WATERS v. PUBLIC TRANSPORT CORPORATION[1]

1. *INTRODUCTION*

In May 1990 the Victorian Equal Opportunity Board directed the Public Transport Corporation to refrain from implementing significant changes to the public transport system. The new 'MetTicket' system would have required commuters to buy 'scratch' tickets from retail outlets and ticket machines and validate them before boarding trams, and anticipated the removal of all conductors from trams.

Several people with disabilities and representative disability groups complained that the new system discriminated against them: they or their members would be unable, or less easily able, to use public transport than unimpaired people. After a lengthy hearing the Board made the orders sought, from which the Corporation appealed to the Victorian Supreme Court.[2] It was from this decision that the original complainants appealed to the High Court.

The case turned upon what was required to establish indirect discrimination in the provision of goods and services:

(i) whether the introduction of driver-only trams involved the imposition of a requirement or condition with which a substantially higher proportion of unimpaired persons could or did comply than could or did impaired persons, under s. 17(5) of the Equal Opportunity Act 1984 (Vic.);

(ii) whether the requirement or condition involved in the introduction of scratch tickets and the removal of conductors was reasonable, within the meaning of s. 17(5) and, specifically, whether the Board erred in failing to have regard to the Corporation's financial justification for the changes;

(iii) whether, even if the changes were discriminatory, the Corporation was entitled to an exception contained in s. 29(2) of the Act, which provides an exception for a service-provider if the impaired person requires a service to be performed in a special manner that cannot reasonably be provided, or which can on reasonable grounds only be provided on more onerous terms than the terms on which the service could be reasonably provided to a person without that impairment;

(iv) whether the Corporation's acts fell within the general exception in s. 39(e)(ii) of the Act. It was argued that since the Minister had (orally) directed that the Corporation adopt the new policy it was necessary for the Corporation to comply with that direction under s. 31(1) of the Transport Act 1983 (Vic.); and

(v) whether the Board's orders exceeded its powers under s. 46(2)(a) of the Act by reason of their vagueness.[3]

On 3 December 1991 the High Court handed down its judgment in *Waters v. Public Transport Corporation*. The case will be analysed in terms of the five separately delivered judgments: Mason C.J. and Gaudron J., and Dawson and Toohey JJ. delivered joint reasons.

2. *THE IMPOSITION OF A REQUIREMENT OR CONDITION*

Indirect discrimination describes the effect of practices which do not on their face, but do in their effect, differentiate among or between people on the ground of some impermissible consideration.[4]

Though the parties agreed that the introduction of scratch tickets was the imposition of a requirement or condition within the meaning of s. 17(5), Phillips J. in the Supreme Court had held that the removal of conductors from trams could not be.

It was necessary first to define the relevant 'service'. Mason C.J. and Gaudron J. considered that

[1] High Court, 3 December 1991 (F.C. 91/038), unreported. At the time this case-note was prepared, only an unrevised copy of the Court's reasons for judgment was available.

[2] *Public Transport Corporation v. Waters* (1991) E.O.C. 92-334.

[3] *Waters v. Public Transport Corporation, supra* n. 1, 4-5 *per* Mason C.J. and Gaudron J.

[4] *Australian Iron & Steel Proprietary Limited v. Banovic* (1989) 168 C.L.R. 165, 175, 182-3.

the Board could define the service as the Corporation's provision of transport, the 'requirement or condition' being that commuters get themselves on and off vehicles without the assistance of staff.[5] They argued that if the Board had adopted a narrower construction of the service, such as the provision of trams generally, then it would not have been possible to find it to be a 'requirement or condition' that people use trams without conductor assistance. The nature of the service provided would have entailed the absence of conductors. Deane, Dawson and Toohey JJ. agreed that the Board had not made any error of law in its approach on this point.[6]

McHugh J., however, considered that the Board's definition of the 'service' was too broad: various public transport services were different in nature — trams, trains, road, air and sea transport *etc*. This error of law made it difficult to tell whether the Board had also erred in formulating a requirement or condition in terms of the removal of conductors from trams. He would have sent this matter back to the Board for redetermination of the 'requirement or condition' after it had defined the nature of the service with greater particularity.[7]

Brennan J. also thought that the Board had made an error of law: in his view the relevant service was a tram system, in which some trams had conductors while others did not. So defined, there would have been no requirement or condition that people use trams without assistance from conductors: that was the nature of the service provided.[8]

3. *REASONABLENESS*

Phillips J. in the Victorian Supreme Court had found that in considering the 'reasonableness' or otherwise of the requirement or condition under s. 17(5), the respondent's financial considerations should have been taken into account. The Board had appeared to consider only the complainants' viewpoint.[9]

A majority of the Court agreed that the respondent's considerations had to be taken into account. Brennan J. went further: the whole of the circumstances had to be considered, including whether the proposals could have been implemented in a different way with a less dramatic impact on the people adversely affected by the particular requirement or condition.[10]

The fact that the same economic or practical considerations had been taken into account by the Board in considering whether or not the Corporation was entitled to the exception in s. 29(2) of the Act did not mean, according to Dawson and Toohey JJ., that they should not also be considered in looking at the reasonableness of the proposals as required by s. 17(5).[11] Deane J. agreed[12] and McHugh J. reached the same conclusion through a slightly different reasoning process.[13]

Mason C.J. and Gaudron J. disagreed on this point. They considered that it would be inconsistent with the purposes of anti-discrimination legislation to require that the reasonableness of what was alleged to be an indirectly discriminatory act should incorporate the respondent's perspective. If the complaint had been of direct discrimination, the reasonableness or otherwise of a respondent's discriminatory act or omission would have been irrelevant. Less favourable treatment is simply unlawful. The same approach should be taken to indirect discrimination.[14]

Thus, a majority of the Court considered that Phillips J. was right, that the Board had made an error of law in the way in which it assessed the reasonableness of the proposals to remove conductors and introduce scratch tickets, and that the case should be returned to the Board to reconsider this point according to law.

5 *Waters, supra* n. 1, 8-9.
6 *Ibid.* 28 (*per* Deane J.), 39 (*per* Dawson and Toohey JJ.).
7 *Ibid.* 48-9.
8 *Ibid.* 21.
9 *Ibid.* 9, 12.
10 *Ibid.* 24.
11 *Ibid.* 39-40.
12 *Ibid.* 29.
13 *Ibid.* 54.
14 *Ibid.* 11.

4. *PROVISION OF SERVICES AND SERVICES DELIVERED IN A SPECIAL MANNER: SECTIONS 29(1) & (2)*

The Corporation argued that it had not discriminated in the provision of services because to breach s. 29(1)(b), a service provider had to be found to provide its service on different terms to one group than it did to another; there had to be two sets of terms, one of which was less favourable.[15]

This argument had not been accepted by Phillips J. in the Victorian Supreme Court, nor was it accepted by McHugh J., nor, by implication, by Dawson and Toohey JJ. McHugh J. considered that it would be inconsistent with the notion of indirect discrimination in s. 17(5) to read s. 29(1) in this way. The provision of a service on less favourable terms could be either direct (two sets of terms, one of which is better than the other) or indirect (one set of terms which has a disproportionately adverse impact on one group compared with other groups).[16]

The Corporation had sought leave to cross-appeal against the finding that 'more onerous terms' in s. 29(2)(b) referred to terms more onerous to the respondent only, and not to the complainants. The Court did not allow the application for special leave on this point, but went on to make various comments about such an interpretation of s. 29(2).

The Board had assumed that the complainants needed the services provided by the Corporation, but that they required to be delivered in a special manner because of their impairments. If so, the reasonableness or onerousness of the special way in which the services had to be delivered had to be considered. If the special terms could not reasonably be provided (s. 29(2)(a)) or, on reasonable grounds, could only be provided on more onerous terms than the service could reasonably be provided to an unimpaired person (s. 29(2)(b)), then the Corporation's failure to provide them was not discriminatory. But the Corporation had not argued that it did not have to provide its services on special terms because it was unreasonable for it to do so (s. 29(2)(a)) and instead relied on s. 29(2)(b).

