REVIEWS

Laura Bennett, **Making Labour Law in Australia: Industrial Relations, Politics and Law**, Law Book Co, 1993, pp xxxvi, 253, $55 (pbk).

In writing her book, *Making Labour Law in Australia*, Laura Bennett makes a valuable contribution to the philosophical and historical writing long dominated by men. The book surveys the historical, political and economic context of Australian labour law. In so doing, the author writes of relatively unexplored dimensions of its evolution, including award evasion, enforcement agencies, the jurisdictional questions raised by increasing deregulation, and the exploitation of 'outworkers'. Bennett's work is ambitious for its size. It attempts to provide an extensive historical 'scaffolding' to legislative developments and common law interpretations of industrial collectivism in Australia. She underpins this historical analysis with an adequate sensitivity to the economic factors that play on the law, notes the law's anomalies and calls for its change. I believe that criticism is the lifeblood of left-wing theorising, and so I shall direct my comments toward the ways in which I believe a subsequent work by Bennett could be improved.

My first concern is the near absence of an epistemological framework. Bennett rejects the 'static' approach of text-book positivism and suggests that the true locus of theory ought to lie in conceptualising labour law as a social phenomenon. She is driven toward exposing the hidden hand of the common law and the relationship between government and a dominant class she is unable, or unwilling, to try to identify. She does not find a relationship between Menzies' conservatism and the interests of big business. Instead, the focus of her attack is the easy target of the more self-evident connection between the common law and the interests of employers as embodied in the status assumptions of the master and servant relationship. She suggests that the study of the evolving conflict between law-creating institutions assumes a paramount importance. The real focus of any critical examination of labour law needs to be the explanation of the interests of the dominant class as they relate to the role of the law-making institutions (provided you can define the class and analyse the relationship). A thorough going look at structuralism in the modern Australian industrial context is sorely needed.

One of the major criticisms of structuralism is that it 'has the cake and eats it too': when reductionist Marxism does not do the

trick, take refuge in the 'autonomy of the law.' This says that the

> ... law ultimately reflects and sustains the social order, yet has its own internal logic and unique modes of discourse ... that are to some extent independent of the will of the powerful, non-legal, social and political actors.'[1]

Poulantzas maintains that this very autonomy best enables legislators and judges to organise the interests of the dominant class as a whole. When the workers win a legal battle (reductionism receives a heart tremor), it is because the law actually *has* to be just occasionally, to retain its credibility and to quell murmurs of class consciousness and revolt.

I fear Bennett has failed to take a stand either way. She does not dive into the historical murk which preceded arbitration with a reductionist approach, and attempt to reconcile or explain the difficulties she would find. Instead, she opts for the sphinx-like (which way is it looking?) safety of Fisher, Mitchell and others who all join in the chorus of 'things weren't that simple.' Another example in point: Bennett looks to the US to check whether there is a link between strikes and arbitration. She concurs with the tiresome pluralism of Finkin: the NLRA embodied several inconsistent goals. If Bennett had given a little more weight to writers like Klare, she would have concluded differently. The NLRA, and in particular the duty to bargain, was a radical response to the strikes of 1934, a response which was pointing in the direction of compulsory arbitration. In fact Section 1 of the NLRA positively raves about the threat of strikes. In *NLRB v Jones and Laughlin Steel Corp*[2] the Supreme Court rejected the potential interpretation of the Act in favour of compulsory arbitration interpretation, with these words:

> The Act does not compel agreements between employers and employees. It does not compel any agreement whatever. It does not prevent the employer 'from refusing to make a collective contract and hiring individuals on whatever terms' the employer 'may by unilateral action determine'.[3]

The theoretical relationship between the rights-maximising legislature and the rights-minimising judiciary is what needs to be proven in the Australian context. Have economic factors been determinant in first, last or no instance? Merritt has begun the task with her consideration of nineteenth century master and servant

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1 Klare, 'Judicial Deradicalisation of the Wagner Act and the Origins of Modern Legal Consciousness' 62 *Minn L R* 265 at 269 (1978).

2 301 US 1 (1937).

