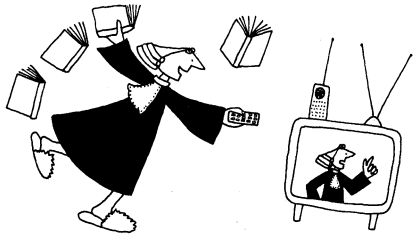
LAW & CULTURE



ASKING THE LAW QUESTION

Margaret Davies; Thomson Lawbook Co, 3rd ed, 2008; 428 pp, $89.95 (softcover)

In *Naturalizing Jurisprudence*, the US philosopher and law professor Brian Leiter grudgingly allows that 20th century critical movements in the study of law (for example, critical race theory and feminist legal theory) reveal 'something of at least moderate interest'. He continues in a similarly magnanimous vein: 'But none of this [i.e. the work of critical legal theory] ... has much direct bearing on jurisprudence, that is, on philosophical thinking about law. None of these theorists shed much light on core jurisprudential questions like: what is law? what is the relationship between legal norms and other norms in society? how do judges decide cases and how ought they to decide them?'.[1] It is one of the many great merits of Margaret Davies's longstanding textbook on legal theory, *Asking the Law Question* (now in its third edition), that it simultaneously provides an introduction *both* to the kinds of legal theory which Leiter and his ilk would allow within the province of jurisprudence (classical common law theory, positivism, natural law, legal realism) *and* to those barbarian thinkers upon whom he would no doubt prefer to close the great gates of jurisprudence.

Asking the Law Question is not simply an excellent teaching text which spans (and explains in lucid prose) a great deal of diverse and difficult material — although these are no mean feats in themselves. Rather, on a broader level and as the subtitle to the second edition proclaimed, Davies's coverage of the diverse currents of jurisprudential, political and philosophical inquiries in law actually reflects (and itself works) a 'dissolution of legal theory' itself. That is, after encountering Davies's sensitive treatment not just of the canonically anointed but also of those more marginal endeavours of which Leiter (and many others, to be fair) speaks so disparagingly, it is impossible to definitively encompass what legal theory 'is' with any degree of certitude. As Davies puts it in the preface to the new edition: '[I]t was no longer possible to see legal theory as a single distinct area of academic inquiry. Legal theory had become, and remains, plural: it cannot be reduced to a core set of questions with a defined number of possible responses' (p v). It may seem an unpropitious (if refreshing) beginning to a legal textbook for it to so readily dissolve its object of inquiry, but Davies's dissolution of legal theory 'properly so called' is an opening onto a much more varied and interesting terrain than the standard tomes routinely permit: here critical whiteness studies jostles with Langdell's case method, and reflections on *Mabo* and terra nullius with Hobbes, Hale and Coke.

The structure of this third edition of *Asking the Law Question* mirrors the structure of the second edition. The first chapter introduces a number of methodological issues which guide the author's approach in the book, whilst the next three chapters deal with what one might call more orthodox or foundational jurisprudential currents of thought: classical common law theory (largely Coke and Hale, with a discussion of the critiques of Bentham and Hobbes); the natural law versus positivism debate (from its ancient formulations to its more contemporary repetitions); and what Davies calls 'legal science' (which encompasses a discussion of the 19th century casebook method, legal formalism, legal realism and law and economics). Davies's elucidation of these different schools of thought is both admirably clear and thought-provoking. In these chapters the usual jurisprudential suspects receive a much more engaging treatment that we are accustomed to expect in legal theory textbooks — classical common law theory is brought into interesting proximity with Jean-François Lyotard (pp 72–4); the hallowed divide between natural law and positivism is constantly submitted to questioning (throughout Chapter 3); HLA Hart's notoriously circular 'rule of recognition' is discussed in terms of Jacques Derrida's critique of legal foundationalism (pp 103–6); and, throughout the discussion Davies's generic eclecticism introduces the reader to *Antigone*, *Gulliver's Travels*, *Rasselas* and *The Merchant of Venice*.

This is the point at which Leiter, had he been writing the textbook, would have stopped. Thankfully Davies progresses beyond page 182 of the present edition to discuss critical legal studies (Chapter 5), feminism/s and gender in legal theory (Chapter 6), race and colonialism in (and as) legal theory (Chapter 7), and postmodern and deconstructive jurisprudence. These discussions are comprehensive and incredibly clear (not something we are always accustomed to in glosses of Derrida and postcolonial theory, for example). I mentioned earlier in this review that *Asking the Law Question* is an excellent teaching text — indeed, I have been using the second edition of the textbook to teach a subject called 'Law and Society' to American exchange students in London for the past several years. In addition to its comprehensive treatment and clarity, one of the reasons I have found the text particularly useful is that it actively challenges students' assumptions about law and legal theory. These latter chapters do that more than the preceding ones, and they are also the chapters in which the voice (not that it is in any way elided in the preceding discussion) and political engagements of the author become most evidently engaged. In challenging students' assumptions about law and legal theory (through both its form and content) *Asking the Law Question* has frequently provoked heated discussion in my classrooms. This is perhaps rather more than can be said about the average text on legal theory, although it is by now perhaps rather evident that for this reviewer *Asking the Law Question* is no average textbook.

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1. Brian Leiter, *Naturalizing Jurisprudence: Essays on American Legal Realism and Naturalism in Legal Philosophy* (Oxford University Press, 2007) 83.

