AUSTRALIAN LAW JOURNAL

BOOK REVIEW

"THE RULE OF LAW: FOUNDATION OF CONSTITUTIONAL DEMOCRACY"

Geoffrey de Q Walker

Melbourne University Press, 1988

Book Reviews

R A SUNDBERG QC

The Rule of Law: Foundation of Constitutional Democracy, by Geoffrey de Q Walker. Pages i-xxvi, 1-406, endnotes 407-465, Index 467-475. 1988. Australia: Melbourne University Press. Price: cloth $62.95.

Mussolini, shocked to hear how the Australian High Court sometimes invalidated national legislation, asked Sir John Latham how many troops the High Court of Australia had to enforce its judgments. The future Chief Justice was able to tell him that it had none. Its orders were obeyed because Australia lived by the rule of law.

This new and handsomely produced book by Professor Geoffrey de Q Walker, of the University of Queensland, takes on an important task, namely, to pull together academic and political discussion about this basic principle of a few societies, of which Australia is happily one. The production of the book could not be flawed, with its excellent presentation, printing and supportive tables. Melbourne University Press is setting a high standard in this regard, although the result is an expensive text. The idea of the book is also timely, as the author points to a number of threats and dangers to this twin pillar of Australian democracy. The other pillar is Parliamentary sovereignty, or the modified version of it which we have in Australia because of our Federal Constitution. Although Walker disputes it, the rule of law is the conservatising force in the constitutional equation. It pulls towards respect for and adherence to settled rules. Parliamentary activity is dynamic. It pushes for constant change. The resolution of these two forces provides the ever-shifting fulcrum of our democracy.

For Walker, the fulcrum has shifted too far, too fast. Thinly disguised by copious references to philosophical writings, Walker emerges as a man angry at what he sees to be growing dangers to the rule of law in Australia. He is against the Human Rights Commission which he charges with "flagrant bias". In fact, he is not much in favour of the tendency to discuss human rights and the rule of law together, as most international bodies, including the International Commission of Jurists, have done in recent years. He is against the *Family Law Act* 1975 (Cth). The Family Court of Australia, he declares in a sweeping denunciation, has lost the confidence of the public. There is not even a passing glance at the fidelity of the Family Court judges and practitioners to their duties. Nor is there any consideration of the thousands of citizens who have been released by the Act from unhappy marriages to find a chance of human happiness. Walker is against feminism and abortion. He refers to the changes in some parts of Australia (but not Queensland) in the laws on homosexuality. The basic thesis is that a small group of determined intellectuals — whom he calls "the Clerisy" — have snatched power from the people. They have distorted the law from reflecting truly popular values. In doing so, they have distanced the laws from the people whom the laws govern.

A warning of what happens when this occurs is given in the rise of the Ayatollah in Iran. He well and truly took the laws back to his vision of popular values. He restored the power of the clergy and of traditional customary law. This is what can happen when a "Clerisy" takes hold of a country. They ultimately provoke a backlash.

Even the High Court of Australia is not exempt from Professor Walker's ire. In its present composition, it is described as "profoundly destabilising". It has embraced centralist constitutional doctrines which have been repeatedly rejected by the people at referenda. It is paternalistic in the way it has adopted a law-making, rather than an adjudicative, role. One can only imagine how Professor Walker must have blanched when he read the radically simple, historically accurate and sensible reformulation of s 92 of the Commonwealth Constitution contained in the unanimous judgment in *Cole v Whitfield* ((1988) 62 ALJR 303).

Professor Walker is in favour of judges "adjudicating". He yearns for the good old days of the judicial adherence to the classical theory of decision-making. By that theory, judges can always find the pre-existing law. There is always only one right answer. All the judge has to do is to look hard enough. The answer is there in the words of the law. The result of the reforming ways of "the Clerisy" or "New Class" is that the people are now striking back. The flowering of the Neighbourhood Watch is given as one instance.