Mason C.J., Gaudron and Deane JJ. considered that s. 29(2)(a) and (b) were irrelevant.[17] The terms on which the Corporation provided its services, as they had been defined for the purposes of s. 17(5), were the same for everyone. Everyone would have had to use scratch tickets and driver-only trams. That was why the complainants alleged indirect rather than direct discrimination: the imposition of blanket terms was said to have a more severe impact on them because of their impairments. But they also considered that the 'more onerous terms' relevant to s. 29(2)(b) were terms more onerous to the complainant, not to the respondent. The Board had formed the opposite view — that it was the effect on the respondent that was relevant.[18]

Dawson and Toohey JJ. suggested that if an impaired person needs a service to be delivered in a special way and this way is either directly more onerous to the complainant, or has a disproportionately adverse impact on the complainant, then the terms of the service-provision would be considered to be 'more onerous' within the meaning of the section and the respondent could lawfully refuse or fail to provide it.[19] This interpretation would seem to give an impaired complainant no real options. He or she could not use the service in the manner in which it was already delivered and the service could not be 'required' to be delivered in a different way. If a service could be used if it were delivered in a different way, and the service-provider proved that the means of delivery was 'more onerous' — directly, or in its differential impact on the complainant — then the service-provider would not have to deliver that service in that other way or on those terms. If that is the correct interpretation of the Act, it could be stated in simpler and more appropriate terms. It would be an interesting outcome, given that the Court generally considered that the Equal Opportunity Act 1984 (Vic.) should be interpreted in a manner beneficial to disadvantaged persons.

McHugh J. did not directly consider whether 'more onerous terms' referred to terms more onerous to the respondent or to the complainant. Brennan J. confined his comments on s. 29(1) to a view that the section did not impose a positive duty on a respondent to provide the impaired with extra services not available to the unimpaired; the provision of staff (conductors) to assist commuters was a special

15 *Ibid.* 50.
16 *Ibid.*
17 *Ibid.* (*per* Mason C.J. and Gaudron J., Deane J. concurring).
18 *Ibid.*
19 *Ibid.* 41.

service, not the performance of an existing service in a special manner. Because he had already decided that the removal of conductors from trams did not 'impose a requirement or condition', this point was not taken further. Brennan J. would have sent back to the Board the issue of the 'reasonableness' of the introduction of scratch tickets.[20]

5. *MINISTERIAL DIRECTION — SECTION 39(e)*

S. 31 of the Transport Act 1983 (Vic.) permits the Minister to direct the Corporation as to its policy. The Minister had given such a direction: to introduce the scratch ticket system and remove conductors from trams. The Corporation argued that it could therefore rely on s. 39(e)(ii) of the Equal Opportunity Act 1984 (Vic.) as a defence, even if its actions, in removing conductors and introducing scratch tickets were found to be discriminatory.

When this argument succeeded in the Supreme Court, the Victorian Commissioner for Equal Opportunity conducted a search of legislation which contained similar provisions to s. 31 of the Transport Act 1983 (Vic.) and found more than 50. Section 5 of the Equal Opportunity Act 1984 (Vic.), however, expressly binds the Crown in right of the State.

Mason C.J., Gaudron and Deane JJ. favoured a narrow construction of s. 39(e)(ii),[21] given that it is an exemption in 'social benefit' legislation. The exemption should apply only to acts necessary to be done in order to comply with a specific obligation imposed by a provision of another Act. The broader interpretation would be inconsistent with the general purposes of the Act and would also leave s. 39(e)(iii), which provides a general exemptions for an act which is necessary to comply with 'an instrument made or approved by or under any other Act', with no apparent purpose. Brennan J. agreed on this point.[22]

Dawson and Toohey JJ. also thought that the Corporation could not rely on s. 39(e)(ii), but rather than advocate a narrow reading of s. 39(e)(ii), considered whether what the Corporation had done was *necessary* to comply with the Minister's direction. They considered that it had a discretion as to how it implemented the Minister's direction. They were persuaded to this view partly because s. 14 of the Transport Act 1983 (Vic.) requires the Corporation to consider a range of matters, including the needs of disabled commuters, in providing transport services. Given this discretion, it was not *necessary* that the Corporation act as it had in order to comply with the Minister's direction.[23]

McHugh and Brennan JJ. took a more direct approach. They both considered that s. 31 of the Transport Act 1983 (Vic.) did not give the Minister the power to direct the Corporation to act in contravention of the Equal Opportunity Act 1984 (Vic.).[24] Such a direction would be in excess of the Minister's power and therefore invalid. The Minister's direction was therefore unlawful if the MetTicket changes were otherwise discriminatory, and the Corporation could not rely on it to claim the benefit of s. 39(e).

McHugh J. also found that if the Minister's direction had been lawful, the Corporation's acts would have been necessary to comply with it (that is, it had no relevant discretion), and s. 31 of the Transport Act 1983 (Vic.) was a provision which allowed it to invoke s. 39(e)(ii) of the Equal Opportunity Act 1984 (Vic.).[25] Brennan J., however, adopted the narrow construction of s. 39(e)(ii) to exclude s. 31 of the Transport Act 1983 (Vic.) from the operation of the exemption.[26]

6. *GENERAL*

One of the more interesting aspects of the case relates to judicial comment on how anti-discrimination law ought to be interpreted. Many Australian judges have tended to interpret anti-discrimination law narrowly, leading to a considerably more formal system and narrower reach than was originally intended.

20 *Ibid.* 24-5.
21 *Ibid.* 15-6 (*per* Mason C.J. and Gaudron J., Deane J. concurring).
22 *Ibid.* 26.
23 *Ibid.* 35.
24 *Ibid.* 26 (*per* Brennan J.), 57 (*per* McHugh J.).
25 *Ibid.* 56-7.
26 *Ibid.* 26.

The complaint process, for instance, was meant to be informal, conciliatory and non-adversarial so that aggrieved individuals should not have to look for traditional remedies through the Courts. That is why complaints are initially made to a statutory officer, in Victoria the Commissioner for Equal Opportunity, who has public education and conciliatory functions, with no power to determine guilt or innocence or any particular way of resolving a particular dispute. The Courts have, however, interpreted these functions in terms of duties to observe what might be described as quasi-natural justice standards of impartiality and judgment in investigation[27] and in conciliation.[28] Further, the Victorian tendency towards a technical interpretation of the requirements of the complaint process has fundamentally changed the informality of the Commissioner's first contact with a complainant.

By its very nature, a 'complaint' is made by lay people. The document on which the Commissioner acts, however, must, on its face, demonstrate a subject matter within the ambit of the Equal Opportunity Act.[29] Only the original complaint can be referred to the Board by the Victorian Commissioner: in *Nestle Australia Ltd v. The President and Members of the Equal Opportunity Commission*[30] the Board was found unable to rely on particulars of complaint, filed after the referral, to establish its jurisdiction. The point at which a 'complaint' is deemed lodged with the Commissioner then becomes extremely significant, not only because of the 12 month limitation period (which can only be extended by the Commissioner for 'good cause'), but also for jurisdictional reasons. The complaint must be formulated very carefully. If the Commissioner acts upon a complaint which, on its face (that is, before the Commissioner gathers further facts on an investigation) is jurisdictionally deficient, a respondent might seek to challenge the investigation and conciliation process.

Perhaps the last word on some judicial approaches to the interpretation of the Equal Opportunity Act 1984 (Vic.) should be left to Marks J.,[31] in a case concerning alleged political discrimination in the dismissal of two 'whistle-blowers'. He interpreted the 'political beliefs or activities' ground in these terms:

> It is most unlikely that Parliament intended to protect an employee against dismissal where his or her activities (even if 'political') were directed against the interests of his or her employer even to the point of wreaking its, his or her destruction. . . . One assumes that Parliament envisaged beliefs and activities not in the arsenal of weapons used by one side to resolve a dispute with the other. . . . [T]he law is careful to ensure that wide and unrealistic latitude is not given to such language so as to sanction the exercise of power in a way which upsets the balance intended by the legislature to be kept.[32]

and described his personal approach to the Act's interpretation thus:

> It must be obvious that unless the law is strictly observed by those entrusted under the Act to apply its provisions and its language afforded a meaning consonant with the fair disposition of justice between accuser and accused, the community is in danger of being visited by a fearful engine of oppression.[33]

It would seem that the High Court has resoundingly refuted that somewhat narrow and protective approach. Mason C.J., Gaudron and Deane JJ. expressly endorsed a liberal interpretation of the Equal Opportunity Act 1984 (Vic.), and a narrow interpretation of the exemptions and exceptions, consistent with the broad and beneficial objects of the Act. Dawson and Toohey JJ. also favoured a generous interpretation, as did McHugh J., though in more careful terms.

