CONSTITUTIONAL JUSTICE: A LIBERAL THEORY OF THE RULE OF LAW, by TRS Allan, Oxford, Oxford University Press, 2001, 331pp, ISBN 0 19 829830 7

HELEN IRVING*

TRS Allan has written widely and for many years in legal theory and the jurisprudence of public law. His 1995 book, *Law, Liberty, and Justice: The Legal Foundations of British Constitutionalism* (Oxford, Clarendon Press) brought together much of his earlier thinking and set out his basic proposition: that the law is not merely formal, but rests upon substantive moral principles and limits, and that it is the role of judicial review to apply these limits and restrain legislative and executive power. This is not just a normative proposition; Allan argues that the rule of law is the foundation of British constitutionalism, and the principles of equality and human dignity it enshrines operate in practice in judicial review.

In this latest work, *Constitutional Justice: A Liberal Theory of the Rule of Law*, Allan extends his theory and applies it to other common law jurisdictions, including Australia. There is, he asserts, a natural unity across the common law world, arising from a shared commitment to certain foundational values, which allows us 'to draw close parallels' and identify common legal characteristics (p. 4). These values derive from the rule of law, which underpins not only judicial decision-making and judicial review, but also informs the institutions, processes and values of policy and legislation in liberal democratic polities. The rule of law itself rests upon principles of natural law; it is an ideal, 'in which the autonomy and dignity of the individual citizen are treated as ultimate legal values.' It is not just concerned with procedural fairness, but is about the permissible content of laws and policies.

The central argument of *Constitutional Justice*, then, is that 'the procedural ideal of "natural justice" or due process, if it is to provide real protection against arbitrary power, must be accompanied by the equally fundamental ideal of equality' (p. 2). Judicial review allows the citizen to set out 'his' grievances (disappointingly, Allan makes no concessions to gender-neutral language) and his claims for equality and fairness in treatment. The principles of equality will be reflected in judicial review, even, it seems, when the judges themselves do not set out to achieve this. Indeed, the principles are treated by Allan as if they are immanent, in that they appear to inhere in, and reveal themselves through, the judicial process: '[i]t is a constant theme of this book', he writes, 'that judges have often reached correct legal conclusions – those indicated by a persuasive conception of the rule of law – which are none the less poorly supported by the reasons offered in their defence.' (p. 5)

The book's discussion of Australian case law will hold particular interest for Australian readers, not (one hopes) for parochial reasons, but because its theories are tested against a one-hundred year old written federal constitution, the original and principal purpose of which was to establish a national government and to

* Senior Lecturer, Faculty of Law, University of Sydney.

distribute powers between it and the state governments. The Australian Constitution does not, *a priori*, have much to say about the individual or the relationship between citizen and state, and the majority of its very few 'rights' provisions are framed as limitations on the exercise of legislative power (and thus are more properly 'negative' freedoms, rather than rights). There is no statement of equality (beyond the very limited prohibition against out-of-state residency discrimination in section 117), and indeed the Constitution's framers in 1898 rejected a proposal for a provision based on the Fourteenth Amendment of the United States Constitution, enshrining 'equal protection of the laws'. They did so on essentially two grounds. On the one hand, they opposed equal treatment for all 'citizens' in such areas as employment (where race-based discrimination operated), and on the other, they regarded equality before the law (in the procedural sense) as so self-evident and fundamental as not to require entrenchment. More than this, they believed that entrenchment might be offensive, serving to throw doubt upon the foundational nature of this principle. Allan would find this second aspect of the original debate supportive of his thesis, but the evidence that it is recognized in Australia's actual record of judicial review is mixed.

Allan devotes a good deal of space to the Australian case of *Kable*[1] in which an Act (the *Community Protection Act* 1994 (NSW)) was passed by the NSW Parliament, allowing for the detention of a 'specified person' (named as Gregory Wayne Kable) for up to six months at a time by court order alone, and for the purposes of preventing the commission of crime. The Act was ruled unconstitutional on appeal to the High Court, on the footing that it represented an attempt to interfere with the independence of the judiciary. Allan treats this case as a vindication of the fundamental principle against bills of attainder (although he recognizes that the Act was not in the form of such a bill), in which individuals are punished for reasons other than a breach of the general law, and exposed to the 'hostile intentions of a legislative majority.' However, *Kable* only succeeded because the NSW Supreme Court was vested with *federal* judicial power; any foundational or constitutional separation of powers was held only to arise from the Commonwealth Constitution, and did not apply, in the absence of other provisions, to state constitutions. Allan acknowledges this limitation by referring to 'doubtful' and 'mistaken' reasoning on the part of the High Court, while applauding the Court's conclusion.

