Review Article

Retreat from Injustice—Human Rights in Australian Law by NICK O'NEILL and ROBIN HANDLEY (1st ed, The Federation Press, 1993) pp i-xxviii + 1-508 (paper).

The Hon Justice Michael Kirby*

The title of this book is taken from a passing phrase of Deane J in *Gerhardy v Brown*.[1] In that case, a precursor to *Mabo*,[2] Deane J "signalled that the Australian legal system need[ed] to retreat from the injustices it had imposed on the Aboriginal people by refusing to recognise their land rights" He suggested that, by 1985, the common law of Australia had "still not reached the stage of retreat from injustice" which the laws of Illinois and Virginia in the United States had reached in 1823. It took another seven years for the retreat in Australia to advance to that point.

The book is offered amongst a veritable flood of contemporaneous publications exploring Australia's human rights record and the likely directions of human rights law. The Constitutional Centenary Foundation, chaired by Sir Ninian Stephen, has promoted consideration of the topic as an important element in the review of Australia's legal and governmental institutions, a century after the adoption of the Constitution. In particular 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 obdurate refusal of the Australian people to insert written guarantees into their Constitution, despite several 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

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* President of the New South Wales Court of Appeal. Chairman of the Executive Committee of the International Commission of Jurists.

1 (1985) 159 CLR 70 at 149.

2 *Mabo v Queensland (No 2)* (1992) 175 CLR 1.

3 See Australian Capital Territory, Attorney-General's Department, Issues Paper, *A Bill of Rights for the ACT?* (1993) Canberra.

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, (1994) Canberra, 27.

5 M R Wilcox *An Australian Charter of Rights?* (1993) Law Book Co Sydney.

written[6] and law reviews organised[7] around the theme of constitutional rights for Australians.

Politicians have also entered the fray. Launching this very book, Senator Gareth Evans QC, Minister for Foreign Affairs and Trade, suggested that a constitutional bill of rights might result in "a far more systematic and Parliamentary-led codification of rights" than was possible in what he described as the "adventurousness that is now being displayed by the High Court in inventing various implied constitutional rights".[8] Senator Evans said that the achievement of the objective of constitutional reform would require more political luck and better management than was shown in the last failed endeavour for the bicentenary in 1988, when the proposals to add various rights to the Constitution were defeated, barely attracting an affirmative vote of 31%. In typically conciliatory tones, Senator Evans said that success in the future would require "a lot less belligerent, mindless, reflexively reactionary opposition from the other side of politics than has been our previous experience".[9]

The Solicitor-General of the Commonwealth, Dr Gavin Griffith QC has picked up the same theme in a public lecture at the Monash University Law School. He urged consideration of a legislated bill of rights which would *not* be enshrined in the Constitution for "wenty or thirty years" so that the people could see how it operated. He suggested that this would be a preferable course to follow than the "implied freedoms industry", by which the High Court had "usurped" the legislative role of the Australian Parliament.[10]

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 derided at the time.[11] Indeed, the notion was actually dismissed by Mason J in a sharp comment in *Miller v TCN Channel 9 Pty Ltd*:

> There was an alternative argument put by the defendant based on the judgment of Murphy J in *Buck v Bavone*, that there is to be implied in the Constitution a new set of freedoms which include a guarantee of freedom of communication. It is sufficient to say that I cannot find any basis for implying a new s 92A into the Constitution.[12]

The authors of this text 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. But not all observers will offer the credit which

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6 See P Alston *Towards an Australian Bill of Rights* (1994) Centre for International and Public Law ANU Canberra; HP Lee and G Winterton *Australian Constitutional Perspectives* (1992) Law Book Co Sydney.
7 See Symposium 'Constitutional rights for Australia?' (1994) 16 *Sydney Law Review* 145ff.
8 *Reported in The Age* 19 April 1994, 6.
9 n 9.
10 Reported in *The Age* 6 May 1994, 5.
11 MD Kirby 'Lionel Murphy and the Power of Ideas' (1993) 18 *Alternative Law Journal* 253.
12 (1986) 161 CLR 556 at 579.

the authors proffer. Some are still waiting for a more open recantation. Others are waiting for a more candid acknowledgment of the power of Murphy J's ideas. Others point to the unevenness of the principles and the inconsistent outcomes where the rights of irritating minorities (such as unrepresented litigants) are involved.[13] 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.[14]

At the very least, authors of books such as the present must have mixed feelings when new High Court decisions are handed down which sweep away, in the name of the Constitution, large tracts of well worn legal doctrine which they have only just written up with painstaking accuracy. Poor Professors Lee and Winterton had only just got out their *Australian Constitutional Perspectives*[15] when the High Court handed down the decision in *Mabo* and later the decision in the *Australian Capital Television Case*[16] (in the latter of which Mason CJ found his s 92A without reference to his jest in *Miller*). At least the present authors had *Mabo* and the implied constitutional rights doctrine in the *Capital Television Case*. But they had written a whole chapter of their book on defamation law (ch 16) which now needs to be revised in the light of *Theophanous v The Herald and Weekly Times Limited and Anor*.[17] Cast aside are the inhibitions of the Founders who deliberately declined to include a 'first amendment' guarantee in the Constiution. 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 hard 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.[18] But in the matter of fundamental rights, things are really changing.