27 *Hall v. Sheiban* (1988) E.O.C. 92-227.

28 *Koppen v. Commissioner for Community Relations* (1986) 11 F.C.R. 360.

29 *Nestle Australia Ltd v. The President and Members of the Equal Opportunity Board* [1990] V.R. 805, later followed in *CPS Management Pty Ltd v. Equal Opportunity Board* (1991) E.O.C. 92-332 and *La Roche v. President and Members of the Equal Opportunity Board* (1991) E.O.C. 92-361.

30 [1990] V.R. 805.

31 In *CPS Management Pty Ltd v. Equal Opportunity Board* (1991) E.O.C. 92-332.

32 *Ibid.* 78, 292-3.

33 *Ibid.*

(a) *Intention to discriminate*

The Victorian Supreme Court has tended to interpret restrictively Victorian anti-discrimination legislation.[34] In the notorious *Arumugam* decision,[35] Fullagar J. sought to require a complainant to prove that the respondent intended to discriminate. Since discrimination arises from shared community or internalized cultural beliefs and practices; since an intention is often neither expressed nor obvious, especially when stereotypical assumptions are acted upon; and since indirect discrimination can only be measured by its impact, not its intent, this was a narrow interpretation indeed. *Arumugam* was never followed and was generously reinterpreted by Phillips J. in the Supreme Court in *Waters*,[36] but its negative impact on ethnic communities' willingness to use anti-discrimination processes was considerable. This was not helped by the Victorian Law Reform Commission's suggestion that its proposed new 'Plain English' version of the Act should require proof of 'conscious' discrimination.[37]

Mason C.J. and Gaudron J., with whom Deane J. agreed, clearly stated their preference for an interpretation of s. 17(1) and (5) which did not require proof of motive or intention to discriminate.[38] In doing so, they expressly disagreed with the *Arumugam* approach. All three Justices felt that all that was needed to show that unfavourable treatment was *because of* a prohibited ground, was that the treatment was *based on* the different status or private life of the complainant.

Only McHugh J. considered that intention was relevant in proving direct discrimination. He found that the words 'on the ground of' and 'by reason of' in s. 17(1) required a causal connection between the discriminatory act and the status or private life of the victim, but added that 'if the discriminator would have acted in the way which he or she did, irrespective of the factor . . . then he or she had not discriminated', a conclusion with which surely nobody could disagree.[39]

Neither Dawson and Toohey JJ. nor Brennan J. had anything explicit to say on this point.

It is now safe to say that *Arumugam* is dead and buried.

(b) *Indirect discrimination*

Mason C.J. and Gaudron J. considered that indirect discrimination could be established in situations which fell outside the criteria in s. 17(5). Section 17(1) is broader and allows a person to argue that he or she was treated less favourably in an indirect way, which would not necessarily fit within the formula in s. 17(5).[40] McHugh J., on the other hand, considered that s. 17(1) and s. 17(5) are mutually exclusive[41] and Dawson and Toohey JJ. also inclined to this view.[42] Brennan J. was concerned that anti-discrimination legislation, which was not designed to remedy deficiencies in services for people with impairments, was misused if bent to that purpose. Though he agreed that anti-discrimination legislation should be beneficially construed, it should not be seen as the only means of alleviating such disadvantage.[43]

7. *CONCLUSION*

The High Court's decision is timely. Anti-discrimination law will shortly be in effect in more or less similar or recognizable form in each State and Territory of Australia. By its nature it recognizes that power can be used to exclude people, whose standing is defined in terms of the characteristics of

34 In determining the ambit of the prohibited grounds, for example, see *Keefe v. McInnes* (1991) E.O.C. 92-331 (impairment discrimination in sport: burden of proof that the exemption in s. 33(1) does not apply lies on the complainant); with respect to the meaning of 'political beliefs or activities', see *CPS Management, supra* n. 29 (ethical beliefs about the conduct of public affairs by a government instrumentality not 'political') and *La Roche, supra* n. 29 (industrial activities or beliefs not 'political').

35 *Department of Health v. Arumugam* [1988] V.R. 319.

36 *Public Transport Corporation v. Waters* (1991) E.O.C. 92-334.

37 Victoria, Law Reform Commission, *Review of the Equal Opportunity Act* (1990) 15.

38 *Waters v. Public Transport Corporation, supra* n. 1, 7.

39 *Ibid.* 45.

40 *Ibid.* 5-6.

41 *Ibid.* 53.

42 *Ibid.* 38.

43 *Ibid.* 18.

a disadvantaged group, from the opportunity to share equally in the benefits of living in Australia. It provides different remedies in its complaints process, and its investigative and 'alternative dispute resolution' process has been regarded with some suspicion by 'traditional' Courts. At times the restrictive interpretation taken by some judges seems, certainly in retrospect if not at the time, unwarranted.

The judgment affirms that a broad and beneficial approach to such legislation ought to be adopted. It signals to some judges of the Victorian Supreme Court that they should take such an approach in future. It affirms to Government that it may not, unless it specifically so enacts, exempt its agencies by administrative action from human rights obligations binding upon the public sector as well as the private sector. The High Court has also affirmed that discrimination is a question of less favourable treatment, 'caused' but not necessarily consciously intended, by the victim's disadvantaged status.

It is a considerable victory, overall, for a much-battered piece of well-intentioned, badly-drafted but, we now know, still workable piece of human rights legislation.

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BOOK REVIEWS

Law, Liberty and Australian Democracy by Beth Gaze and Melinda Jones (Law Book Company, Sydney, 1990) pages i-xxxvi, 1-494, index 495-505. Price $69.00 (soft cover). ISBN 0 455 20986 3.

Perhaps the only subject more worrying than the indifferent record of protection of civil liberties in Australia is the barrier to positive change posed by the uninformed nature of public debate. Legal and political issues and institutions in Australia often face this problem, but we seem to have reached the stage where a respected newspaper such as the Melbourne *Age* uses the tag 'civil libertarian' as an insult. If it finds the wide audience it deserves, this new book by Beth Gaze and Melinda Jones should do much to rectify this regrettable situation.

As Gaze, a lecturer in law at Monash University, and Jones, a lecturer in law at the University of New South Wales, state in their preface to the book, the aim of the work 'is to stimulate and improve the level of debate about individual rights and liberties in Australia'.[1] Adopting an approach which combines the virtues of both the textbook and cases and materials formats, the authors cover much ground. They begin with an introductory discussion of civil liberties theories and the Australian legal and political culture (Part I), consider a broad range of 'rights' at State, federal and international level (Parts II and III) and conclude with an excellent and challenging part on the meaning of equality and a consideration of social and economic rights. The work is thorough and provocative.

