employees assume the risk while the costs of plan administration to employers are greatly alleviated. Nevertheless, Zelinsky accepts that DC is the new paradigm and, as his closing sentence bluntly admits, “The best we can do is try to make that paradigm work.” (p.163)

What, then, is left unsettled or confused, aside from the predictably murky waters of tax policy and plan regulation? As suggested above, Zelinsky’s fourth chapter (“Why Did It Happen? And Why Social Security Accounts Didn’t”) is a source, albeit not the exclusive one, of the difficulty. The titular theme of the ownership society participates in the confusion, as well. In his otherwise nuanced examination, Zelinsky credits American “cultural receptivity” with facilitating the wide embrace of DC plans and individual accounts. “Such accounts resonate with some of the strongest-held values of American culture, namely, personal autonomy, private property and self-support.” (p.97, footnote omitted)

20 Zelinsky also recognizes that the capacity to realize these values may correlate to class:

[T]he United States always has been an ownership society. The defined contribution paradigm is a new, important but by no means inevitable
Zelinsky provides ample support for a view of America as an ownership society: early homestead policy and legislation, post-World War II federal underwriting of housing, a recent book drawn from Pew Global Attitudes Project reports demonstrating, inter alia, that:

Americans continue to be more skeptical of the role of government and more resistant to government regulation than people in other countries. Americans are less supportive of a government social safety net, for example, than are the peoples of the social democracies of Western Europe. Americans want government help in the form of unemployment insurance, Social Security, and some medical care for the poor. But they value personal freedom more.\(^{21}\)

But this view, America’s perception of itself as promoting autonomy and self-support, is already confused, not least in its facile distinction between government “regulation” (bad) and government “help” (acceptable). Implicitly, too, government regulation is equated here with paternalism, yet the regulation imposed by ERISA burdened not primarily the personal freedom of individuals but the operational freedom of corporate sponsors of DB plans.\(^{22}\) Granted, the traditional DB plan afforded a participant little or no opportunity to make his or her own investment choices respecting plan contributions, but of course that was the bargain freely made when the participant chose to work for the employer on those compensation terms.

Moreover, the argument that America was culturally receptive to what Zelinsky depicts as an incremental and unintentional (if also arguably insidious) advance of the DC paradigm begs the question of the scope of culture vis-à-vis other spheres of social behavior. It is unclear, in other words, how Zelinsky intends this troubled, reductive mythology of American culture chapter in the story, expanding the portfolios of middle-class and upper-middle class households from their homes to the financial instruments such households own via their 401(k), IRA, 529 and other individual accounts. (p.100)


\(^{22}\) Zelinsky explicitly approves a tempered paternalism in the context of individual accounts, arguing that “there is room for improving the retirement savings choices of many people if the rules are formulated and implemented with reasonable care and subtlety.” (p.148) The implication, of course, is that DB plans exemplify a “heavy-handed paternalism” the rejection of which spurred the acceptance of DC plans by individual investors. (pp. 147-48)
to explain what the more robust political, legal, and economic factors he identifies haven’t already satisfactorily addressed. He might instead more effectively have deployed a notion of ideology (wolfish political goals in sheepish cultural clothing) to resolve, for example, the tension he disregards between the unintended specific consequences of ERISA legislation and what must certainly have been a very deliberately intended eventual release of plan sponsors from burdensome fiduciary obligations.

Revisiting *The Origins of the Ownership Society* in 2009 is an experience tellingly distinct from first reading it not so long ago, shortly after its publication in 2007. Zelinsky, whose scholarship includes topics as diverse as income taxation and same-sex marriage, pursued much of his work on the book after the 2001 collapse of Enron, an event he deems a landmark in the history of the establishment of the DC paradigm:

The causes of the defined contribution society are deeply-rooted and now self-reinforcing. This explains why, in the aftermath of Enron and the well-publicized losses of the Enron 401(k) participants, there has been neither a popular or political backlash against the defined contribution paradigm nor a concerted effort to resuscitate defined benefit pensions. (p.162)

Moreover, predicting the durability of the paradigm he foresees “nothing on the horizon to hinder the ongoing shift to individual accounts for private sector retirement, medical and education savings.” (p.138) With hindsight, we may today discern the storm clouds portending the present global financial crisis as they loomed over the horizon, and so we might understandably pause at the irony of Zelinsky’s confident observation.23

It remains to be seen how the economic implosions triggered subsequent to the book’s publication will affect retirement and welfare benefit investment behavior.24 But it may very well turn out that Zelinsky’s...
confidence will not prove unjustified. *The Origins of the Ownership Society* should instill such confidence in its readers, for it depicts how the retirement system has become paradigmatic, in the sense of having achieved the status of a world view or a default position taken for granted, any significant deviation from which must assume the political burden of proving its own superiority. Like the Enron episode, the current economic collapse has shaken foundations and upset expectations. It has rightly prompted outright disappointment and anxious skepticism about the security of retirement investments. But it probably hasn’t instilled a revolutionary fervor adequate to upset the paradigm.25 Besides, given Zelinsky’s account of the casual, incremental shift from DB to DC, the previous revolution occurred before anybody ever noticed.

Dean C. Rowan  
Reference Librarian  
Boalt Hall School of Law  
Berkeley, CA USA


25 And “[t]inkering at the margins will not rejuvenate the now-stagnant defined benefit system . . .” (162).