

Rethinking Human Rights edited by **Brian Galligan** and **Charles Sampford** [Sydney, The Federation Press, 1997, xxvii + 260 pages, ISBN 1 86287 252]

Rethinking Human Rights, a collection of essays that is mainly on the jurisprudence of human rights, opens with a chapter by Michael Kirby¹ entitled "Human Rights: an Agenda for the Future".² The essays appear as thirteen chapters and are divided into three parts: (i) Developments in Rights Thought, (ii) Protection and Implementation of Human Rights Norms, and (iii) Particular Rights and their Protection. With the exception of Chapter 9, the essays are written by single authors who, in the words of the editors, are either "reflective practitioners" or "engaged academics".³

Broadly speaking, the essays deal with general issues but four of them, according to the editors, particularly focus on the protection of human rights in Australia.⁴ The first of the four is an essay entitled "Identifying Rights for the 21st Century", written by Glenn Patmore.⁵ The second, entitled "Rights and Reasons: Teaching Tolerance and Rationality", is contributed by Tim Round.⁶

The third and fourth essays discuss human rights issues within the Australian constitutional and judicial context. Of these two, the first is written by DFB Tucker on "Natural Law or Common Law: Human Rights in Australia".⁷ This essay is mainly a critique of the "emerging tendency towards judicial activism" by the High Court of Australia and of the

¹ Judge, High Court of Australia.

² At 2-22.

³ At xvi.

⁴ At xxv-xxvi.

⁵ Chapter 7 at 97-113.

⁶ Chapter 10 at 154-171.

⁷ Chapter 8 at 120-143.

Court's "judgments incorporating or identifying implied rights".⁸ Such statements prompt one to recall the words of the late Sir Garfield Barwick⁹ who lamented the "Americanisation" of the Court. Tucker also makes the point that even in the United States "judicial elitism" is now being seriously reassessed, if not increasingly attacked.¹⁰ He notes that the liberal judicial activism of the Supreme Court of the United States, mainly during the era when the late Earl Warren was Chief Justice (1954-1969), resulted in the conservative backlash of the Reagan and Bush administrations.

However, Tucker fails to mention that a "judicially active", *yet* conservative Supreme Court in the United States had been judicially elitist during significant periods of the nineteenth century and in the 1930s. During those periods, the Court thwarted the wishes of the majority of the American people which were expressed through their elected representatives. For example, in the latter half of the nineteenth century, progressive legislation, such as that on the minimum wage, was struck down for allegedly violating the principle of "freedom of contract". In the 1930s, until about 1936 when President Franklin Roosevelt threatened to "pack the court", a conservative, judicially elitist *and* "activist" Supreme Court struck down most of the New Deal legislation.

The other essay, "Citizen and Elite Attitudes Towards an Australian Bill of Rights" is written by Brian Galligan and Ian McAllister and appears as Chapter 9.¹¹ In this essay, the authors survey the attitudes of both "legal and political elites" and "the general public". The authors conclude that Australia is unlikely to enact "a bill of rights in the foreseeable future"¹² and this conclusion is supported by reference to relatively recent events that have occurred in Australia.

⁸ At 121.

⁹ Chief Justice of the High Court of Australia from 1964-1981.

¹⁰ At 140-141.

¹¹ At 144-153. This is the only essay in the book that is written by more than one author.

¹² At 153.

For instance, not long after the publication of this book, the Australian Constitutional Convention was held in Canberra's "old" Parliament House in February 1998.¹³ The Constitutional Convention was convened to consider the issue of whether Australia should become a Republic. The Convention rejected the proposal of some delegates to consider wider issues apart from that of the Republic. With the benefit of hindsight, one can now reasonably conclude that issues concerning a Bill of Rights for Australia would be dealt with (if at all) at the Federal rather than at State level, and only after the referendum on the Republic had been held.

In the reviewer's opinion, any discussion of the main issues concerning human rights in Australia, whether as a matter of rethink, retrenchment or advance, would have to include the rights of the indigenous population, rights issues in a multicultural society and, though it affects comparatively few people, the rights of refugees. In fact, none of the essays deals with the rights of refugees. Perhaps this omission is due to the fact that refugees is arguably a specialist topic and therefore is not suitable in a book that has the jurisprudence of human rights as its main focus.

Indigenous issues are briefly discussed in some of the essays including those by DFB Tucker and Michael Kirby referred to above. Alastair Davidson looks at issues that relate to multiculturalism and these are mainly discussed in the global context. His essay is entitled "Globalism, the Regional Citizen and Democracy" and appears as Chapter 13, the final chapter.¹⁴ The essay by Michael Kirby, including that by Anne F Bayefsky on "The UN and the International Protection of Human Rights" which appears as Chapter 5,¹⁵ are more concerned with international, rather than domestic, legal issues.

Alice Erh-Soon Tay¹⁶ contributed two essays, "Human Rights Problems: Moral, Political, Philosophical"¹⁷ and "A Policy for Human Rights in the

¹³ The Convention was chaired by the Hon Ian Sinclair, MP.

¹⁴ At 210-233.

¹⁵ At 74-86.

¹⁶ Appointed President of the Human Rights and Equal Opportunity Commission of Australia in April 1998.

¹⁷ Chapter 2 at 23-30.

Asia-Pacific”¹⁸ The latter essay is, in part, a cogent comment on claims concerning “Asian uniqueness”¹⁹ and partly on “Asian values”²⁰ as espoused by the political elites, mainly from “Singapore, Malaysia and Indonesia”.²¹

In the present climate, an academic tract on human rights theory and practice, especially one that is published in a Western country, would be “incomplete” and deemed politically incorrect if it failed to include issues concerning gender rights and feminist perspectives. The essays by Hilary Charlesworth and Beth Gaze entitled “Taking the Gender of Rights Seriously”²² and “Some Aspects of Equality Rights: Theory and Practice”²³ respectively, discuss these issues, in full or in part. Both authors conclude that in effect, drastic changes are required in both theory and practice to redress “the inequality of power between women and men”²⁴ and “to demonstrate a real commitment to helping marginalised groups”.²⁵

In the context of the necessity or otherwise of helping marginalised groups a curiosity is aroused in the reviewer: in Australian society today, which is the most marginalised group - women (including feminist academics), the indigenous population as a whole (male and female) or disadvantaged members of society such as poor immigrants and refugees? Suffice it to say that Hilary Charlesworth devotes an entire chapter and Beth Gaze significant parts of a chapter to feminist issues and gender rights, as they

¹⁸ Chapter 6 at 87-96.

¹⁹ At 90.

²⁰ At 91.

²¹ At 91.

²² Chapter 3 at 31-49.

²³ Chapter 12 at 189-209.

²⁴ At 49.

²⁵ At 209.

see them. On the other hand, only brief parts of Chapter 1²⁶ and Chapter 8²⁷ deal with the rights of indigenous groups.

The book will more likely appeal to teachers and students of jurisprudence and rights discourse than to teachers and students of international law and international human rights law. However, this observation should not detract from the thought-provoking and substantive contributions made by the various authors to human rights discourse. Still, at a price of AUD 75 for a hard cover version, most students (whether of jurisprudence, international law, human rights, political science or others) who wish to extend their horizons might find the book a tad beyond their means. On the other hand, a cheaper soft cover edition would alleviate the problem and ensure a wider distribution.

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²⁶ At 11-12.

²⁷ At 121-122.