The most difficult task the authors set themselves, and for which they deserve much praise consequent upon their success, is the general discussion in the opening two chapters, 'Democracy and Civil Liberties' and 'Civil Liberties in Australia'. As the authors acknowledge in the preface, these chapters are demanding for a reader new to the field, but they reward close attention. The reader is guided — perhaps a little too quickly — through the concepts of positive and negative liberty, human rights, the distinction between rights and liberties, different theories of rights, the constitutional, statutory and common law protection of civil liberties in Australia and the alternatives for legal reform. The material is dense, but the balance of text and reproduced materials is good. To borrow the words of Raymond Carver, these two chapters are an excellent introduction for someone who wants to know 'what we talk about when we talk about' civil liberties.[2]

The discussion of specific rights — including voting rights, rights of public protest, freedom of speech, state security, freedom of religion and belief — exhibits not only an enviable command of the intricacies of State and federal legislation and of the subtle differences in the operation of similar statutory regimes in various States, but also admirable familiarity with sources that are not purely legal (*e.g.* material from the fields of jurisprudence and the social sciences). I would like to focus on two chapters in particular: chapter nine dealing with privacy and chapter ten entitled 'Policing Social Standards'. While the authors could have devoted more space to the search for an adequate definition of privacy (for which useful reference could be made to the work *Personal Information* by Raymond Wacks), they assemble relevant material on the Privacy Act 1988 (Cth), the New South Wales Privacy Committee, the Australia Card scheme, government surveillance and privacy in the private sector. The coverage of these topics is necessarily brief but the central issues of the relationship between privacy law and free speech and the difficult public/private sphere distinction are adequately addressed. Readers interested in this area could also make reference to two English developments subsequent to this book's completion: the case of *Kaye v. Robertson and Sports Newspapers Ltd*[3] and

1 Gaze, B. and Jones, M., *Law, Liberty and Australian Democracy* (1990) *v*.
2 Carver, R., *What We Talk About When We Talk About Love* (1980).
3 Court of Appeal, unreported.

the *Report of the Committee on Privacy and Related Matters*.[4] The recommendations of this Committee[5] should raise concern in the minds of all civil liberterians.[6]

Chapter ten addresses what role the law may play in the regulation of private conduct and public morality. The chapter deals with issues of sexuality including the relevance (if any) of the homosexuality of a parent in child custody cases, prostitution, offensive behaviour, obscenity and censorship. The authors assess the material from the Dworkinian standpoint that the law should be conducive to each individual being treated with equal concern and respect. This approach is most interesting when applied to the problem of pornography in our society. Drawing upon the pioneering work of Catharine MacKinnon and Andrea Dworkin in America, the authors suggest that pornography may be viewed not as an exercise of free speech but as a denial of the equality of women and thus an infringement of a woman's right to be treated with equal concern and respect. As MacKinnon has argued, pornography is not about the free speech of pornographers, but about the silence of women.[7]

It is rare for a law text which covers so much ground to sustain a common thread and unity of approach. This book succeeds in pursuing the theories of Mill and Dworkin, in particular, throughout the discussion of different areas of the law and then, in Part IV, illlustrates their impact on perhaps the most pressing and certainly the most controversial areas of civil liberties in our community: the issues of discrimination laws, affirmative action policies, special laws for minorities and the need for positive liberty. These concerns are very much at the forefront of current legislative debate. The discussion is opinionated and forceful. The authors' basic contention is that:

> The legal protection of individuality and its expression, required if people are to be accorded equal concern and respect by others, will only be meaningful where a basic standard of living leaves individuals free to have a sense of dignity about themselves. Self-respect and a sense of self-worth are prerequisites to the exercise of freedom.[8]

This quote underlines the major strength of this book: it is not about black letter law as such but the ability or inability of people to exercise their potential as individuals.

This book will do a great service if it provokes further discussion of the important issues it treats. As acknowledged by the authors, civil liberties in Australia have been fairly well respected compared with many other countries. But this should not be a cause for celebration or a signal to shelve debate of the many problems that remain. The authors should be congratulated for publishing this challenge to not only the courts and politicians but the general community.

CHRISTOPHER CALEO*

4 (1990) Cmnd 1102.

5 *E.g.* the Committee recommended the creation of specific statutory offences where certain physically intrusive acts (such as taking the photograph of an individual on private property) are done with a view to publication of the information obtained. The effect of such legislation would be the creation of a special law for the media; particular acts would be criminal if performed by a member of the media but not if performed by a private individual for his or her own personal motives: *Report of the Committee on Privacy and Related Matters*, *ibid.* ix.

6 For related comments see Markesinis, B., 'Our Patchy Law of Privacy' (1990) 53 *Modern Law Review* 802 and Munro, C., 'Press Freedom — How the Beast was Tamed' (1991) 54 *Modern Law Review* 104.

7 MacKinnon, C., *Toward a Feminist Theory of the State* (1980) 205-6.

8 Gaze, B., and Jones, M., *op. cit.* 492.

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International Law and the Rights of Minorities by Patrick Thornberry (Oxford University Press, 1991), pages 1-398, appendices 39-430, bibliography 431-43, index 445-451. Price $155.00 (hardback). ISBN 0 19 825620 5.

The appalling treatment of the Kurds in Iraq, the disintegration of the Soviet Union and the reemergence of ethnic tensions in Eastern Europe mean that the rights of minorities are a vital area of international law. Of course, minority rights, like other human rights, often fall victim to the lack of political will of states and therefore offer no instant solutions. They do, however, merit thoughtful study and Thornberry's book is such a study.

Thornberry opens his book with a short introductory chapter that highlights some of the tensions in the area of minority rights — tensions between equality and non discrimination on the one hand and the maintenance of the identity of the minority on the other; tensions between the minority group and the individual; and tensions between the state and the minority group. It is made clear that the book will explore both rights of minorities as groups and the rights of individual members of minorities. The chapter ends with a brief reference to the right of self-determination and the idea that internal self-determination as opposed to the ultimate form of external self-determination, secession, may be both applicable and useful to minority groups.

The introduction also sets the tone of the book. Thornberry is alive to the potential abuse of language and he uses language with critical sensitivity throughout the book. Problems surrounding the frequent use of the word 'integration' and the invocation of 'equality' or 'non-discrimination' for practices which are assimilationist, are exposed. The assimilationist potential of language itself though the denial of usage of minority groups' languages is also explored. Generally speaking, the language of the book is also gender neutral.

In the first part of the book, Thornberry sets out the history of the protection of minorities. This part contains a wealth of historical material, particularly about the League of Nations scheme for the protection of minorities. The chapter concludes that with the advent of the concept of universal human rights, the League of Nations scheme for the protection of minorities died. The tension between universal rights of the individual and rights of groups is a continuing theme of the book.

The rest of the book is a thorough and systematic establishment of various rights of minorities and their members, and a description of the content and status of these rights at international law.

Part II deals with the prohibition on genocide which is directly applicable to minorities and which Thornberry treats as the establishment of a right to existence of minorities.

Part III is an initial examination of the concepts of, and conflict between, the right of minorities to identity, or the right to be different (which Thornberry states it might tentatively be called), and the right to non-discrimination. In the next two parts of the book, Thornberry thoroughly examines the sources of international law — relevant treaties and their *travaux préparatoires*, declarations, state practice, case-law and the writings of jurists to establish the rights to identity and non-discrimination as law. He comments on the authority of the sources themselves and makes what he admits to be 'cautious' or 'tentative' conclusions regarding the content and status of the norms sought to be established, rather than overstating the position.

In Part IV, Thornberry examines more closely the content of the right of identity in the context of Article 27 of the International Covenant on Civil and Political Rights. Here the author looks at the various 'manifestations' of a minority group such as language, race, ethnicity and religion and examines the hybrid nature of Article 27 as a right given to individuals to be exercised 'in community' with other members of the minority group. The main contention of this chapter is that Article 27, despite its fairly weak language, requires more than the toleration of minorities and requires some active encouragement of their right to identity. The ultimate test of whether the right to identity can be exercised freely is not simply whether there is no restriction on the exercise of the right by individuals, but whether the minority as a group has the resources and encouragement to exercise the right in public fora through, for example, the establishment of schools or through education in the minority's language. Included is a useful examination of the use of the First Optional Protocol to bring claims for breach of Article 27 before the Human Rights Committee.

Part V looks at the right of non-discrimination and its application to minorities. The main point is

that non-discrimination can and should allow for recognition of difference and affirmative action. Particular reference is made to the strongest prohibition on discrimination at international law, the prohibition on racial discrimination, and an appraisal is made of the consequences of the 'spectre' of apartheid for a full recognition of the right to identity or the right to be different. This is of interest to Australian readers, who will make cross-references to the cries of 'discrimination' and 'apartheid' which so often meet Aboriginal demands for land rights.