13 See, for example, *Cachia v Hanes* (1994) 68 ALJR 374 (HC). Contrast *Cachia v Hanes* (1991) 23 NSWLR 304 (CA) with *Secretary, Department of Foreign Affairs and Trade v Boswell* (1992) 39 FCR 288 .

14 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.

15 (1992) Law Book Co Sydney.

16 *Australian Capital Television Pty Limited v Commonwealth (No 2)* (1992) 177 CLR 106.

17 Unreported, 12 October 1994.

18 See eg *Abalos v Australian Postal Commission* (1990) 171 CLR 167 and the cases therein cited.

The structure of O'Neill and Handley's text is logical enough. Deprived of a constitutional, or even a statutory, bill of rights to analyse textually, the authors are obliged to 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 leapt 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 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.

Mind you, there is a very interesting story in the first chapter of the attempt of King James II in 1685 to "suspend" the operation of lawful statutes imposing restrictions on his Majesty's Roman Catholic subjects. This was the 17th century equivalent of the contemporary clash over Tasmania's *Criminal Code* provisions on homosexual offences. James lost. But the new joint sovereigns, William and Mary, came to England from the Netherlands at the invitation of the people. They came only upon condition that they would respect the basic rights of the commons of England to be declared in the *Bill of Rights* of 1688. Constitutional monarchy, popular sovereignty and fundamental rights were then set upon their modern course.

The authors examine, in a short chapter, the express constitutional provisions contained in the relatively few sections of the Australian Constitution to protect fundamental rights. Only the provision protecting property against acquisition by the Commonwealth except on just terms[19] and that guaranteeing freedom of movement between the States[20] originally enjoyed a handsome construction. Everything else was cut back by the High Court of Australia, in its original manifestation.

There follows a chapter on implied constitutional rights. This picks up the *Australian Capital Television Case* and the *BLF Case* in the New South Wales Court of Appeal.[21] 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* (ICCPR), individuals may take their complaints against Australian laws to the United Nations Human Rights Committee. This is what

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19 s 51 (xxxi).
20 s 92.
21 (1986) 7 NSWLR 372 .

Mr Nick Toonen did in relation to Tasmania's *Criminal Code*. The resulting decision of the committee, which found that the laws put Australia in breach of several provisions of the ICCPR provided the foothold for the Federal Parliament's legislation designed to protect sexual privacy and effectively to over-ride inconsistent State laws.[22]

The second, and possibly more fruitful consequence of the ratification, is the influence which subscription has opened up for the ICCPR in the development of Australia's common law and in providing a reference point for the construction of ambiguous statutes.[23] This technique of common law decision-making by reference to the jurisprudence of the ICCPR (and other treaties) has been sanctioned in the High Court.[24] It is increasingly evidencing itself in decisions of the courts of Australia.[25]

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). The last four mentioned chapters will need now to be re-written in the light of *Theophanous* and the concurrent decision in *Stephens v West Australian Newspapers Limited*.[26]

In the case of each chapter there is a useful reference to international human rights principles, a description of 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 who have been most discriminated against. Chapters 21 to 24 deal successively with Aboriginals, 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). The last chapter will also need to be rewritten following the coming into

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22 Human Rights (Sexual Conduct) Bill 1994 (Cth). See W Morgan 'Protecting Rights or Just Passing the Buck?' (1994) 1 *Australian Journal of Human Rights* ???; discussion (1994) 1 *Privacy Law and Policy Reporter* 1.

23 MD Kirby 'The Australian Use of International Human Rights Norms: From Bangalore to Balliol — A View from the Antipodes' (1993) 16 *UNSWLJ* 363.

24 See *Mabo*, above n 2 at 44.

25 See eg *Young v Registrar, Court of Appeal (No 3)* (1993) 32 NSWLR 363 and *R v Sandford* (1994) 33 NSWLR 172.

26 Unreported, 12 October 1994.

force of the *Migration Reform Act 1994* (Cth) in September 1994. Although this legislation is referred to, there is a need to read the detailed provisions of the statute set out in the text with the new Act in mind. In several important ways, the Act has restricted rights of judicial review in the Federal Court. It has also provided for conclusive ministerial certificates as to refugee status.

The important point to make about this book is that it is not a grand philosophical tract. Thus, there is no epilogue which attempts to pull the threads together and point to the future. 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, gays 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*,[27] might have a much broader protective function than assuring a few interstate barristers the right to appear in Queensland courts.

But 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. If we are to have a constitutional bill of rights, like a republic, it should come about by proud decision and informed choice. It should have the legitimacy of acceptance of the Australian people. It should not be determined by a few wise heads in Canberra.

The book is well produced, with excellent tables and a detailed index. Indeed, the only typographical mistake I found was in a quotation (on p 110) from a judgment of my own in *Carroll v Mijovich*.[28] As it appears in a flight of rhetoric where I was correcting a contention of Meagher JA, I hope that it will be amended in the second edition. Such is the speed of change in rights jurisprudence in Australia that I suspect a second edition will be needed from the authors pretty soon. I do not expect that it will contain the news of a constitutional bill of rights, adopted at referendum. Instead, 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. This book demonstrates at once the achievement and limitations inherent in that approach.

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27 (1989) 168 CLR 461.
28 (1991) 25 NSWLR 441 at 445.