

Australian Constitutional Law and Theory

Commentary and Materials

Tony Blackshield and George Williams; The Federation Press 1998; 2nd edn; 1256 + xxxix pp; \$90.00 softcover.

They're back! And they've written back!

Only three years after the first edition of their ambitious reimagining of the ground of Australian constitutional law studies was first reviewed in these pages, Blackshield and Williams have produced a second edition. Readers will get a sense of the intellectual politics of the volume when they read the cover blurbs: (Justice) Michael Kirby praised the first edition for reflecting on the big questions; (Professor) Neil Rees' assessment is: 'Brilliant! The best Australian casebook I have read in any area of law'. For those with less knowledge of the personalities of Australia's legal establishment but a sense of the ghosts that trouble our unhappy constitutional hybrid, there is the closing sentence of the preface:

The law is stated as at 11 November 1997.

There is also the epigraph — what Foucault might have said about common law constitutional jurisprudence if we had asked him in time.

And there is the fact that causes me — as well no doubt as other professional commentators on the profoundly consequential drama that is the contemporary making of Australia's constitutional imaginary — to (self-) reflect both on recusance in all its forms and on the ethics of judgment. Blackshield and Williams have responded, thoughtfully and imaginatively, to criticisms made of the first edition by scholars and teachers, including your reviewer. However, accepting that reviewing, like compiling casebooks or rendering judgments in constitutional cases, is a positioned phenomenon — that we write from where we stand, if you like — is something that Blackshield and Williams and this writer have in common.

To the eyes of an Australian teacher of law this is an exciting variation on the legal casebook genre. Its choice of readings beyond the boundaries of black-letter law and the reflectively pedagogical way it introduces materials and discusses issues are groundbreaking. This time the range of sources is often inspired, as in the inclusion of work by the leading political theorist Wendy Brown and Cardozo's Michel Rosenfeldt. Together with Yale's Jack Balkin, represented in both editions, these are among the most exciting contemporary thinkers on the broad question of national identity — although an extension further across disciplinary boundaries into writing by Benedict Anderson or Homi Bhabha, say, would have been a welcome stretching of the envelope. To writing on legal categories by Reg Graycar and Margaret Davies on subjectivity has been added a piece by the late Mary Jo Frug on identity politics. Foucault is now offered as a counterpoint to Kelsen in the acute framing of the constitutional relevance of the sharpening conflict between traditional and poststructuralist conceptions of knowledge that marks our era in the history of ideas.

These are just part of this text's appeal as a teaching and learning resource. The imaginative reworking of the early chapters on constitutional theory and history enables students to conceive of legal study as an intellectually and ethically engaging pursuit. The taking-up of Mary Crock's suggestions in adding a chapter on the immigration and aliens power to the sample powers explored is as constitutionally

significant to this volume as the chapter on 'Indigenous peoples and the Question of Sovereignty' was to the first — and critical to students' understanding of the intimate connections between the study of constitutional law and the crises of identity currently besetting our nation. The expansion of the material on implied rights and freedoms into three chapters enables students to view constitutional law from the cutting-edge. If the authors' representation of and selection from cases does not always bear out their conviction that the contested and contingent nature of judicial decision making inevitably leads judges 'to draw upon deeper and ultimately more personal conceptions of the purposes, principles, values and practical impact to which a constitutional system of law and government ought to aspire (including ... a personal conception of the appropriate scope and limits of the judicial process)', the effort makes this a marked innovator in the Australian legal casebook field.

US scholars and teachers of constitutional law are generally bemused when they register that teaching the subject in this country is not the glamour assignment it has traditionally been in theirs. With the new edition of *Australian Constitutional Law & Theory: Commentary & Materials* their Australian counterparts have only ourselves to blame if it remains the Cinderella of the Priestley 11.

PENELOPE PETHER

Penelope Pether is a feminist constitutional lawyer who teaches at universities in Australia and the USA. At the time of writing she was a Senior Lecturer in Law at the University of Sydney, and a visiting scholar

Just Words

Constitutional Rights and Social Wrongs

Joel Bakan; University of Toronto Press 1997; 152 pp + notes, references and index; softcover.

Joel Bakan's nicely titled *Just Words* provides an excellent introduction to the Critical Legal Studies critique of rights in the Canadian context. It also provides a salutary tale for those on the left who support the idea of a Bill of Rights for Australia (myself, though somewhat ambivalently, included). The book canvasses the cons (and pros)

of the entrenchment of rights in the Canadian Constitution by way of the Canadian Charter of Rights and Freedoms. Bakan is clearly a rights-skeptic, notwithstanding his more moderate claims in the conclusion.

The book is divided into four parts. First is an analysis of the legitimacy of judicial review of legislation and

constitutional interpretation. Bakan concludes that those who champion judicial review under the Charter have failed to demonstrate why such review is legitimate. The words of the Charter are indeterminate and thus require judges to make political choices, yet there is no satisfactory account of why we should entrust such choices to judges who, after all, are all lawyers, mostly male, mostly white, mostly able-bodied and mostly straight. Notwithstanding their good faith efforts to act impartially, Bakan argues that judges 'cannot escape the personal and structural conditions that determine a partial and elite perspective' (p.41).