The rights of indigenous peoples — closely related to the rights of minorities because indigenous peoples are so often minorities — are examined in part VI. This is a particularly sensitively written chapter as the author is at pains to expose the inadequacy of the existing law — contained mainly in International Labour Organization Convention 107. The existing law is paternalistic and outdated as it falls into the trap of focusing on integration in response to the low economic status of many indigenous peoples, whilst ignoring the right to identity and the intrinsic value to indigenous peoples of maintaining their cultures. 'Valid criticism and reform of the present international system must incorporate in some form the indigenous peoples' perception of their relationship to international law.'[1] The reference to the need for indigenous peoples to have input into international law is made in the context of the practical realization that the present actors in international law, nation states, are unlikely to concede the claims made by some indigenous peoples to full external self-determination or secession.

The conclusion draws together the author's findings on what are the established rights of minorities and what norms are continuing to evolve in the context of the various tensions dealt with throughout the book. One important tension, that between the rights of minority groups and the universal rights of individual members of minority groups, which is mentioned at a few points in the book is again dealt with in the conclusion. The problem of cultural relativism (whilst not invoked by name) and the questions frequently raised about practices within minority groups which may infringe universal human rights, is dealt with as a matter of choice for the individual. There is no room for 'group determinism' within the International Covenant on Civil and Political Rights, says Thornberry: the individual can choose between the rights which attend membership of that group and the universal rights of the individual.[2]

This seems only a partial solution, given that the problems for an individual wishing to assert rights against the group may be greater than the problems faced by groups trying to assert rights against the state: however, the debate on absolutism versus relativism attends all of rights discourse and charges of cultural relativism can be used, similarly to charges of apartheid, as an excuse to deny the right to identity. The barriers to the recognition of the rights of minorities and indigenous peoples are not built on fears of cultural relativism but on the desires, well illustrated by Thornberry through extensive use of the *travaux préparatoires* to various treaties, of national governments for 'loyalty', cultural heterogeneity and stability. Thornberry argues convincingly for the right of minorities to defend their cultures from the power of the state.

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1 Thornberry, P., *International law and the Rights of Minorities* (1991) 369.
2 *Ibid.* 394.
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Human Rights in a Changing World by Antonio Cassese (Polity Press, Cambridge, 1990), pages 1-188, appendices 189-207, notes 208-226, bibliography 227-235, index 236-245. Price $59.95. ISBN 0 7456 0723 3.

Professor Cassese's latest book makes an important contribution to the literature on human rights. The author selects five of what he describes as '... the great scandals of our epoch':[1] genocide, torture, apartheid, the forced disappearance of political opponents and hunger in undeveloped countries. In discussing these examples of human rights abuses, Cassese takes a broad approach to the subject. He uses the examples not only to demonstrate the development of international human rights standards, but also the palpable inefficacy of such standards in the face of State sanctioned violations. Despite the discouragement of contemporary reality, however, Cassese believes that governments, non-governmental organizations and individuals can and do make a difference. It is difficult to read this book and respond passively.

The book is not a comprehensive, systematic text on the subject of human rights. Cassese explicitly states that it was not his intention to produce such a book. He argues that the subject has already been considered by constitutional lawyers, international lawyers, political scientists and philosophers, each of whom have tended to analyse from a specialized and therefore limited view. Cassese instead prefers a broad enquiring approach to a few select examples of human rights abuses.

The author's deliberate concentration on a few examples enables him to develop a more balanced, more complete analysis of human rights in the world. Cassese's book is also necessarily 'limited' but its limitations have more to do with the number of specific issues addressed rather than the analytical approach taken. The book is highly successful in achieving its specific objectives.

The book is written in three sections. The first section contains three introductory chapters which provide a contextual background for the rest of the book. In this section the author explains the process by which individuals and groups of peoples have come to be recognized as proper subjects of the international system. Cassese identifies two contributing processes at work: one is the adoption of a series of significant international legal instruments; the other is a growing global 'culture' recognizing the importance of human rights. Cassese examines the world's great cultural traditions and concludes that despite obvious differences in attitudes to human rights there are important areas of convergence enabling us to conclude that at least some human rights are truly universal.

In the second section of the book Cassese considers his five great scandals. Two of these — genocide and hunger in the undeveloped world — will serve to illustrate the author's use of the examples he has chosen.

In the chapter on genocide Cassese analyses the failure of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide to achieve any more than a normative standard of what 'ought to be'. The author identifies two major weaknesses in the Convention. First, the definition of genocide requires the 'intent to destroy' as an essential element of the crime. This allows States to argue that the commission of any alleged acts of genocide was not accompanied by the necessary intent. Second, the Convention lacks any effective enforcement mechanism. The perpetrators of genocide will only be punished if the State where they reside (whether or not it is the State in which the action occurred) is prepared to take action against the responsible individuals.

While these observations have been made by many commentators on the Genocide Convention, Cassese goes on and considers examples of genocide since the implementation of the Convention and laments the virtual uniform lack of effective international response to such situations. Cassese is critical of the dearth of political resolve by the international community to become involved and of the overly sensitive emphasis on the principle of non-intervention in domestic affairs at the cost of human dignity.

The chapter on hunger in the undeveloped world is a significant inclusion because it is rare to find a Western author writing about such an issue in a book on human rights. Cassese does not, however, provide a systematic analysis of the right to life or of the developed world's responsibility to feed the

[1] Cassese, A., *Human Rights in a Changing World* (1990) 4.

undeveloped world. Instead Cassese takes a well known case — the Nestlé Affair — and uses it to expose the inability of the West to challenge the goal of profit at the cost of human life.

Nestlé (like other multinational companies) was producing powdered milk formula for babies and marketing the product on a large scale in Third World countries. In the early 1970s several groups began to disseminate information about the deleterious effects of the distribution of powdered milk in countries where there was no running water, no opportunities for sterilizing baby bottles and little chance of illiterate people understanding written instructions for mixture and use of the milk. A Swiss group concerned with Third World issues translated an English pamphlet into German and entitled the pamphlet *Nestlé Tötet Babies* (Nestlé Kills Babies). Nestlé (with international headquarters in Switzerland) brought a criminal action against the group and succeeded in having the members of the group convicted of the offence of false accusation.

Cassese analyses the reasoning of the Swiss court and characterizes the judgment as 'clumsy, vacillating and a mixture of legal formalism and hypocritical moralism'.[2] He argues that the inescapable conclusion of the case is that 'the machinery of the law has been used to make strength prevail over justice'.[3] Cassese bemoans the power and unregulated influence of multinational corporations who still sell more than US$2,000,000,000 of substitutes for mothers' milk in the Third World every year. Nonetheless, he does not conclude on a pessimistic note. He claims that criticism and long, impassioned campaigns have made a difference and the enormity of the task is not a sufficient reason to capitulate to the multinationals.

In the third and final section of the book Cassese outlines what he believes to be the value of human rights standards in the contemporary world. He cautions against both pessimistic inaction and unrealistic idealism and challenges his readers to recognize the achievements of the human rights movement as a motivation to continue in the struggle to achieve effective minimum standards for the treatment of people. Cassese argues that States must be willing to sacrifice some sovereignty to ensure universal respect for human dignity. The impetus for such change will come not from political institutions or government bureaucracies but from people 'who contribute in a thousand different ways and at different levels to the patient, humble tasks that must be accomplished day by day'.[4]

Cassese includes as an Appendix a useful practical guide to 'The Main International Organizations Active in the Field of Human Rights'. Cassese briefly describes the work of the relevant Intergovernmental and Non-Governmental Organizations with addresses of the international headquarters of each of the NGOs.

This book is worth reading for anyone with even a slight interest in Human Rights.

TIM MCCORMACK*

2 *Ibid.* 142.
3 *Ibid.* 149.
4 *Ibid.* 187.

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What's Wrong With Rights? Problems for Feminist Politics of Law by Elizabeth Kingdom, (Edinburgh University Press, Edinburgh, 1991) pages vi-xi, 1-152, notes 153-57, bibliography 158-167, index 168-172. Price £25 (hardback). ISBN 0 7486 0250X.