UN COVENANT ON CIVIL AND POLITICAL RIGHTS: CCPR Commentary

Manfred Nowak; N P Engel, 2nd revised ed, 2005

With the recent enactment of the ACT *Human Rights Act 2004* and the Victorian *Charter of Human Rights and Responsibilities 2006*, together with the proposed development of Human Rights Acts in Tasmania and Western Australia, it is both inevitable and important that domestic

law be informed by international and comparative human rights jurisprudence.

The jurisprudence of the United Nations Human Rights Committee is likely to be particularly influential. Each of the existing and proposed domestic human rights Acts enshrines civil and political rights that are primarily sourced from the *International Covenant on Civil and Political Rights* (ICCPR). It is an accepted principle of domestic law that it is legitimate to have regard to the opinions and decisions of bodies established to receive reports or determine claims under the treaty over which it has jurisdiction (see, eg, *Commonwealth v Bradley* (1999) 95 FCR 218 at 237 [39] per Black CJ (with whom Tamberlin J agreed); *Commonwealth v Hamilton* (2000) 108 FCR 378 at 387 [36], 388 [39]). It is also well established that it is desirable, as far as possible, that expressions used in international agreements be construed in a uniform and consistent manner by both municipal courts and international courts and panels (see, eg, *Rocklea Spinning Mills Pty Ltd v Anti Dumping Authority* (1995) 56 FCR 406 at 421E; *Povey v Qantas Airways Ltd* (2005) 216 ALR 427 at 433 [25] per Gleeson CJ, Gummow, Hayne and Heydon JJ). These principles of interpretation are codified in the Victorian *Charter* and the ACT *HRA*, which, at s 32(1) and s 31(1) respectively, direct practitioners and courts to consider 'International law and the judgments of domestic, foreign and international courts and tribunals relevant to a human right' in the interpretation of human rights and statutory provisions.

The Human Rights Committee is, of course, the human rights treaty body established under the *ICCPR* to monitor its implementation, interpret and develop its normative content, and receive and determine individual complaints under its *First Optional Protocol*. The judicial authority of the Committee has been recognised by both domestic courts (see, eg, *Tavita v Minister of Immigration* [1994] 2 NZLR 257; *Cornwell v The Queen* [2007] HCA 12 at [175]–[176] per Kirby J) and parliaments (see, eg, Explanatory Memorandum to the Victorian *Charter*).

There is no doubt that the jurisprudence of the Committee is complex and, at times, difficult to access. It is developed incrementally through Concluding Observations on states' reports (of which there are over 350), General Comments on treaty provisions (of which there are now 32) and, of course, the Views of the Committee on individual communications (of which there have been more than 1500).

For these reasons, the 2nd revised edition of Manfred Nowak's *CCPR Commentary*, published by N P Engel, will be absolutely invaluable to domestic human rights practitioners. Manfred Nowak is the United Nations Special Rapporteur on Torture, Director of the Ludwig Boltzman Institute of Human Rights at the University of Vienna and a member of the International Commission of Jurists.

At 1277 pages, *CCPR Commentary* is a substantial tome and the authoritative text on the *ICCPR* and the work of the Committee.

Parts I, II and III of the text deal with the substantive human rights provisions of the *ICCPR*. Each provision is discussed and analysed in considerable detail by reference not only to the jurisprudence of the Committee itself, but also the *travaux préparatoires* and the jurisprudence of persuasive international, regional and comparative human rights bodies, such as the European Court of Human Rights and the Inter-American Human Rights Court and Commission. Part IV of the text discusses international enforcement provisions, with particular reference to the practice and procedure of the Committee, while Parts V and VI discuss provisions relevant to the interpretation, application and mechanics of the *ICCPR*.

In addition to considering the *ICCPR* article-by-article, *CCPR Commentary* also examines the *First Optional Protocol* in detail. With the Committee having rendered decisions on over 1500 cases under this *Protocol*, of which over half have been deemed admissible and decided on the merits, this is a very useful discussion.

CCPR Commentary also includes a number of very useful appendices and tables. Appendices include the full texts of the *ICCPR*, the *First Optional Protocol*, the *Second Optional Protocol*, the Committee's *Rules of Procedure* and General Comments, while the tables include a subject-matter index and a case index (with the most important cases indicated in italics).

Internationally, it is well recognised that the work of the Human Rights Committee is increasingly rigorous, professional, critical, dynamic and therefore persuasive. Particularly during the early years of the Victorian *Charter* and the ACT *HRA*, a time when 'the development of an Australian jurisprudence drawing on international human rights law is in its early stages' (*Royal Women's Hospital v Medical Practitioners Board of Victoria* [2006] VSCA 85 at [71] per Maxwell P), it is critical that domestic courts and practitioners have close regard to the *ICCPR* and the Committee's jurisprudence. If this is to be the case, *CCPR Commentary* by Manfred Nowak is an absolute 'must have'.

For further information or to order *CCPR Commentary*, contact N.P.Engel@EuGRZ.info

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COMRADE ROBERTS: Recollections of a Trotskyite

Kenneth Gee QC; Desert Pea Press, 2006; 250 pp, $29.95

A LIFE IN CRIME: Stories from the Streets

Michael Kuzilny; New Holland, Sydney, 2007; 272 pp, $24.95

Comrade Roberts is a collection of 'recollections' by Kenneth Gee, QC, a former 'middle class boy from the wealthy suburb of Strathfield' and now a NSW District Court judge.

Gee came from a home of 'Yorkshire pudding and the stiff upper lip', a family 'quite devoid of feeling or emotion'. His father was a solicitor of British origin. He characterises his mother as a suitable consort for 'empire-builders devoid of passion', a British female of the same cast as Boadicea, who did not weep 'even when the victorious Romans set her alight'.

This background would seem almost to suggest an answer to the central question