Book Reviews

Freedom's Law: The Moral Reading of the American Constitution

By Ronald Dworkin
Harvard University Press, 1996, pp viii, 404

In early 1998 it is planned that delegates (both those appointed by the Commonwealth Government and those elected by the Australian people) will convene in a constitutional convention to debate whether or not Australia should become a republic. Underpinning that discussion will be the delegates' assumptions about the nature of Australian society and, fundamentally, the character of Australian democracy. One should think that, almost one hundred years after federation, the contours of democracy in Australia would now be well defined. That this is not so may be seen in the reaction to some recent decisions of the High Court including, for example, *Australian Capital Television Pty Ltd v Commonwealth*[1] and *Theophanous v Herald & Weekly Times Ltd*[2] (two of the 'free speech' cases), *Mabo v Queensland (No 2)*[3] and *Wik Peoples v Queensland.*[4] The Court has been condemned by some for participating in 'judicial activism'. But what does this mean? And what role would those who so condemn the Court allocate to it? This issue raises the broader question of the relationship between the judiciary and the legislature in a democratic society. More fundamentally, in a democratic society with a written constitution such as Australia, what role may an unelected constitutional court legitimately play in striking down legislation passed by the elected legislature?

This question is perhaps thrown into starker relief in the United States. Due to that nation's constitutionally entrenched Bill of Rights, the United States Supreme Court is much more involved in the great social, moral and political issues of the day than is the High Court of Australia. Issues such as abortion and euthanasia are, in the United States, matters of constitutional concern, whereas in Australia, they clearly are not. In the early 1970s, for example, in the well known

1 (1992) 177 CLR 106.
2 (1994) 182 CLR 104.
3 (1992) 175 CLR 1.
4 (1996) 141 CLR 129.

case of *Roe v Wade*,[5] the Supreme Court decided that women have a constitutionally protected right to abortion.

In *Freedom's Law*, a collection of essay, most of which have been published elsewhere, Dworkin campaigns for a method of constitutional interpretation that involves a moral reading of the Constitution. He also argues that the Bill of Rights commits the United States to a particular type of governance:

> government must treat all those subject to its dominion as having equal moral and political status; it must attempt, in good faith, to treat them all with equal concern; and it must respect whatever individual freedoms are indispensable to those ends, including but not limited to the freedoms more specifically designated in the document, such as the freedom of speech and religion.[6]

The nature of democracy in the United States is, therefore, distinctive. Dworkin rejects the 'majoritian premise' as the basis of United States democracy. In short, the 'majoritian premise' holds that, in a democracy, political issues should be decided in accordance with the will of the majority. This is not to deny that an individual may possess rights. However, as Dworkin notes with reference to Great Britain, 'the majoritian premise has been thought to entail that the community should defer to the majority's view about what these rights are, and how they are best respected and enforced'.[7] Dworkin could have referred to Australia here as easily as to Great Britain.

In other words, legislatures elected by a majority of the people, and not unelected members of the judiciary, should have the final say on what rights the people have, and the extent to which they are permitted to exercise them. In the United States, Dworkin argues, the 'majoritian premise' carries considerable weight. Although it is accepted that on occasion the will of the majority as expressed in legislation will be overturned by the Supreme Court. However, the 'majoritian premise' insists that when this occurs 'something morally regrettable has happened, a moral cost has been paid'.[8] On this view, judicial review is at odds with democracy and hence, 'the central question of constitutional theory must be whether and when that compromise is justified'.[9]

5 (1973) 410 US 113.

6 R Dworkin, *Freedom's Law: The Moral Reading of the American Constitution* (Harvard University Press, 1996) pp 7-8.

7 Id at p 16.

8 Ibid.

9 Id at p 18.

Instead of democracy founded on the 'majoritian premise', Dworkin suggests that the vision of democracy offered to the world by the United States is that which he labels the 'constitutional conception of democracy'. This view of democracy involves decisions being 'made by political institutions whose structure, composition, and practices treat all members of the community, as individuals, with equal concern and respect'.[10] Certain conditions must be met for such a democracy to exist. For example, individuals must, Dworkin argues, have an opportunity to take part in the collective decision-making process through universal suffrage and effective elections. Further, the interests of each individual must be of equal concern when collective decisions are made. Third, on this view, democracy involves 'moral independence':

> A genuine moral community must therefore be a community of independent moral agents. It must not dictate what its citizens think about matters of political or moral or ethical judgment, but must, on the contrary, provide circumstances that encourage them to arrive at beliefs on these matters through their own reflective and finally individual conviction.[11]

One's understanding of what democracy requires clearly influences one's approach to constitutional interpretation. As the sub-title to *Freedom's Law* suggests, Dworkin offers a moral reading of the Constitution of the United States. Many of the clauses in the Bill of Rights are expressed in abstract moral language. The First Amendment guarantees the right of freedom of expression and the Fourteenth Amendment (added in 1868) guarantees that the state cannot deprive any person of life, liberty or property without due process of law. According to Dworkin, the moral reading demands that these clauses 'be understood in the way their language most naturally suggests: they refer to abstract moral principles and incorporate these by reference, as limits on government's power'.[12]

The moral reading requires those who wish to interpret the Constitution to first begin with what the framers said, and second, to situate their interpretation within the record of past interpretations. Judges may not, Dworkin argues, 'read the abstract moral clauses as expressing any particular moral judgment, no matter how much that judgment appeals to them, unless they find it consistent in principle with