Fran Olsen recently titled a review of Catharine MacKinnon's *Feminism Unmodified*[1] 'Feminist Theory in Grand Style'.[2] In this genre, Elizabeth Kingdom's *What's Wrong with Rights?*, might be called 'Feminist Theorist Rejects Grand Style', or even 'Feminist Theory in Modest Style'. I use this terminology for a number of reasons. In her introduction, Kingdom rejects the 'grand theorising' of both Carol Gilligan and Catharine MacKinnon, accusing each of essentialism, the essentialism of different voices and male power respectively. Along the way she also throws the accusation of essentialism at another critic of these authors, Carol Smart (*Feminism and the Power of Law*, 1989), whose analysis Kingdom describes as 'nonetheless dependent on the essentialist concept of law's power as derived solely from its self-confirming claim to singularity and unity'.[3] A feminist analysis that rejects 'essentialism', is less likely to be described as 'grand theory'. Secondly, Kingdom's own analysis, whilst it could be superficially described as a rejection of rights discourse — a grand claim, if not a grand theory — in fact pragmatically embraces such a discourse when, in her view, it can still be useful. Kingdom invites readers to 'detect essentialism' in her own work, admitting that it is easier to see it in others than in oneself. I have eschewed this invitation and still enjoyed the book.[4]

What's Wrong with Rights? is largely a collection of Kingdom's previously published works in this area, although some changes have been made and references updated. Even for those who have managed to read all of Kingdom's previous work, a reading of them together as a sustained critique of rights discourses is warranted. Further, Kingdom has included internal references to preceding and subsequent chapters, adding to the coherence of the analysis.

The first two chapters analyse the meaning of sexist bias in law as used by a variety of theoreticians. In the second chapter Kingdom sets up the three models as a way of analysing these various theoretical interventions: 'sexist bias as intervention in law' where she describes theorists (*e.g.* Sachs and Wilson whose work *Sexism in Law*, is also the subject of a more detailed critique in ch. 1) who assume the impartiality of law which is only rendered partial by the intervention of non-legal factors — say, economic, class or 'patriarchal' interests. The second model, 'sexist bias in law' describes theorists who, in Kingdom's view, see the law as intrinsically sexist, rather than searching for extra-legal factors which make it so and who thereby see law reform as the means for ending law's sexist bias. The third, 'sexist bias as effect of law' covers those who concentrate on law's far-reaching role in causing inequality between men and women in the extra-legal sphere. This model has two versions: Model 3a, which presumes that law is inevitably oppressive, and Model 3b, which views law as sometimes having positive effects for women. Those who know Kingdom's work will not be surprised to learn that Kingdom believes that Model 3b has the greatest purchase for achieving socialist feminist objectives. For Kingdom, such a model leads to specific analyses of particular areas of law and their effects on women, rather than sweeping generalities. And it is in these specific analyses that I believe Kingdom's book is most effective, as her own theorising suggests.

There are three specific topics (or four, if you count her discussion of formal Bills of Rights as specific) covered in this book: abortion, sterilisation and cohabitation rights. Of these, the analysis of discourse surrounding abortion is most successful. Here she warns against the use of the language of 'a right to choose': it is a discourse more amenable to seeing abortion as an aspect of privacy than as a collective right; as well, as an absolute right the 'right to choose' is meaningless — we would

1 MacKinnon, C. A., *Feminism Unmodified: Discourses on Life and Law* (1987).
2 (1989) 89 *Columbia Law Review* 1146.
3 Kingdom, E., *What's Wrong With Rights? Problems for Feminist Politics of Law* (1991) 6.
4 See Gallop, J., Hirch, M. and Miller, N. K., 'Criticizing Feminist Criticism' in Hirsch, M. and Fox Keller, E. (eds) *Conflicts in Feminism* (1990) for an interesting warning about such a 'search and destroy' mission.

have to disengage from debates about safety in abortion practices, time limits and other social conditions which can make abortion a realisable option for all women, not just those with the money to pay for it. She points out too, in a note on the *Bobigny* case[5] that an appeal to a transcendent right can be met by an appeal to an equally compelling transcendent right, here a 'right to life'. Which right ends up prevailing is likely to be a function of prevailing political forces and, Kingdom argues, a fight over rights will assist in suppressing discussion of wider social issues.

Kingdom's discussion of sterilisation is less successful, perhaps because of the complexity of the issue. The question of sterilisation can arise in a number of different contexts. There is a world of difference between the issues raised by sterilisation as contraceptive method of choice by some (hopefully properly informed) women and men, and the eugenic sterilisation of women with intellectual disabilities and, effectively, of poor women, particularly women of colour. Within each of these areas, there are complex and distinctive legal issues: who can give consent to either form of sterilisation — what if a man's consent to his wife's sterilisation is sought, but not her consent to his vasectomy? Is it up to a medical practitioner, parents or the court to authorise a 'non-therapeutic' sterilisation of a young woman with an intellectual disability? And how should feminists respond to the 'package deal': the anecdotal evidence that unmarried women in the U.K. are offered an abortion provided that they agree to be sterilised? Kingdom raises all of these questions and argues that the adoption of a discourse of rights — either the right to choose or the right to reproduce is a dangerous course in trying to develop a feminist response to these issues. If a women has a right to reproduce (the language used to a progressive end to prevent the sterilisation operation on a 11 year old girl with Sotos' syndrome in *Re D*[6]), then it is easy for men also to make this claim.[7] And, Kingdom points out, the discourse of rights can hide differences amongst feminists and divert attention away from dealing with the enormous diversity in the need for/resistance to sterilisation. This chapter raised many of the diverse issues in relation to sterilisation, but I would have liked to hear more. I think more could be made of the exclusion in much feminist policy formation of the interests of poor women and women of colour more generally; if the 'package deal' is being 'offered' to unmarried women in the UK, the evidence from other countries suggests it is also being differentially offered to poor women, aboriginal women and other women of colour. Whilst Kingdom recognises that a feminist response to sterilisation cannot be simply formulated from a particular feminist analysis, and suggests the complexity required in a feminist response to sterilisation, her own (avowedly non-exhaustive) analysis of responses — 'deregulation', 'mandatory provision', or 'safeguards' — fails to identify overtly which groups of women each kind of policy is most likely to benefit. To be fair, the aim of her analysis is largely to articulate the range of (contradictory) options which can be hidden under the rubric of the 'right to choose'; however her analysis of these options would have been even more telling if the diversity of women's experiences of sterilisation were more explicitly described. By this stage of her analysis, we have lost sight of the concerns of women with severe intellectual disabilities, although the emphasis on 'safeguards' (rather than deregulation or mandatory provision, the latter a somewhat unfortunate term in this context) is more likely to encompass their interests. That is, Kingdom has managed to recognize many women's different interests in the issue of sterilisation, but she perhaps needed to spend more time developing the way this recognition could and should transform the analytic framework. And at the risk of exposing my own essentialist underwear, can the difference in result between *Thake and another v. Maurice*[8] (a successful claim for damages for the cost of raising an unexpected (girl) child after a failed male sterilisation) and *Udale v. Bloomsbury Health Authority*[9] (an unsuccessful claim for damages for the cost of raising an unexpected (boy) child after a failed female sterilisation) be adequately explained by an avoidance of rights rhetoric in the former? Kingdom does not posit the avoidance of rights rhetoric as *the* analysis of these contrasting cases, yet she hints at it. She suggests that such an avoidance will not necessarily lead to a decision that feminists will support, but that:

5 Kingdom, *op. cit.* 60-2.
6 *Ibid.* 65-6.
7 *Ibid.* 79.
8 [1986] Q.B. 644 (C.A.).
9 [1983] 2 All E.R. 522.

> the advantage would lie in the opening up of questions of policy. Since the claiming of rights usually has the effect . . . of overriding questions of the wider calculation of the proper distribution of social benefits, the avoidance of rights claims is a strategy which should facilitate discussion of that calculation.[10]

Yet I do not think Kingdom's analysis can be maintained here. For as it was not because *Thake* involved a failed vasectomy and *Udale* a failed laparoscopic sterilization that the different result occurred, nor is it true to say that public policy considerations were avoided in *Udale*. Indeed, the judge in *Udale* is at pains to discuss the policy considerations from the point of view of the child[11] and to comment on Mrs Udale's 'maternal instincts', and her (their) desire for a boy child after the birth of four girls; that the parents' point of view and their financial need was of more relevance in the *Thake* case is hard to 'read off' from an avoidance of rights discourse in the latter. Whilst I disagree with Kingdom's specific analysis here, what is really of more interest is that she includes a case on damages for failed sterilization in a general discussion of the development of feminist policy on sterilization, a move which allows her, indeed requires her, to complicate her discussion.[12] That is, even if you disagree with her conclusions on these cases, she demonstrates that she takes her own rhetoric seriously — detailed scrutiny of law is required, even law that appears to be peripheral to the general policy debates in a particular area in order to develop a properly nuanced analysis.

