B Galligan and C Sampford (eds) *Rethinking Human Rights*, Sydney: Federation Press, 1997

At a time when there is considerable "doom and gloom" abroad about the state of Australia's intellectual culture, it is heartening to turn to a work entitled, *Rethinking Human Rights*. Its title suggests not only a measure of continuity with the intellectual past, but further a promise for the future. In this work, one begins with the expectation of finding not merely the fruits of contemporary "thinking", but of critical evaluation of past scholarship and approaches, methods and perspectives, and also some proposals for future development of the discipline. To a large extent this reader's expectation has been realised, although there were some startling inclusions which will be discussed later. The aim of rethinking the most fundamental propositions about human rights and their implementation both legally and politically, in international and domestic contexts is most opportune in view of the volatile contemporary political and economic climate worldwide.

Human rights scholarship continues to attract a wide range of disciplinary interests and approaches, and some serious and significant perspectives on current human rights debates are made by the contributors to this volume. The very clear strength of this collection of essays is its intellectual breadth, with contributions from political science, law, jurisprudence and philosophy. The essays are well-documented and the volume is complemented by a thorough bibliography which will be of use to students and scholars alike. The book, like Caesar's Gaul, is divided into three parts.[1] The first part of the book contains four essays by distinguished contributors on the theme of "Developments in Rights Thought". This is followed in Part Two with six contributions on the more pragmatic theme of the "Protection and Implementation of Human Rights Norms". The volume is completed in Part Three with "specialist" studies under the rubric "Particular Rights and their Protection".

Part One of the work was a delight to read and forms an intellectual heartland for the work. Although very distinctive in style and approach, there is a coherence and relatedness amongst the first four contributions which sustains and stimulates the reader. Justice Michael Kirby's essay, entitled "Human Rights: An Agenda for the Future" provides a literate overview of many contemporary issues associated with human rights scholarship, from the categorisation of rights as first, second, or third "generation" rights, to the issue of universality of international norms and difficulties of domestic implementation. Justice Kirby's professional experience on the international human rights "stage" permits thoughtful personal observations on key human rights issues. This is complemented

[1] With the tripartite division the simile ceases, as there is little to suggest that the Republican Gauls had much interest in human rights (nor did Caesar for that matter).

by the keenly-honed and elegant prose of Alice Erh-Soon Tay in "Human Rights Problems: Moral, Political, Philosophical." I was excited by the clarity and conciseness with which Professor Tay expounded some most difficult ideas, making at the outset the key theoretical distinction between legal and moral claims in the human rights arena. I was also encouraged by her approach which eschewed simplism in the matter of the difficulties associated with the theory and practice of human rights. On the final page of her essay, Professor Tay concludes:

> "This is the reason we have law as an intellectual system, searching for coherence and consistency in the application of principles and for a recognition of the difference made by circumstances, by context. Any list of human rights, no matter how well formulated, will have to be applied to cases that raise at least some doubts in our minds about the scope, purpose and application of the right."

Hilary Charlesworth's contribution provides both a critique and a challenge to traditional rights thinking. In "Taking the Gender of Rights Seriously", Charlesworth provides both a careful exposition of feminist arguments in the ongoing debates about the public/private aspects of rights and the limitations of formal equality, and thoughtful observations about possibilities for future development in rights thinking building upon past experience and perspectives. This essay can be read with profit together with the contribution of Beth Gaze in Part Three on "Some Aspects of Equality Rights: Theory and Practice". Both essays contain theoretical discussions and detail some feminist criticisms of existing conceptualisations of human rights. Whilst the contributions of both Charlesworth and Gaze are critical, sometimes highly critical, of the "current, abstract, gender-neutral individualism" associated with human rights, they are also constructive in suggestions for new directions in achieving the aspirations associated with human rights protection in the future. For example, both consider to good effect the ALRC 1994 *Report on Equality before the Law: Women's Equality.*

The final contribution in part one of the book, from Charles Sampford is perhaps the most conspicuous in its reassessment of human rights theory. He proposes a reconceptualisation of human rights as "multi-dimensional". Human rights, for Sampford, may be three- or four- dimensional. The dimensions include negative rights (freedom from state interference), protective rights (freedom from the interference of other citizens), and positive rights (which contain resource implications for government).The fourth (or psychological) dimension upholds the social value placed on citizens making and acting upon "real" choices. There is much that is attractive in this refocussing of our perception of human rights. In particular, it addresses the various contexts within which rights function, including the social/community and historical, and further attempts harmonisation out of what Sampford describes as, "the haphazard and piecemeal way in which rights have come to be asserted".

The contributions in Part Three also tend to explore the theoretical dimensions of particular rights. J W Harris makes a sophisticated contribution to the rights debate in "Is Self-Ownership a Human Right?" He critically evaluates the philosophical and jurisprudential tradition on the "right of self-ownership" and concludes that the claim to "body-ownership" is often used rhetorically and cannot be theoretically sustained as a human right per se. However, he does accept that "there is a human right to the exclusive control over one's own body" which is not related to ownership in any traditional proprietary sense. His argument in the essay is both articulate and convincing. Alistair Davidson's essay on "Globalism, The Regional Citizen and Democracy" offers a largely rhetorical and expository consideration of voting rights and the possibilities of "new direct democracy" for the future in Australia. His contribution might offer more to the political scientist rather than the lawyer.

