

Human Rights for Australia, by Alice Erh-Soon Tay, Canberra, Australian Government Publishing Service, 1986.

Human Rights for Australia is the first volume in the Human Rights Commission's Monograph Series. In it Professor Alice Erh-Soon Tay, with the assistance of other scholars, has satisfied, with considerable success, the request made to her to assemble a comprehensive bibliography of literature on human rights; and, moreover, material with an Australian accent derived either from publication in this country or from particular relevance to Australian conditions or concerns. Fortunately for all those who will use the book as an indispensable vector for further examination of the topic, Professor Tay seems to me to have interpreted the second part of her mandate with admirable liberality. So what we have is a collection of literature about human rights selected with a discriminating eye to the universal importance of the subject matter.

As the guide to the bibliography points out "human rights can and do involve examination of the whole of human existence" and it is no light task to capture the distillation of that experience and then confine it under the appropriate rubrics. This, however, has been triumphantly accomplished without either overlapping or obscurity. The "synoptic table of human rights" not only affords a general view but, in focussing also on what it terms "related issues", stimulates the inquiry which the author evidently intends it to provoke.

The bibliography constitutes Part Two of the enterprise. Part One consists of a survey of relevant literature and developments which incisively covers the field. It presents with admirable conciseness a wealth of information about topics ranging from the situation of aborigines to the moral dilemmas involved in promoting "a right to die". It indicates apparent trends in community attitudes to a galaxy of problems, and summarises legislative and judicial response. To my mind section 13 of the Survey which deals with the philosophical bases of human rights, and which was written jointly by Professor Tay and Professor Eugene Kamenka, is of especial interest. It identifies and explains with clarity and scholarship the various grounds upon which assertions about human rights may stand.

It is impossible, I think, to say which of the ideas discussed has been the prime factor in generating such legislative initiatives as have taken place in Australia. They probably owe most to the diffuse stimulation of general international movements in the field; and, as Professor Tay says, the discussion of human rights in Australia "takes place in the context of increasing suspicion of bureaucracies and their procedures, and of growing concern for the rights of groups that have been discriminated against in law or in practice or both . . ." The reaction which these apprehensions have generated has tended to create specific remedies designed to protect or advance the aspirations of particular groups, rather than to exploit the broad concept of individual rights. Federal measures such as the Racial Discrimination Act 1975 and the Human Rights Commission Act 1981

have been passed without much controversy or even, unfortunately perhaps, a great deal of debate. Their selection of particular targets may have a comforting pragmatism about it.

Professor Tay includes a section dealing with the history of the proposed Australian Bill of Rights, and notes that in October 1983 Cabinet approved the planned presentation of such a Bill to the Parliament; and the "update" mentions that the Australian Bill of Rights Bill was introduced in October 1985. It passed all stages in the House of Representatives on 14 November 1985, moved into the Committee stage in the Senate in February 1986 but, soon after Professor Tay's book was published, was discharged on 28 November 1986. This is not the place to attempt an analysis of exactly why the Bill was withdrawn; that examination is perhaps too political for a judge. But I think I can join Professor Tay in identifying two arguments against the adoption of a Bill of Rights which were well supported, although I find it impossible to say whether either of them played a significant role in its ultimate rejection.

First, there is the objection that a Bill of Rights would inevitably and undesirably leave in the hands of the judges the task of interpreting and applying general normative precepts. This consequence is said to be undesirable because the judges would not be good at it and, good or bad, would be "politicised" by it; and because it would shift power from an elected assembly to the judges, and would therefore constitute a rejection of the democratic process. Delicacy forbids my making any comment about the first of these three points, and the third, as formulated, really requires no answer. But the second one has more substance, taking "politicise" to mean a process by which judges can decide cases only by the application of their own moral and political convictions, and which would therefore cast them in the role of creative law makers which they have habitually purported to reject. There is something in this argument, despite the more realistic view of the judge as law maker which now prevails. Since the passage of statutes such as the Administrative Appeals Tribunal Act 1975 and the Administrative Decisions (Judicial Review) Act 1977, judges are routinely involved in administrative review both to guarantee due process and to reconsider the merits of bureaucratic and administrative decisions. This aspect of judicial responsibility commonly passes without adverse notice. But from time to time the Ministers whose departmental decisions may be adversely scrutinised seek to return the judges to the confines set by early nineteenth century legal thought, although not by the more robust attitudes of earlier times. A recent example was provided by Ministerial response to a decision of the Equal Opportunity Tribunal of New South Wales, upheld in the Court of Appeal.

