

Book Review-Retreat from Injustice - Human Rights in Australian Law
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BOOK REVIEW

Nick O'Neill and Robin Handley *Retreat from Injustice - Human Rights in Australian Law*
The Federation Press, 1994, Sydney; i-iv Frontispiece; v-vii Preface (by authors); ix-xvii Table of Cases; xix-xxviii Table of Statutes; 1-498 Text; 499-508 Index. Paperback: rrp \$AUD55 (soft cover).

This book is one in a developing flood of publications exploring Australia's human rights record and the likely directions of human rights law. It takes its title from a remark of Deane J¹ in the context of the rights of Aboriginal Australians.²

In particular Australian jurisdictions, active consideration is being given to the adoption of sub-national bills of rights to repair the omission of such a charter from the written text of the *Constitution* and to remedy the repeated refusals of the Australian people to insert written guarantees into their *Constitution*, despite a number of invitations.³ Distinguished judges have entered the fray. Mason CJ in 1988 acknowledged that, if he had not reached the point of "enthusiastically embracing a bill of rights," he at least recognised that the idea had "much more virtue" than he had initially perceived.⁴ Other judges, such as Justice Murray Wilcox of the Federal Court have been even more affirmative.⁵ Encouraged by a number of important High Court decisions, text books have been written,⁶ official

reports prepared⁷ and law reviews organised,⁸ around the theme of constitutional rights for Australians.

The Federal Solicitor-General, Dr Gavin Griffith QC, has urged new consideration of a legislated bill of rights which would *not* be enshrined in the *Constitution* for "twenty or thirty years" so that the people could see how it operated. He suggested that this would be a preferable course to follow than what he described as the "implied freedoms industry", by which the High Court had "usurped" the legislative role of the Australian Parliament.⁹

The "implied rights" being "discovered" by the High Court out of the structure and implications of the text of the *Constitution* can trace their recent history to the constitutional theories of Murphy J, expressed in a series of decisions of the High Court for which he was generally derided at the time.¹⁰ The notion was dismissed as heresy.¹¹ Its time, it seems, has now come.

The authors suggest that it is to the "abiding credit" of some of the judges of the High Court that they "have now changed their minds about constitutional guarantees". Fundamental change of opinion in late years is, it is true, psychologically surprising. However, some observers are still waiting for a more candid acknowledgment of the power of Murphy J's ideas in this context. Others point to the unevenness of the principles and the inconsistent outcomes where the rights of some irritating minorities (such as unrepresented litigants) are involved.¹² Most fundamentally, others suggest that it is time the judges stopped rewriting substantial parts of the law and stuck to expounding and applying it - changing it only interstitially and then at the margins.¹³

Authors of books such as the present must have mixed feelings when new High Court decisions are handed down which sweep away large tracts of well worn legal doctrine which they have only just written up with

painstaking accuracy. The present authors had written a whole chapter of their book on defamation law(ch 16). It now needs to be revised in the light of *Theophanous v The Herald and Weekly Times Limited and Anor.*¹⁴ Cast aside are the inhibitions of the Founders who deliberately declined to include a "first amendment" guarantee in the *Constitution*. The refusal of the people of Australia to add such a guarantee of "freedom of speech and expression" at the referendum in 1942 is also set aside. The repeated advice of the National and State law reform bodies rejecting a "public figure" defence to exempt politicians from defamation defences is not enough. There, in the *Constitution*, it is found. And it has been there all this time, just waiting to be discovered and expressed.

This, therefore, is a difficult time for authors of books on constitutional doctrine in Australia. The ink from their pens will scarcely be dry, it seems, but new doctrine will be pronounced. We should look on the bright side. Times of such change promote unpredictability and therefore much litigation and text writing. In some areas of the law there must be finality, certainty and predictability.¹⁵ But in the matter of fundamental rights, things are really changing.

The structure of O'Neill and Handley's text is predictable enough. Deprived of a constitutional, or even a statutory, bill of rights to analyse textually, the authors adopt the rather more messy approach of gathering the principles of the common law, the inherited imperial statutes and decisions, and the local Federal, State and Territory legislation under each topic that can broadly encompass aspects of human rights. The book begins with an interesting review of the development of fundamental rights. Within three pages we have passed from ancient Greek philosophers, through the *Magna Carta* of 1215 to 17th century writers such as Hobbes and Locke. But that matters not. For this is a practical book for lawyers. It does not stay too long to ask where natural rights actually come from, whether they are

universal to different cultures and how traditions other than that of the common law have coped with them. It mainly describes cases and statutes.