In Chapter 8, Kingdom suggests feminists might cautiously support the introduction of a formal Bill of Rights in the UK. She argues it is not impossible for such a Rights document to encompass economic and social rights, rights of particular importance to women, and emphasizes the importance of a symbolic victory if such a rights document explicity accorded women and men the same rights. Further, as she notes in her conclusion, the issue is more how to respond to a discourse of rights, particularly a formal Bill of Rights, rather than whether such a debate may be avoided.

At various places throughout the book, Kingdom suggests language that could be used to respond to rights discourse without necessarily using rights language. For example, in relation to a formal Bill of Rights, Kingdom argues that rather than 'putting claim and counter-claim for rights', it is more useful to 'scrutinis[e] small print and calculat[e] the likely effects of such a bill on existing legislation, legislative practices, and social institutions'.[13] Elsewhere she draws on the language of 'capabilities, capacities and competences'. These terms she argues are preferable to the language of 'women's rights' as these terms are both general to a large number of areas of law and yet have specific meanings in legal discourse whilst also being central to a series of current legal debates.[14] Once again, I want more. I think her suggestions are interesting, particularly where she refers to a feminist document presumably unavailable here, *A Woman's Claim of Right in Scotland*. This document addresses specific strategies to improve women's political status, without once, according to Kingdom, using the language of rights.[15] I would have liked her to develop the language of competences and capacities in, say, the discussion of sterilization more fully. Whilst she does discuss what 'safeguards' on the provision of sterilization might be required in order to ensure that a fully informed consent was given, an explicit demonstration of the utilization of her suggested new discourse would have been even more convincing.

This is a coherent and developed critique of the discourse of rights and the problems, and advantages, of such a discourse. At one point Kingdom describes the main theme of her book 'the position that there is no single principle from which to derive feminist politics'.[16] Her book is a significant demonstration of the fact that 'women's rights' cannot perform that function and the necessity for specific and detailed responses to particular legal issues.

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10 Kingdom, *op. cit.* 83.
11 *Ibid.*
12 See, in particular, Kingdom's discussion of the calculation of damages in *Thake*, *Ibid.* 83.
13 *Ibid.* 115.
14 *Ibid.* 43-5.
15 In this context see Fraser, N., 'Women, Welfare and the Politics of Need Interpretation' in Fraser, N. (ed.) *Unruly Practices* (1989).
16 *Kingdom, op. cit.* 127.

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The Hidden Gender of Law by Regina Graycar and Jenny Morgan (The Federation Press, Australia, 1990) pages v-xxii, 1-419, bibliography 421-449, index 450-464. Price $45.00 (soft cover). ISBN 1 86287 041 1.

In setting out to write a book that is both a 'law book' and a 'book about law'[1], Graycar and Morgan explode another of the positivist dichotomies that pervade the formulation of Western legal thought and perpetuate the oppression of women. Black-letter law as pronounced by judgments and by legislation is not, as we are often still led to believe, the sum total of *real* law. Law is not divorced from the everyday experience of people and thereby somehow objective and autonomous. Law is a social process which both constructs and contests our social realities and relationships.

Over the years, feminists have oscillated between hostility and hopefulness in their approaches to the law. On the one hand the law has been theorized as an irredeemable tool of the patriarchal state. On the other hand the potential of the legal system to be a vehicle for the achievement of equality and justice for women has been asserted. The precariousness of feminist legal reforms that have resulted from this latter approach is now well documented. There is little doubt that gains have been small in number, tenuous and 'uneven'.[2]

As a result, feminist legal theorists have turned their attention to the *form* of the legal system and the possibility that it is the *structure* of legal method that makes the law 'impervious' to feminist challenge.[3] In so doing, feminist legal strategists are moving beyond the confines of positivist jurisprudence in order to devise a 'transformative' vision of legal theory and practice.[4] *The Hidden Gender of Law* is a valuable contribution to this endeavour. Graycar and Morgan describe their project as 'beginning a reconstruction of law to make it more responsive to women's lives'[5] by providing 'a mode of analysis that presents possibilities'.[6]

Graycar and Morgan locate their epistemological foundation within women's experience. By moving women from our erstwhile position of *other* to that of *subject*, they cast aside the claim that traditional legal categories are universal. These categories have also served to fragment women's lives, often beyond recognition, obscuring both the practical experience of women and the role of the legal system in constructing a particular discourse of *woman*. By dispensing with the boundaries drawn by these categories, sub-texts of legal characterization and legal treatment of women become visible.

Graycar and Morgan choose three of the emerging sub-texts to form the major parts of the book: women and economic (in)dependence; women and connection; and injuries to women. Within each of these sections familiar feminist themes are highlighted, particularly, the legal distinction between private and public spheres, the usefulness of various models of equality, and the gendered partiality of legal precepts. They draw on a staggering range of source materials that encompass Australian, British, Canadian and North American legal experience and critique. A chapter on legal education and curriculum also ensures the book's utility as a teaching aid. The resulting bibliography is not only impressive, but enormously useful. The comprehensiveness of this approach overrides an occasional niggling frustration with the apparent reticence of Graycar and Morgan to tell us of their own conclusions and views about the material they present.

In the chapters exploring women's economic position, the authors utilize Dahl's tripartite conceptualization of women's economic options.[7] They canvass the areas of waged employment, marriage (*de facto* or *de jure*), and social security (in Dahl's terms, 'social insurance'), and the

1 Graycar, R. and Morgan, J., *The Hidden Gender of Law* 6.

2 Smart, C., 'Feminism and Law: Some Problems of Analysis and Strategy' (1986) 14 *International Journal of the Sociology of Law* 116.

3 Mossman, M. J., 'Feminism and Legal Method: the Difference it Makes' (1986) 3 *Australian Journal of Law and Society* 45.

4 Thornton, M., 'Feminist Jurisprudence: Illusion or Reality?', (1986) 3 *Australian Journal of Law and Society* 23.

5 Graycar and Morgan *op. cit.* 6.

6 *Ibid.* 13.

7 Dahl, T. S., 'Women's Rights To Money' (1984) 12 *International Journal of the Sociology of Law* 137.

connections between them. They explore how the legal system discourages women's economic independence by validating formulations that, for example: lay claim to a separation of private and public spheres of life; devalue domestic labour; construct the worker as male; and presume women's economic dependence on men. Graycar and Morgan provide a sobering assessment of the gains made as a result of feminist initiatives in this area. The intended goals of equal opportunity and anti-discrimination legislation have been severely restricted, if not totally thwarted, by legal application and interpretation. Likewise, apparently progressive reforms in the area of family law have utilized notions of equality that are detrimental to women's interests.

The section on 'women and connection' exposes the way in which the law constructs women in relation to others. Whilst this is not necessarily undesirable, it is anathema to the liberal legal system that conceptualizes legal entities as individualized and autonomous players. The relegation of women to relational categories such as mother, wife, pregnant and daughter, is one of the mechanisms through which the legal system defines women as *other*. This ensures that we do not fit the independent and separate (male) standard. Graycar and Morgan explore the implications of this for women across a broad spectrum of legal areas including tort, criminal, and family law. Of central importance to most women is our relationship with children. Making judgments about our worth as mothers has provided a particularly potent means of controlling women. Moralizing and oppressive stereotypes of good and bad mothers are constructed and reinforced by the legal system's approach to such issues as foetal rights, surrogacy, abortion, custody, and wardship. Under the guise of protection of children, the legal system serves sexist, racist and middle class agendas that perpetrate the oppression of women.