3 Id at 45.

legislation. However, contemporary questions have long gone unanswered. Can the utterances of judges in Menzies' time be linked to a definable class interest? Instead of extensive critique, Bennett touches on the *Boilermakers' Case* and the *Seamen's Case* and leaves it there. More frustratingly, Bennett cites the American experience from time to time, and instead of exploring the contradictions she chooses to ignore them, as if she does not want to confuse the reader or waste time on 'side issues'.

Bennett later writes:

> The legislative history of various governments indicates not simply the (very predictable) importance of factors such as electoral and economic considerations and the significance of groups such as the unions but also the importance of intangible factors.'[4]

Is Bennett saying, 'I'd go further left if I could find the evidence' ? Intangible factors? Most writers of the Left have their work cut out for them to persuade the world that economic factors are consistently tangible. At no stage does Bennett state a bottom line, either because she has not seen it or because the seductions of postmodernism have robbed her of the capacity.

Consider two rather blunt rhetorical statements: (i) the law is used by the dominant class as an oppressive tool on the propertyless to keep them propertyless; (ii) the expansion and contraction of law permitting collective action is dependent on capitalist economic cycles and the related needs of the propertied classes. These are the two 'controversial' terms of reference for a writer of the Left. You either grapple with them or you join the Pluralists: out of harm's way, standing above the barricades, wanting to see everybody's side of the argument and to recognise and legitimate the diffusion of power across institutions and classes. In large part, the generosity of conciliation and arbitration to workers may account for the conspicuous absence of an academic tradition which would overtly match Marxian theory with Australian industrial law. Perhaps this will change as wage differentials widen and disadvantaged workers aren't so much awardless marginals but of the commonplace. The problems of reductionism and the self-fulfilling tendencies of structuralist prophecy are not insurmountable. It is a problem which all unassuming writers of the Left share: it is unfortunate that Bennett did not tackle it more explicitly.

My second criticism of the book is in its use of language and generalisations at certain points. Bennett uses words like 'labourist',

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4 Bennett, *Making Labour Law*, p 63.

'fluidity' and 'downgrading' without adequate explanation of who or what the words are being used to describe. This is particularly frustrating when she plants the seeds of a radical criticism of the evolution of Australian labour law. Bennett successfully identifies the influence of trade union ideology on the Australian Labor Party. This was not a particularly difficult exercise. She reports that one of the party's ideological desires was to 'eliminate, reform or downgrade the importance of non-representative institutions such as upper houses, the Constitution and the courts.'[5] When she combines this idea with the goal of the unions as bodies which undertake to 'civilise capitalism',[6] I see the beginnings of some truly exciting possibilities for the research and the development of a theory of greater importance. Bennett has a very engaging style of writing. However, she needs to pay more rigorous attention to the way she uses certain words and needs to expand on a generalisation rather than deliver it as a *fait accomplis*.

This is especially evident in her dabbling with comparativism. Bennett reports that 'In the eighties Britain also saw a significant escalation in the passage of anti-union legislation.'[7] My immediate response to this is 'yes, but ...'. Far more significant than Thatcher's rhetoric of a worker's 'freedom to choose' (and her 'Reds in the GHQ' antics) was the progressive disestablishment of collectivism through the abolition of Wages Boards and minimum wages for a variety of poorly organised workers. This was the thrust of Thatcher's attack. I strongly suspect Bennett's occasional lack of substantiation may lie more in the 'tyranny of breadth' of her work than in the defensibility of her views.

My final substantive criticism lies in the topical emphasis of her work. There are at least two ways to proceed: tackle labour law by topic and make it easy to read or present a clearly defined ideological framework and see if the industrial reality measures up. Bennett's decision to do the former leaves the reader wanting more. It is only in Chapter Nine that Bennett begins seriously to deal with the implications of Australia's transition to a decentralised system of industrial relations. Even then, the Chapter bounces eclectically from jurisdiction to jurisdiction, to specific issues, such as the New Right or women under enterprise bargaining - it all being braced by a 'grab-bag' of sources. This Chapter ought to have been a meticulously organised, critical indictment of the folly of decentralised systems in Australia. Instead, Bennett draws together

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5 Id at p 39.