In a short chapter, the authors examine the express constitutional provisions contained in the relatively few sections of the Australian *Constitution* which protect fundamental rights. Only the provision protecting property against acquisition by the Commonwealth other than on just terms¹⁶ and that guaranteeing freedom of movement between the States¹⁷ initially enjoyed a large construction. Everything else was cut back by the High Court of Australia, in its earlier manifestations.

There follows a chapter on implied constitutional rights. This picks up the *Australian Capital Television Case*¹⁸ and the *BLF Case*¹⁹ in the New South Wales Court of Appeal. There are then chapters on the way in which the common law protects human rights (ch 5); on the statutory institutions and mechanisms established in Australia to protect and enforce such rights (ch 6) and international protection of human rights (ch 7).

The last subject is finally proving most fertile. It is doing so in two ways. Since Australia ratified the First Optional Protocol to the *International Covenant on Civil and Political Rights*, individuals may take their complaints against Australian laws to the United Nations Human Rights Committee. This is what Mr Nick Toonen did in relation to Tasmania's *Criminal Code* resulting in Federal legislation to uphold adult rights to sexual privacy.²⁰

The second, and possibly more fruitful consequence of the ratification, is the influence it has opened up for the *Covenant* in the development of Australia's common law and in providing a reference point for the construction of ambiguous statutes.²¹ This technique of common law decision-making, by reference to the jurisprudence of the *International Covenant* (and other treaties), has been sanctioned in the High Court.²² It is increasingly evidencing itself in decisions of the courts of Australia.²³

From this introductory section, the authors proceed through chapters on liberty and security (ch 8); fair trial (ch 9); persons in custody (ch 10); freedom of assembly (ch 11); freedom of association (ch 12); freedom of speech, expression and the media (ch 13); censorship (ch 14); contempt of court (ch 15); and defamation (ch 16).

In the case of each chapter there is a useful reference to international human rights principles, a description of Australian common law and statute law relevant to the fundamental right in question and a discussion of the way in which local laws measure up to the international standards.

The next series of chapters deal with various issues of discrimination. There is a description of anti-discrimination statutes (ch 17), a discussion of the statute and case law on direct discrimination (ch 18) and on indirect discrimination (ch 19). This is followed by a chapter on affirmative action (ch 20), with references both to local law and to developments overseas, particularly in the United States.

The final series of chapters flow naturally enough from the section on discrimination. They deal with some of the groups which have been most discriminated against. Chapters 21 to 24 deal successively with Aborigines, their part in the criminal justice system, their land rights and the protection of their heritage. The very last chapter of the book deals with immigrants and refugees (ch 25). This will also need to be rewritten following the coming into force of the *Migration Reform Act* in September 1994.

The important point to make about this book is that it is not a grand philosophical treatise. In their preface, the authors acknowledge that "most Australians assume, with some justification, that their rights are well protected". The book shows how, with obvious failings and imperfections, common and statute law in Australia have combined to provide, at least for the majority of orthodox citizens, a high measure of legally protected

freedoms. On the other hand, common and statute law have fallen down as the book demonstrates, in the protection of the rights of women and of sometimes unpopular minorities such as Aboriginals, migrants and refugees, demonstrators, unconventional people, homosexuals and prisoners. Clearly enough, the discovery of new implied rights in the *Constitution* may afford some protections to these neglected groups. Thus, it is possible, that the prohibition on discrimination and unequal treatment in s 117 of the *Constitution*, re-worked in *Street v Queensland Bar Association*,²⁴ might have a much broader protective function than that of assuring a few interstate barristers the right to appear in Queensland courts.

The book is well produced, with excellent tables and a detailed index.

The fundamental question which remains after a reading of the book is whether new judicially enforced fundamental rights is the way to go, for default of legislative attention (or to correct legislative excesses) concerning basic rights of Australians. Or should such a move have the legitimacy of legislation and, possibly, a vote of the people at referendum?