The third section of *The Hidden Gender of Law* constructs a framework within which it is possible to recognize the gendered nature of injuries to women, that is, that they happen overwhelmingly to women because of our sex. Graycar and Morgan draw on Howe's conceptualization of social injury as the 'lived, internalized experience of lower gender status as personal failure'.[8] They agree with her contention that the notion of gender-specific injury may be a useful tool for extracting legal remedies for harms endured by women, since the idea of *injury* is legally cognizable. They position a diverse array of women's injuries along a continuum stretching from those experienced and responded to as individualized, to those perpetrated against all women. By this means domestic violence, medical interventions (associated with contraception, pregnancy and cervical cancer), rape, sexual harassment, pornography and media vilification are drawn into the same frame. The potential and the obstructiveness of legal responses to such injuries to women is explored, especially *via* an excellent case study on domestic violence.[9]

The final chapter on strategies is disappointing both in its brevity and its openendedness. However, this may arise more from my residual desire for an outline of the definitive way forward, rather than from shortcomings of the chapter itself. Indeed, the book has prompted me to abandon my search for an absolute understanding of the law's role in the construction of gender. Graycar and Morgan achieve their goals of opening possibilities for analysis and action, and of suggesting conceptualizations that can be utilized in the processes of exposing concealed legal *agenders*.

DIANNE OTTO*

[8] Howe, A., 'Social Injury Revisited: Towards a Feminist Theory of Social Justice' (1987) 15 *International Journal of the Sociology of Law* 423, 433.

[9] Graycar and Morgan *op. cit.*, ch. 11.

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Human Rights in the World by Dr A. H. Robertson and J. G. Merrills (Manchester University Press, third edition, 1989), pages i-vi, 1-305, index 306-314. Price £19.95 (hardback). ISBN 0 7190 2278 9.

Human rights have become a matter of international concern at two levels. First, there is the concern manifested by the increasing activism of groups such as aid organizations and non-governmental organisations (NGOs) and the greater awareness displayed (often dramatically and always irregularly) in the wider community. Second, the protection of individual human rights has become a recognized part of international law since 1945. Unfortunately, at the public level, international law can often seem invisible. The legal aspect of human rights is frequently either ignored or marginalized. Everyone has heard of Amnesty International or the Kurdish crisis, but few have any awareness of the First Optional Protocol to the International Covenant on Civil and Political Rights (I.C.C.P.R.) or the United Nations Human Rights Committee.

An introduction to this less visible aspect of the human rights story is provided by J. G. Merrills in a competent and informative update to the late Dr A. H. Robertson's standard introduction to human rights law. This, the third edition of *Human Rights in the World*, purports to be neither exhaustive nor particularly detailed but it does fulfill its brief diligently enough. That is, it offers the human rights novice a guide to the various international instruments designed to protect the rights of individuals and groups within the international legal system.

In the main body of this study Merrills deals with three distinct jurisdictions. First, he sets out the various methods employed by the United Nations and its agencies to develop and promote the realization of human rights. Then, there is a substantial section on the favourably regarded European Convention on Human Rights and the mechanisms adopted by the Europeans in pursuing human rights goals. Finally, the American Convention on Human Rights is considered. These three chapters are by far the most accomplished and Merrills is to be commended, in particular, for explaining the workings of the labyrinthine United Nations system with such clarity.

Of particular interest to Australians should be the discussion of the workings of the Human Rights Committee under the I.C.C.P.R. Australia signed the First Optional Protocol to the I.C.C.P.R. last year, thereby permitting individuals within Australia to bring complaints to the Committee. While the Committee has dealt with a mere 20-25 communications[1] each year, it has developed a useful jurisprudence. Merrills makes the important point that not all communications arise from severe human rights abuses (such as in the Uruguayan cases of the early 1980s). Many are concerned with maladministration[2] and some have involved issues of great complexity where human rights standards themselves were in potential conflict.[3] Nonetheless, Merrills warns us not to view the Committee as a Supreme Court of Human Rights. It represents only one component of the United Nations structure. Others include the Resolution 1503 procedure of the Economic and Social Council, the interstate complaints mechanisms of Article 41 of the I.C.C.P.R. and the reporting process outlined in Article 40. None of these have been unqualified successes and Merrills' rather depressing conclusion seems to be that, on a universal scale at least, only those human rights instruments with the most modest ambitions can avoid outright failure.

We can derive more encouragement from the operation of the European Convention on Human Rights if only because the political and philosophical consensus within that community is more likely to generate effective standard setting and implementation. Attempts to extend those community standards beyond Western Europe have been relatively unsuccessful. The Helsinki Accords were crippled, not so much because of the refusal on the part of the then Eastern bloc to 'regard their

[1] Only 5-10 have been decisions on the merits: Robertson, A. H. and Merrills, J. G., *Human Rights in the World* (1990) 65.

[2] *Ibid.* 62-4.

[3] This was true of the *Lovelace* Case Comm. No. R. 6/24, Decision of 30 July 1981. Text in (1981) 2 *Human Rights Law Journal* 158) where a determination by the Canadian Government to amend legislation as a result of a United Nations Human Rights Committee decision was challenged by some First Nations leaders on the basis that the change, while securing certain rights under the Covenant, simultaneously threatened the right to cultural self-determination: *ibid.* 64-5.

undertakings seriously',[4] but because the ideological gulf and political hostility existing between the two communities served to undermine the false consensus achieved in the Agreement.

The different emphases placed on specific human rights and/or strategies of enforcement across the various jurisdictions and schemes are conscientiously identified by Merrills. Thus we find that while in the European system the interstate complaints procedure is obligatory for contracting parties, within the American system it is optional. The reverse is true for the individual petition procedure within the two systems.[5] The author clearly finds it interesting to make these comparisons and there are many scattered throughout the text.[6] Unfortunately, few conclusions are drawn about these differences.

When Merrills does take on the larger theoretical questions the book becomes less convincing. His assumptions are transparently those of the progressive liberal. For example, one might be hard pressed to locate the 'widespread recognition of the need to render the system of international protection more effective'[7] beyond a small coterie of academics and human rights lawyers. Surely it is the rather more widespread fear of such a development on the part of states representatives that makes this highly unlikely. Also, the book has a habit of distinguishing between those states practising imperfect brands of liberal democracy 'with its respect for fundamental rights'[8] and the rest of the world community. No examination of the role these same democracies play in maintaining that distinction is thought necessary. There is, however, a critique of the Convention on the Elimination of All Forms of Discrimination against Women. Article 5 of that Convention requires states to take 'all appropriate measures to modify the social and cultural patterns . . . with a view to achieving the elimination of prejudices [and] stereotyped roles for men and women'. For a book so resolutely uncritical of human rights universalism, the concern that this Article 'might permit States to curtail to an undefined extent privacy . . . and the freedom of opinion and expression'[9] is certainly revealing.

The absence of analysis is not untypical of the book as a whole. Indeed, the one large question is left unanswered: if so many of these implementation procedures are designed to be ineffectual,[10] what function are they playing? What does the sheer scale of non-compliance tell us about human rights law? Is it capable of resisting Benthemite reservations about its very status *as* law? (The analogy drawn between human rights abuses and domestic crime seems pat and unconvincing in this context.[11])

Of course a book like this is bound to have theoretical deficiencies. This is, after all, an introduction, and to be fair to Merrills he does raise most of the theoretical issues in the brief space afforded this aspect of human rights law. Its strengths, though, are undoubtedly to be found in the description of the structural arrangements underpinning the protection of human rights at international and regional levels. Anyone expecting more than a cursory discussion of the profound philosophical and political dimensions of the human rights field will be disappointed. Conversely, more modest expectations should be met handsomely.

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4 *Ibid.* 156.
5 *Ibid.* 52.
6 *E.g. ibid.* 192-3.
7 *Ibid.* 2.
8 *Ibid.*
9 This argument of Thomas Meron's is quoted with approval: *ibid.* 92.
10 *Ibid.* 298.
11 *Ibid.* 1.

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BOOKS RECEIVED

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Freedom of Information by V. R. Krishna Iyer (Eastern Book Company, Lucknow, 1990) ISBN 81 7012 432 8.

Precedent in the Indian Legal System by A. Lakshmi Nath (Eastern Book Company, Lucknow, 1990) ISBN 81 7012 425 5.

Human Rights: Australia in an International Legal Context by Peter Bailey (Butterworths, Sydney, 1990) ISBN 0 409 30057 8.