Walker's views are no doubt sincerely held. They are certainly shared with a number of citizens. There are a number of useful insights in this book which make its publication worthwhile. For example, the author repeatedly stresses the importance of the independence of judges and the dangers which accompany well-intentioned legislative measures which weaken judicial independence. Recent events in Malaysia and Fiji show how a judiciary of our tradition can be demoralised by repeated attacks from the other branches of government. There are also many instances of Third World failures in the rule of law which are collected in the book. The Ayatollah, for example, denounced the rule of law as a "Western sickness". Walker is right to stress that, ultimately, respect for "a government of laws not of men" depends on the spirit of the people as Latham told Mussolini. The courts still have no armies to enforce their orders. They depend, in the end, upon popular acceptance of the System.

The book also contains a good historical analysis which shows how the unequalled centralisation of the English judiciary in Tudor times helped to create respect for the courts and for the obedience to their orders. The role of the early Privy Council in striking down the validity of the laws of the American colonists might have been an element in provoking the American Revolution, with its great consequences for Australia. But that judicial power was soon asserted by the Supreme Court of the infant republic. It is asserted by our own courts today. It rests, ultimately,

not on a principle in the Constitution itself but upon the claim of such a power by the judges.

All of this is well assembled in Professor Walker's book. So is a thoughtful section on the dangers of unbridled judicial discretion. Judicial tyranny is tyranny nonetheless. Judicial law-making, if it is to occur at all, must only occur in the "minor key" according to Professor Walker.

This said, there are certain unsatisfactory features of the book to which I must refer. At one stage, Professor Walker says that the lawyer of the future will be "bewildered" by the extent of law-making. Well, that was the impact which the first few chapters had on me. Bewilderment. A judicial colleague with greater perseverance confessed that he found the first chapters of the book rather "heavy going". Certainly some of the terminology of the early section is a little eye-glazing. It takes a while to work out what is the "holographic paradigm", or to unwrap the riddle of "synchronicity" (a word of Jung's).

But if the reader doggedly moves through these chapters, the later ones are more lively. They deal with "The Legislative Explosion"; "The Clerisy of Power"; "The Decline of the Legal Order" and "The Last Chance for the Rule of Law". Yet here Walker sometimes falls into another error. This is that of the sweeping generalisation. For example, his special bêtes noires — or are they bêtes rouges — are the proponents of Critical Legal Studies. These are a sprinkling of minority law academics who try to teach law students to be critical of the law and of legal institutions. They are elevated to a power by Professor Walker which, I imagine, will surprise even them. According to Walker, "the Clerisy", whom they have spawned, enjoy "unmatched political skills". They threaten to "take control by claiming to speak for the ordinary people [whom they] secretly despise". They are even blamed for the sexual revolution!

> "The destruction of the customary rules of sexual behaviour by the Clerisy in the late 1960s placed the women involved in [de facto] relationships, and the children of such unions in a vulnerable position and created the need for new legal rules to protect them."

The Family Court is labelled with an unproved

> "reputation (deserved or not) for capriciousness that seems to have triggered the pattern of shooting and bomb attacks against Family Court Judges and buildings".

How the three such attacks — which might all be the work of a single distorted mind — can be laid at the door of capricious judicial decision-making, and by a law Professor, is not explained. It seems to be a verdict which is a trifle unfair to many judges, faithfully doing their work in an inescapably difficult area of the operation of the law.

But some of the harshest words are reserved for the High Court of Australia. The current majority of that Court has fallen victim to "distorted realism" and "paternalism in contract law". Under the profound influence of Professor Julius Stone, the real problem is that our top legal institutions have fallen into the hands of an élitist, wilful activist group of people who are scornful of popular values and determined to stamp their own opinions on a hapless society. Amongst the worst offenders are the law reformers. Needless to say, I myself come in for a few words.

What is to be made of this? In a free society, it is thoroughly desirable that intellectual debate should be stimulated by books which put forward provocative ideas. But there are a few basic flaws in Professor Walker's book which will probably cause it to miss its mark. I leave aside the obscurity to the extent mentioned above of the early chapters and the price of the book which will probably limit its market. More serious are the author's generalisations, and most fundamental of all are the criticisms which go to the basic thesis which the book expounds. The "Clerisy" is condemned — but never really identified. Who are these powerful intellectuals in a country normally portrayed as anti-intellectual? How do they have such influence if, with a sigh of relief, Professor Walker admits elsewhere that they have had little impact on legislation? Does it ever occur to Professor Walker that the *Family Law Act* was a response to — and not a cause of — a significant social change? That it followed reforms introduced elsewhere around the world before ever they reached Australia?