In recent times, in New South Wales at least, the courts have demonstrated a more resolute willingness than in the past to exercise their power to prevent abuse of process. This has been effectively manifested in decisions ordering a permanent stay of proceedings tainted by long delay or unconscionable lethargy on the part of prosecutors or claimants. Decisions of this kind may involve judicial value judgments of an intricate

kind. But they lie at the kernel of the judicial process. They cannot be regarded as an intrusion into areas of policy closed to judicial entry. Judicial activity (but not activism) of this kind may facilitate acceptance of the role which the judges would undoubtedly have to undertake if a Bill of Rights were adopted. It is important to emphasise that—if I may make a brief reversion to a point I affected to ignore—it is necessary for the profession to understand that this area of judicial enterprise cannot be successfully exploited unless the judges are given the materials for judgment. Lawyers will have to adjust themselves to preparation of something like a "Brandeis brief" to ensure that decisions are made with full appreciation of factual consequences and options for selection.

Secondly, although this defect was less generally determined and discussed, the rights asserted for protection under a "Bill" of the kind in question, tend to represent, as Professor Tay observes, "Sectional (though urgently felt) contemporary demands" which are often in conflict. These are "the demands of society" which the law is required to satisfy, notwithstanding that the demands themselves are often difficult to identify and fluctuating in incidence and intensity. There can scarcely ever be consistent demands in which the vast majority join, apart from a few fundamental expectations already, in most cases, protected by the law. As a result the satisfaction of some rights asserted for recognition inevitably entails the rejection of others. Those adhering strongly to certain social and, in particular, religious ideas saw the formal expression of apparently latitudinarian liberties as a threat to be repelled. The lack of rigorous public discussion in Australia while the projected Bill was still alive meant that questions of this kind were never adequately debated. Whether the project will be revived is dubious.

I finished Professor Tay's book in a mood of increasing melancholy induced not by the quality of the text, of course, but by the realisation it brought home of the almost universal international retreat from any serious endeavour to maintain basic civil liberties. We are all familiar with Western criticism of the Eastern bloc's failure to protect civil rights, and the denunciation of South Africa by nations whose own records in the field do not bear examination. Marxists can no doubt muster a respectable argument in support of their own approach to civil and political rights; and it is possible to acknowledge some force in the doctrine of gradual development or "guided democracy" in countries where no indigenous tradition ever existed to underpin the adoption of individual rights, provided the ultimate democratic destination is kept well in view.

But now in countries where it seemed that at least the protective tradition of the common law was well established social pressures (of racial disharmony above all) have demonstrated the frailty of the rule of law. More than that, the concomitants of western democracy are seen as continuing shackles of a colonial past. Autocracy is perceived to be the true heritage; liberalism is a false import. Such an approach has the benefit of being palatable to both right (particularly the religious fundamentalist right) and left. Perhaps it embodies the truth. Perhaps individual rights

and civil liberties and so on, rejected in one way or another by the majority of nations, are really the exotically feeble product of western pluralist democracy and essentially unfit for export. The Universal Declaration of Human Rights must therefore be regarded as an abberation occurring at a time of great international tension and uncertainty; and the only truly international declaration is the text of the laws of association football!

I hope not. The value of a book such as this is not merely that it instructs, but also that it inspires. It stimulates us to continue to strive for the continuance of civilization's minimum requirements.

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