This arouses suspicion of a certain tendentiousness in Allan's use of such examples. Setting aside the political equality cases (most recently *McGinty*)[2] and acknowledging Allan's preference for 'negative' rather than 'positive' rights and freedoms, a series of other cases across the twentieth century still throws doubt on just how 'foundational' the rule of law is (or has been) in Australia's constitutional system. *Leeth*[3], *Polyukhovich*[4] and *Langer*[5] stand as quite recent examples which,

1 *Kable v Director of Public Prosecutions (NSW)* (1996) 138 ALR 577.

2 *McGinty v Western Australia* (1996) 136 CLR 140.

3 *Leeth v Commonwealth* (1992) 174 CLR 455.

4 *Polyukhovich v Commonwealth* (1991) 172 CLR 501.

5 *Langer v Commonwealth* (1996) 186 CLR 302.

arguably at least, tend to demonstrate the opposite. Allan recognizes the ambiguity in the first two (he does not discuss *Langer*), but his preference for dissenting judgments tends to tilt his argument in a normative direction, and weaken his empirical claims for the immanence of 'constitutional justice'.

As would be expected, Allan also discusses the UK *Human Rights Act* of 1998 (which took effect in October 2000), in which the rights protected by the European Convention on Human Rights are incorporated into British law in the form of a guide to the interpretation of legislation. This Act is discussed as an illustration of the overriding argument of *Constitutional Justice*: that the 'Diceyan' doctrine of parliamentary sovereignty (at least as it is understood in a simplified form) is untenable, since the legitimacy of parliament itself rests upon the same moral principles as the judiciary (a view, Allan argues, that Dicey in fact held), and arises from a shared constitutional foundation in the rule of law.

From an Australian perspective, there is something rather quaint about the English obsession with fighting the ghost of Dicey, whose theories could never quite be made compatible with the operation of a federal, written Constitution, a High Court empowered to review legislation, and a history in which a series of direct popular processes (the Constitution Bill referendums of 1899 and 1900) competed with imperial enactment (in July 1900) as the source of the Constitution's legitimacy. Limitations upon the parliament's 'sovereignty' have always been part of the Australian political landscape, although the processes whereby Australia's Constitution has slowly been disentangled from its imperial parliamentary history have meant that the Diceyan perspective has had an occasional Australian hearing, and is still not entirely dismissed from the scene. Allan's exposition of a shared *grundnorm* in both written and unwritten constitutions may perhaps help Australians to understand how the bath water of their imperial origins may be thrown out, without at the same time losing the baby.

None of these quibbles about Allan's interpretation of actual constitutional processes and outcomes, however, undermines the value of the book. *Constitutional Justice* is a very rich, complex work, in which theories of governance, morality, justice, principles of rights and citizenship are 'tested' against real cases and substantive outcomes. It is a difficult and challenging work, one which recognizes that principles of equality and justice cannot be simply applied as a template across different countries, nor in a formalistic, abstract manner. Given the processes of constitutional reform under way in Britain, as well as the constitutional debates (in particular regarding a Bill of Rights) currently being heard in Australia, this type of approach will (at least if nuanced arguments are to enter the field of debate) become all the more important over the next few years.

The current cluster of appeals before the Federal Court of Australia[6] in which a privative clause added to the Commonwealth *Migration Act* in late 2001 (denying applicants for refugee status the right to appeal from determinations of

6 *NAAV of 2001 v MIMA* (N265 of 2002); *NABE of 2001 v MIMIA* (N282 of 2002; *Ratumaiwai v MIMIA* (N399 of 2002); *Turcan v MIMIA* (V225 of 2002); *MIMIA v Wang* (S84 of 2002).

Tribunals) will also test Allan's thesis. The constitutional validity of proposed anti-terrorism laws (the character of which is not dissimilar to the Menzies Government's anti-Communist Bill thrown out by the High Court in 1951)[7] will be an even more useful case study, as will similar laws in other common law jurisdictions. Indeed, the rule of law post-September 11 could well constitute the subject of Allan's next work, and legislative responses to (a perceived) increased threat of terrorism in the world could severely test whether his theories are to stand principally as normative, rather than descriptive of real processes, and also challenge Allan to set down the minimum conditions of their operation. Admirers of Allan's approach would receive such a work with great interest.

---

7 *Australian Communist Party v Commonwealth* (1951) 83 CLR 1.