AFTER THE RIGHTS REVOLUTION by Cass R Sunstein, Harvard University Press, Massachusetts, 1990, 283pp. ISBN 0-674-00908-8

After the Rights Revolution by Cass Sunstein is a thoughtful and compelling analysis of the United States welfare state and the role of courts in modern government. Sunstein argues that it is the deliberative process of government and its potential for political actors to engage in empathetic dialogue with other participants which gives democracy its emancipatory potential.

Sunstein believes that this dialogue must take place without the constraint of any presumption in favour of private or pre-legal ordering. This can be achieved by highlighting the legitimacy of state interference to restrict autonomy. To circumvent the inequalities of power and access which rigidify in a market economy, Sunstein advocates regulation, which, paradoxically, produces liberty via coercion — it "promotes liberty by allowing people to do or get what they want" (p44).

Sunstein is evidently very fond of the policies of the New Deal, the Great Society and the idea of an interventionist government. But Sunstein is not a welfare apologist, and recognises diswelfares in a detailed and unforgiving analysis of a number of United States product safety and occupational health and safety regulations. In a fascinating chapter (Chapter 3) Sunstein identifies and analyses the failure of enacting legislatures to take account of the unanticipated consequences of regulation, problems in the coordination and implementation of regulation, problem misdiagnosis, poor policy analysis and inappropriate interest-group transfers. Perhaps to demonstrate his commitment to rigourous analysis, Sunstein also provides a chilling list of "selected regulations in terms of cost per life saved" (Appendix B).

Within a modern government cognizant of the welfares and diswelfares of legislative initiatives, the courts have a special role to play. Sunstein says that courts can, through the use of certain "canons of interpretation" (Appendix A), interpret statutes with a premium placed on realising the social policy goals of government in furtherance of the common good. Sunstein argues that courts should not, when interpreting statutes, rely on the distortions of private ordering to thwart this view of the good because regulatory regimes are necessary in order to guarantee that entitlements reflect the collective aspirations of the public and not just to respond to the aggregation of private preferences, which adapt to and are a function of existing circumstances which may include injustice. He notes that the traditional rules of statutory construction often impair rather than clarify the operation of statutes. This is because the judiciary is perceived only to be the reactive agent of the legislature, rather than a proactive body which can invoke nonformal considerations which might lead to better outcomes. A judge, perceiving his/her duty to be to one of legislative agency, may make a decision in a case based on what s/he considers to be the "original meaning" of the statute concerned but this "meaning" may elevate the technical application of the provisions in question at the expense of the legislative aim of the statute. Alternately, judges may rely on a view that judicial consideration be

value-neutral and "objective" when the public policy enacted in the relevant statute is value-loaded.

Sunstein's refreshing contribution to the ongoing debate over the legitimate ambit of judicial review is to re-emphasise the importance of the courts' role as an *independent* and *enlightened* arbiter in the legal interpretative process. The courts need not be bound by the straitjacket of the "legality/merits" dichotomy or other similar technical distinctions which can cloud the true object of judicial activity — to do justice.

A general weakness of the book lies in its failure to indicate *ways* in which the parliamentary or congressional "deliberative effort for the common good" could be put into practical operation. This is a critical problem in a polity characterised by its combatant pluralism and inequalities of economic and social power. Sunstein refers to Gorbachev's *perestroika* as an example of the type of cathartic moment needed to bring about empathetic dialogue in government but in 1992, *perestroika* has lost its appeal. Of course nobody expects Sunstein to break open the Philosopher's Stone but the fact that the "common good" is a phrase used repeatedly in the book and is never explicitly defined is a flaw.

Sunstein is also too dismissive of deconstructionist approaches to government and law (p191), which are helpful in their recognition of the ubiquity and indeterminacy of (political) perspectives — the perspectives which could well be accommodated within Sunstein's "deliberative process". Sunstein's belief that deconstructionism fails because of the existence of "shared interpretive principles" and "standards . . . by which to mediate among conflicting views" (p191) is unacceptably laconic.

Despite these weaknesses, *After the Rights Revolution* is an interesting and engaging work. It recommends itself to Australian readers for its rigourous and interesting approach to the analysis of regulation and its effects; for its open, realistic appraisal of the role of the courts in interpreting regulations; and for its its enlightening discussion of the proper role of government in the modern state.

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