And what is the alternative? Many lawyers of today are still old enough to remember the régime of adultery and matrimonial fault. Few who do, would want to go back to the days of bedroom snoops and discretion statements. A real challenge to the rule of law which Professor Walker overlooks, is that of a society whose laws preach one morality and whose citizens practise another. There are surely sufficient warnings of the dangers of this in the current controversies of contemporary Australia to alert Professor Walker to the perils of leaving old laws to apply to new situations. His yearning for the old morality and his objection to feminism, etc, represent a desire for things past which will not return. The legal caravan too must eventually move on.

And that is the other flaw of this book. Given that the genius of the English common law has been in its very adaptability to new circumstances, it is a little surprising to find fulmination against judicial law-making. That, after all, has been an enduring feature of our system down the centuries. Why, pray, should creativity be limited to the judges of England in years gone by but denied to judges of our own country today? Where does Professor Walker think his great hero Holt found his common law — does he really think it was there in the breast of the judges just waiting discovery? I know of no serious legal scholar today who believes that words in casebooks or statutes always have but one clear meaning. The English language is inescapably ambiguous, being the marriage of several linguistic sources. Judges have to make choices every day. This necessitates an element of conscious creativity. Professor Walker might prefer that it was not so, but the necessity of choice will not go away. The real debate about judicial creativity is not whether it exists. The contrary view is, as Lord Reid once said, "a fairy tale". The issue worthy of a book on the rule of law today is how judicial creativity may be limited in a principled way to avoid the danger of unbridled legislation from the bench, which so alarms the author of this book.

At one stage, in the midst of a particularly vehement attack on the Clerisy (see above), Professor Walker despairs, speaking of their imputed views, "How simple the world is!". That, I confess, is my reaction to the central idea of this book. It yearns for a simple world. But the

world is complex. The rule of law will only endure if its proponents recognise that complexity, and if they concern themselves about the content of the law, whose rule they demand should be obeyed. Hitler's Germany was a land of laws. It stands as a warning to us of many things. One of them is the danger of unquestioning obedience to law — or laws that will last a thousand years, a danger inconsistent with the dynamic character of the rule of law.

Michael Kirby

Australian Courts of Law, 2nd ed, by James Crawford. Pages i-xvii, 1-277, Tables 278-279, Index 280-286. 1988, Australia: Oxford University Press, Price: limp $25.00.

Although primarily directed at student readers, especially first-year law students in need of an introduction to legal institutions in Australia, there is much in this volume for other readers. The description of the courts, their structure, staffing and jurisdiction, covers the courts of general jurisdiction (Magistrates' Courts, District Courts, Supreme Courts, Federal Court of Australia and the High Court), and specialist courts and tribunals (Family Court, Children's Courts, Industrial Courts and Commissions, and Small Claims Tribunals).

Issues of contemporary importance are examined, and it is here that matters of interest to the more general reader are found. The possibility of an integrated court system is considered (pp 272-274), and the recently enacted cross-vesting of jurisdiction legislation is described (pp 38 and 146-148). As well as noting the effect of the legislation, Professor Crawford queries the constitutional validity of that part of it which confers State jurisdiction on Federal courts. Thus, he says:

> "The difficulty arises, first, from the implication drawn by the High Court from the notion of federal supremacy, to the effect that the States cannot legislate so as to bind the Commonwealth, and secondly, from the apparently exclusive or exhaustive language of ss 75 and 76 of the Constitution in enumerating the possible scope of the original jurisdiction of federal courts. It would be curious if the Commonwealth Parliament could, by consenting to State legislation, give it an effect it could not otherwise have, and which the Parliament could not itself enact": p 38.

Despite these serious reservations as to the validity of this feature of cross-vesting, the author expects the High Court to uphold it.

Also new to this edition are more detailed discussions of judicial independence and discipline (pp 56-60), and the problems, jurisdictional and otherwise, of the Family Court of Australia.

This edition fulfils its author's dual aim admirably. As a guide for the beginner it is clear and comprehensive. As a more general text it is stimulating and at times provocative. Professor Crawford's interest in constitutional and Federal issues makes these parts of the book of special interest.

RAS