Part Two of the book is a distinct curate's egg, and in view of the strengths of other contributions, a disappointment. Ann Bayefsky's essay on the United Nations highlights important limitations associated with the international protection. It is peppered with astute, practical observations about those ideas, policies and practices which limit the effectiveness of United Nations organs, and is highly readable. Tay's second offering to the volume on "A Policy for Human Rights in the Asia Pacific" offers sage advice for the development of regional protocols based around principles, pragmatism and, most importantly, patience. There is much stimulation in the presentation by Galligan and McAllister of the empirical results of the Rights Project Opinion Survey in which citizen and elite views of bills of rights in Australia were sought. Tom Round's paper on "Teaching Tolerance and Rationality", which argues that effective human rights education should be based in providing reasoned justification of rights protection to the populace, is largely uncontroversial. Glen Patmore's "Identifying Rights for the 21st Century" I found disappointing and unconvincing. Much of the material is derivative from J Whyte, C Pateman and others in order to provide the basis for the exposition of rights suitable in a "developmental democracy". The rights that Patmore lists are associated firmly with citizenship and democratic participation. I found this perspective too narrow to sustain a convincing argument.

At the very centre of the book sits the choleric essay by DBF Tucker. I found this contribution overwhelming in many senses. Tucker has written what he calls a "conservative" piece. The arguments he presents are not unfamiliar, but the robustness of the language used, the intemperate nature of some assessments (for example, he speaks of the "hubris" of members of the judiciary on page 123), the use of generalisations, the bald statements provided without evidence are truly "breathtaking". I must admit that I probably found this the most "stimulating" contribution in the book, but also the one which left me most uneasy and in a sense quite despondent. Tucker is a disciple of Dicey (parliamentary sovereignty and the "rule of law") and Bentham (legal positivism). He is also

a Reader in Political Science, and thus has the benefit of a disciplinary perspective different from my own. There are some fundamental points of difference, which may or may not be discipline-related, and which arise in response to Tucker's argument. I shall relate these.

At the core of the differences is my assessment that Tucker's perception of law is as a "scientific" institution, which can provide "certainty" and neutrality" by some means which approximates the natural sciences (for example, see page 140). As some of the eloquent contributions in this volume testify, this is just not so. The age of "law as science" or "law as if it were science" is gone. Law is a complex human institution and should be evaluated in all its complexity. Legal certainty is not "scientific" certainty. Further, Tucker does not accept international law norms as a legitimate influence on the domestic law of a nation. His response to the reality of the internationalisation of law as represented in *Mabo*, for example, is to suggest that the Australian legal system is "remaking" itself in a "US image". This is a "Canutan" posture which is difficult to entertain in the contemporary global environment. The law will develop and in its development it will be subject to many influences, including "US" influences among others.

Tucker does not seem to like judges or courts very much, but the question is really not whether he "likes" judges, but how accurately he assesses what they really do. Judges settle disputes. The decisions they make between litigants have many ramifications for others if the principles of law applied to resolve a dispute become "the law", and attract value as precedents. Tucker states (at p 141) that:

> "it is unacceptable for judges to think that they have been placed on the courts to represent interest groups, or to solve political conflicts by fiat or to impose values that are not widely shared."

However, he provides no evidence that this is what judges do in fact, or even that judges believe that this is what they do. When Tucker speaks of the countermajoritarian "problem" of judges protecting rights and the crisis of "democratic legitimacy" (page 138), there is no hint that he believes that in a democracy governments must govern for the weak as well as for the strong. Here, we have humanity once again in the "state of nature", in which only the "fittest" will survive. In a modern democracy the courts can provide an important check upon the abuse of governmental power by the strong against the weak, which may be a "problem" but one which a society is prepared to live with.

There are a number of other points which could be mentioned, but I shall confine my comments to one more. Concern was roused in respect of the treatment of a South African hypothetical concerning human rights abuses and the prison system (page 133 ff). Tucker asks rhetorically (at page 133): "Why should the Constitutional Court enjoy the right to decide that money needs to be spent providing more toilets in overcrowded

prisons and not on providing the pipes that will enable rural citizens to have access to a tap?" The real issues encompassed in this example are obscured by this means of formulating the question. Human rights issues are at the very intersection of the legal and the political. Judges in determining, by reference to the constitution, whether a particular prisoner's human rights have been infringed whilst in custody may arrive at conclusions which have political, social and economic ramifications for people other than the litigants. However, in Tucker's South African example, the "rural citizens" without access to clean drinking water are not parties to the *legal* dispute. Such citizens may well have an independent cause of action against the state for infringement of other human rights protected by the constitution, but the job of the court is not to weigh up whether the prisoner or the rural citizen is "more deserving" of resources. In this context, human rights norms do not provide a blueprint for the distribution of resources. They provide the ideals by which a society wishes to function, where the dignity of individuals and groups is respected. Perhaps this commentary reveals again a difference of disciplinary perspective.

My final reflection is that this a book well worth reading and owning. It makes a significant contribution to the development of contemporary human rights scholarship.

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