10 Id at p 17.
11 Id at p 26.
12 Id at p 7.

the structural design of the Constitution as a whole, and also with the dominant lines of past constitutional interpretation by other judges'.[13]

Dworkin dismisses as a myth the view that judges decide difficult constitutional cases by the application of technical law and without regard to their own political and social convictions. A clear advantage of the moral reading of the Constitution is that it makes explicit what judges actually do. However, this does not mean that judges can make any decision they like relying on their personal prejudices. Rather, as was noted above, in interpreting the Constitution, a judge must begin with the document itself and his or her decision must fit with previous decisions:

> Supreme Court justices, like all judges, must always respect the integrity of the law, which means that they must not deploy moral principles, no matter how much they are personally committed to such principles, that cannot be defended as consistent with the general history of past Supreme Court decisions and the general structure of American political practice.[14]

Dworkin discusses and illustrates this theory of constitutional interpretation in the essays contained in *Freedom's Law*, ranging over issues such as abortion, freedom of speech (including academic freedom and pornography), euthanasia and the appointment of judges. All of the essays will not be discussed here. Rather, this review considers Dworkin's interpretive approach to the First Amendment, which guarantees freedom of speech.

The First Amendment guarantees an abstract principle, freedom of speech. Dworkin argues that in order for the First Amendment to be applied in specific cases some purpose must be assigned to it. For example, it may be that in a democratic society, allowing people to freely express their views contributes to the greater well-being of that society. On this view, free speech plays an important instrumental role. However, Dworkin argues this is a fragile and limited basis for the guarantee. It is limited in the sense that it protects mainly political speech. It is difficult to see how, on this reading, the First Amendment would extend to protect artistic or personal speech. It is fragile in the sense that a majority of the people may decide that, in the best interest of their society, some politically sensitive material may be censored by the government.

13 Id at p 10.

14 Id at p 319.

On the other hand, Dworkin argues that the freedom of speech guaranteed by the Bill of Rights may be justified on the basis that 'it is an essential and "constitutive" feature of the just political society that government treat all its adult members, except those who are incompetent, as responsible moral agents'.[15] This justification, Dworkin continues, has two elements. First, morally responsible people must be able to make up their own minds about political, moral and ethical issues. An individual is denied his or her dignity when the majority or a government official forbids him or her access to the opinions of others. Second, morally responsible people have a duty to express their views to others 'out of respect and concern for them, and out of a compelling desire that truth be known, justice served, and the good secured'.[16]

In the Australian context, the High Court in *Australian Capital Television v Commonwealth* and in *Nationwide News Pty Ltd v Wills* identified on the basis of representative democracy provided for in the Commonwealth Constitution, the implied guarantee of political communication. This implied freedom is justified on what Dworkin identifies as instrumental grounds. There is no suggestion that the implied freedom flows from a conception of Australians as responsible moral agents.

In *Australian Capital Television*, for example, Mason CJ, after observing that parliamentarians are elected by the people and exercise power on their behalf, stated that 'indispensable to that accountability and that responsibility is freedom of communication, at least in relation to public affairs and political discussion'.[17] Similarly, in *Theophanous* Deane J said:

> The freedom of citizens of the Commonwealth to examine, discuss and criticise the official conduct and consequent suitability for office of persons entrusted with those powers of government, such as parliamentarians, judges and leading members of the Executive, is critical to the working of a democratic system of representative government of the type which the Constitution incorporates.[18]

This freedom of political discussion is not based on any inherent individual or natural right. It is merely procedural in nature; it is something that is needed for the system to work effectively. As Bren-

15 Id at p 200.

16 Id at p 200.

17 (1992) 177 CLR 106 at 138.

18 (1994) 182 CLR 104 at 180.

nan J said in *Theophanous*, 'the freedom which flows from the implied limitation on power considered in *Nationwide News* and *Australian Capital Television* is not a personal freedom'.[19] The freedom is necessary, Mason CJ stated in *Australian Capital Television*, to ensure the 'efficacy of representative government'.[20]

It might be said that we in Australia have little to learn from an understanding of Dworkin's theory of constitutional interpretation. The Australian Constitution does not, after all, contain an entrenched Bill of Rights and hence, even if we accept the legitimacy of his moral reading of the United States Constitution, that reading cannot be transferred to the Australian context. However, when a nation decides to debate fundamental constitutional change it is of utmost importance that its citizens appreciate, first that democracy is not a simple political concept with only one meaning. Secondly, it must be further acknowledged that the approach to democracy favoured by a nation will dictate the type of Constitution it adopts, how power is distributed within the institutions established under that Constitution and, importantly, who is the final arbiter of that Constitution.

One hopes that Dworkin's *Freedom's Law* will not be restricted to reading lists in Constitutional Law and Political Theory. Indeed, it is to be hoped that it enjoys widespread discussion and debate outside academia.

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Tasmanian Criminal Law: Text and Cases - Volumes I and II

By John Blackwood and Kate Warner
Revised Edition, University of Tasmania Law Press, 1997, 992 pages plus indexes, $90 (pbk)

Tasmanian Criminal Law: Text and Cases is the latest text published on Tasmanian Criminal Law. Though primarily aimed at students, this text is also a valuable source of reference for Tasmanian legal practitioners, and potentially practitioners in other Code jurisdictions as well. The primary focus of the text is the Tasmanian Criminal

19 Id at 149.

20 (1992) 177 CLR 106 at 139.

* Parliamentary Information and Research Service, Canberra. The views expressed in this review are those of the author and should not be attributed to the PIRS.