In Part II, Bakan turns to a more substantive assessment of particular Charter provisions. He focuses on equality, speech and freedom of association and then turns to an assessment of the use of the Charter by already powerful groups and entities. While Bakan sees the right to equality as offering some limited potential as a tool for progressive social change, he is ultimately skeptical about its transformative potential and suggests that in some cases it may have negative effects. Both gender and sexual preference provide useful illustrations here. Although women have won various Charter battles, on issues such as abortion (*R v Morgentaler* [1988] 1 SCR 30) and pornography (*R v Butler* [1992] 1 SCR 452), they have also lost ground gained in the legislative arena; for example, the striking down of 'rape-shield' legislation, which prevented the introduction of evidence of a woman's past sexual history into a rape trial (*R v Seaboyer* [1991] 2 SCR 577). For lesbians and gay men, there is a similarly mixed picture: although 'sexual orientation' has been recognised by the courts as a prohibited ground of discrimination (*Egan and Nesbit v Canada* [1995] 2 SCR 513), this has not always translated into actual defeat of discriminatory laws.¹ Furthermore, even where Charter victories are achieved, they may not result in 'positive effects in people's daily lives' (p.57).

Perhaps the most chilling area that Bakan discusses concerns union and labour rights under the Charter. While in other areas gains as well as losses are apparent, here the picture seems to be all one way – losses for workers. Unions have taken seven freedom of association cases to the Supreme Court and have lost every time. Although the right to form unions has been protected under the right to freedom of association, this

does not translate into a right to strike or a right to engage in collective bargaining — yet why else would one join a union? In Part III, where Bakan looks at the role of dominant ideologies in judicial decision making, we see that the judiciary has portrayed unions as self-interested, picket lines as coercive, and workers who refuse to cross picket lines as irrational. In contrast, business advertising is portrayed as assisting citizens in making informed, rational choices, thus serving the public interest. Furthermore, as Bakan illustrates in Chapter 6, 'Power to the Powerful', corporations have been remarkably successful in bringing Charter challenges to legislative measures they find problematic — again in marked contrast to the success rate of unions.

The final Part of the book addresses two somewhat disparate issues: first, the defeat of the 'Charlottetown Accord' (which was to give Quebec and First Nations peoples some recognition as distinct cultures within Canada and to allow them some ability to override the Charter in order to protect their culture); and second, a critique of arguments for the addition of social rights to the Charter. The first issue is peculiarly Canadian and, although some of the points Bakan makes are of broader relevance, I will not discuss it here. The second issue, to which the final chapter is devoted, is more interesting. Social rights go beyond the traditional, negative conception of rights (freedom from government interference) and attempt to place duties on government to provide a range of benefits to citizens, such

as food, housing, health care, education, social security, working conditions and so on. As Bakan points out, social rights 'have been proposed by some as a solution to the Charter's limitations'. Bakan dismisses this suggestion, however, for two main reasons: first, because these rights, like those already in the Charter, would be interpreted by an elite (be it judges or members of parliament); and second, because social rights would address only the symptoms, not the complicated causes, of social inequality.

Bakan is not entirely opposed to the use of rights as a tool in the struggle for progressive change. Rather, he sees his critique as providing an insight into the limitations of rights as such a tool, in the context of a dominant ideology which sees rights, and the Charter, as the answer to all social ills. He is careful to distance himself from those who conclude that the Charter is profoundly negative, with no redeeming qualities — although at times the book reads in such a way in its unrelenting critique. Ultimately Bakan expresses the view that 'the day to day lives of people in Canada would not be that much different — not much better, nor that much worse — if the Charter had never been entrenched in the Constitution' (p.145). Bakan's careful analysis suggests that we need to think carefully about whether the battle for constitutional rights is really worth the effort.

KRIS WALKER

Kris Walker is a Melbourne academic studying in New York.

Women's Encounters with Violence: Australian Experiences

edited by Sandy Cook and Judith Bessant; Sage Series on Violence Against Women 1997; 268 pp; \$32.95.

We (particularly those who work, teach or do research in the area) might ask, 'What can yet another book on violence against women in Australia offer us?' The answer is, 'A great deal'. Sandy Cook and Judith Bessant have managed most successfully to bring together a variety of contributors who either provide discussion of something rarely addressed in the literature (for example, the impact of war; homeless young women) or who offer interesting and unique analyses (for example, language and bias in the court; construction of masculinity and rape law). As one would expect, there is some varia-

tion in quality. Most chapters do, however, share a consistency in presentation style that speaks comfortably even to those readers who do not have a background either in violence against women or in the law.

Preceded by an excellent introductory overview, the book is divided somewhat arbitrarily into three sections. Each of these contains largely theoretical pieces, juxtaposed with chapters of a more empirical nature. The juxtaposition is effective in illuminating an array of feminist facets about the issues in a palatable form. My only criticism of the choice of topics is