Such is the speed of change in rights jurisprudence in Australia that I suspect a second edition will be needed from the authors before long. The future, like the past, looks likely for some time to involve more of the same: detailed laws on specifics, not the broad constitutional sweep seems to be the way congenial to most Australians. But one cannot be sure. A century ago Australians made a bold political and legal change to their way of government. Are they now summoning up the will to repeat the adventure?

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- 1 Gerhardy v Brown (1985 159 CLR 70, 149.
- 2 Gerhardy was a precursor to *Mabo v Queensland [No 2]* (1992) 175 CLR 1.
- 3 Australian Capital Territory, Attorney-General's Department, Issues Paper, *A Bill of Rights for the ACT?*, Canberra, 1993.
- 4 Cited in Constitutional Centenary Foundation, Options Paper, *Securing a Bountiful Place for Aborigines and Torres Strait Islanders in a Modern, Free and Tolerant Australia*, by F Brennan, Canberra, 1994, 27.
- 5 M R Wilcox, *An Australian Charter of Rights?*, Law Book Co, Sydney, 1993.
- 6 P Alston, *Towards an Australian Bill of Rights*, Centre for International and Public Law, ANU, Canberra, 1994. See also H P Lee and G Winterton *Australian Constitutional Perspectives*, Law Book Co, Sydney, 1992.
- 7 See Australian Parliament, Joint Committee on Foreign Affairs, Defence and Trade, *A Review of Australia's Efforts to Promote and Protect Human Rights*, AGPS, Canberra, 1994.
- 7 See Australian Parliament, Joint Committee on Foreign Affairs, Defence and Trade, *A Review of Australia's Efforts to Promote and Protect Human Rights*, AGPS, Canberra, 1994.
- 8 See Symposium, *Constitutional Rights for Australia?* in (1994) 16 *Sydney L Rev* No 145ff.
- 9 Reported *The Age*, 6 May 1994, 5.
- 10 They are collected in M D Kirby "Lionel Murphy and the Power of Ideas" ((1993) 18 *Alternative LJ* 253.
- 11 See eg *Miller v TCN Channel 9 Pty Limited* (1986) 161 CLR 556, 579 (Mason J).
- 12 See eg *Cachia v Hanes* (1994) 68 ALJR 374 (HC). Contrast *Cachia v Hanes* (1991) 23 NSWLR 304 (CA) and *Secretary, Department of Foreign Affairs and Trade v Boswell* (1992) 39 FCR 288 (FFC).
- 13 Cf C Saunders, "External Powers Require Federal Balancing Act", *The Australian*, 2 September 1994; A Funder, *The Toonen Case* (1994) 5 *Public L Rev* 156; H Charlesworth, "The Australian Reluctance About Rights" (1993) 31 *Osgoode Hall LJ* 195. The Attorney General for Victoria (Mrs Wade), following *Theophanous* declared that the High Court had "put itself above the Australian people" who, she said, were the only true authority entitled to amend the *Constitution*. See *The Age*, 14 October 1994, 7. See also D Rose, "Judicial Reasonings and Responsibilities i Constitutional Cases" (Second Lucinda Lecture, Monash University (1994) 20 *Monash Uni L Rev* 195.
- 14 (1994) 68 ALJR 713 (HC).
- 15 See eg *Abalos v Australian Postal Commission* (1990) 171 CLR 167 and cases there cited.
- 16 S 51 (xxxi).
- 17 S 92.

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- 18 (1992) 177 CLR 106.
19. (1986) 7 NSWLR 372 (CA).
- 20 Human Rights (Sexual Conduct) Bill 1994 (Cth). See discussion (1994) 1 *Privacy Law and Policy Reporter*, 1.
- 21 M D Kirby, "The Australian Use of International Human Rights Norms: From Bangalore to Balliol - A View from the Antipodes" (1993) 16 *UNSWLJ* 363.
- 22 See *Mabo*, above n 2, 44.
- 23 See eg *Young v Registrar, Court of Appeal and Anor [No 3]* (1993) 32 NSWLR 363 (CA) and *R v Sandford* (1994) 33 NSWLR 172 (CCA).
- 24 (1989) 168 CLR 461.