6 Ibid.

7 Id at p 217.

her themes and fails to give an extensive critique of modern developments. Perhaps such a critique could be successfully spliced into preceding chapters on a temporally comparative basis.

Most of my criticisms have centred around the assertion that Bennett's book does not go far enough. This is because she has awoken an excitement for ideas which, given the scope of the book, cannot always be satisfied fully. Bennett's book marries a much-needed consolidation of left-wing critical thought about labour law with profound and original insights into its operation. Her 'close to the action' treatment of the jurisdictional wrangles of the Fifties and Sixties is excellent. Particularly good are her (all-too-brief) abstractions about bias in the judicial process. She notes the need to understand theoretical suppositions through first-hand experience of court proceedings. It is, for instance, one thing to note the status assumptions of the master and servant doctrine; it is another to give a first-hand expose. Only then can the demonstrable antipathy of the courts toward workers be understood and conveyed. Immersion in the events and in the philosophies of industrial parties (the way Walker did with the Broken Hill miners) is a great tradition in Australian critical writing about industrial relations in general, and a particular strength of Bennett's book.

My final comments are more general in nature. Kahn-Freund, the British labour law theorist, once wrote, 'there exists something like an inverse correlation between the practical significance of legal sanctions and the degree to which industrial relations have reached a state of maturity.'[8] Bennett's book has made me question the truth of this assertion. Kahn-Freund's view owes more to Durkheimian sociology than to the values and aims of class struggle and the relation of law to it. Bennett's book has shown me that an unregulated and high trust system of industrial relations can merely mean that the oppressed have a higher tolerance of exploitation.

Conciliation and arbitration delivered an armoury of rights and entitlements to Australian workers. I think that Bennett's book portrays it as a system which 'had its heart in the right place'; it was because of its regulatory nature that it was mature and sophisticated in its protection of weak and marginalised workers. I learnt a great deal from this book. However, the theoretical and practical determinence of economic factors is left safely in the background, at a time in which such analysis should be bursting to the fore. The

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8 O Kahn-Freund, 'Legal Framework' in Flanders and Clegg (eds), *Systems of Industrial Relations in Great Britain* (Basil Blackwell, 1967) p 43.

award safety net and concepts such as 'flexibility' rest on assumptions which have gone largely unchallenged. From here, we either decode the discourse or use the facts and figures of inequality to play on the consciences of our legislators. Adopting a style all her own, Bennett largely achieves both ends. I commend her book as a subtle and thoroughly researched work.

*Rohan Price**

Margeret Davies, **Asking the Law Question**, Law Book Company, 1994, pp xi, 308, $45 (pbk).

The highest compliment I can pay to Margeret Davies' delightful (and slightly tongue-in-cheek) book, *Asking the Law Question*, is to admit openly and publicly that it is a book I would be proud to have written myself. It is charmingly written, both scholarly and rigorous, and altogether a splendid first work by an immensely promising young scholar. It admirably fulfils its primary objective, that of being an accessible introductory text for students encountering jurisprudence for the first time. It is to be hoped that it will quickly find a place in our law schools and in other disciplines where the 'law question' is asked.

Asking the Law Question succeeds in conveying much of the range and vitality of contemporary scholarship in jurisprudence. The author charts a clear and original course through a range of conventional (and not-so-conventional) areas of theoretical scholarship, including common law theory, natural law and positivism, 'legal science,' critical legal studies, a variety of 'feminisms' and postmodern scholarship. The range of perspectives canvassed and the frequently perceptive and witty way the author addresses them are, on their own, sufficient to ensure that *Asking the Law Question* is entitled to a place on the bookshelf of every legal academic who is interested in the insights jurisprudence has to offer (and hopefully that means every legal academic).

While, on one level, *Asking the Law Question* can be read as an engaging descriptive introduction to contemporary legal theory, on a deeper level Margeret Davies is never willing to content herself with the merely descriptive. Her work has a vitality and freshness that descriptive accounts lack because Margaret Davies remains

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