

The Place of Theory in Australian Constitutional Law

**A Review of T Blackshield and G Williams,
Australian Constitutional Law and Theory,
2nd Edition, Federation Press, 1998**

Craig Arnott

The success of Blackshield and Williams' *Australian Constitutional Law and Theory Commentary and Materials* is well indicated by the speedy appearance of its second edition. It has rapidly and deservedly become the leading available casebook for teachers and students of law interested in the theoretical dimension to the subject. Australian constitutional jurisprudence, for those of us schooled in it, has been notorious for ignoring the political and social nature of constitutional law. By this I do not just mean the political context of legislative or government actions and constitutional challenge, but I mean the political and philosophical principles inherent in explaining, interpreting and developing the meaning of Australia's constitution. For those interested in teaching and crafting a principled constitutionalism in this latter sense, the introduction of a theoretical dimension by Blackshield and Williams has been promising.

Absences Between The Extracts

For all that, however, one feels a sense of disappointment with the second edition. Its worth remains primarily as a casebook rather than as a commentary. Make no mistake, it is superior to the first edition, mainly in its streamlined and more coherent structure. The disappointment is that of a promise not quite

fulfilled. The novelty and worth of the book is its treatment of theory and yet the second edition, with some improvements on the first, reveals that treatment is all too sparse. A reviewer should, of course, be careful not to reprimand the authors of a book for not having written or compiled the book the reviewer would have produced. However, Blackshield and Williams have claimed the mantle of constitutional theory and it is fair to ask how the book measures against the standard they claim; does it provide the ideological and doctrinal contexts that would explain the shifting and evolving expositions of law given by the High Court (Blackshield & Williams 1998: vi)? It cannot be said adequately to do that in three important respects which remain crucial absences between the extracts.

First, the relevance of and reliance on postmodernist and deconstructionist theories, intermittently injected, is not made clear. This is a critical methodological problem because the authors seem to challenge the orthodox view of positivism that 'law is what the cases say' *simpliciter* by suggesting one must understand the doctrinal context of the law (Blackshield & Williams 1998: vi, 245, 251ff). Yet they ultimately fail to provide a doctrinal context themselves for their own work or for judging the High Court's. Second, and related to the first, the extent to which theoretical dimensions are introduced at all is sporadic and inconsistent across the subject matter of the chapters. Third, the most fundamental problem of constitutional theory – the constitutional claim of authority or legitimacy – remains dramatically underexplored. I will suggest that there is a body of work of 'reconstructive critical theory' which has made an important contribution to this topic that has been entirely overlooked by Blackshield and Williams. The aim of that critical

theory is both to provide an alternative to legal positivism and explain the meaning and role of popular sovereignty in a constitutional state. Both aims have direct bearing on Australian constitutional discourse today and, ironically, weaknesses in Blackshield and Williams' casebook.

Below I detail what I see as the weakness in these three areas. Let me first reiterate that this is a superior edition to the first, with new material and chapters added and a cleaner structure. Chapter Six on interpretation has become a highlight and I only wish that the hints of interpretative rigour and insight it contains were applied consistently throughout the other substantive chapters. The innovative chapter on Indigenous Peoples and the Question of Sovereignty (now Chapter Four) is clearer than in the first edition, but resiles from dealing with the pressing question of what Aboriginal self-determination might mean. This is indicative of the problem with the treatment of theory in the book: how will we derive and make sense of the principles of Australian constitutionalism? Our struggle to do this will help suggest answers to problems such as 'self-determination'. The authors, for the most part, sidestep that challenge.

The chapters on 'implied freedoms' (expanded into The Implied Freedom of Political Communication, a separate and deserved treatment of Political Communication and the Law of Defamation and the Implied Right to Due Process) are, I believe, great improvements in this edition. These themes have been given the prominence they deserve, that many constitutional lawyers have been loath to accord them, and yet the chapters still remain theoretically weak. There is almost no theoretical treatment

included, from Australian academic commentators or others, of what free expression or rights in a constitutional sense might mean. Indeed the selection of US First Amendment cases does not convey the ideological context of First Amendment jurisprudence at all. At least the different ways that the American jurisprudence has influenced the High Court judgments in this field – a cause for note itself – could usefully be clarified. The attention to *Levy v Victoria*¹ at the conclusion of Chapter 25 may also be somewhat misplaced. The issue of the subject matter of the freedom is turning out to be far less controversial than the test for assessing potential legislative infringement and how influential US ideas of value-neutrality turn out to be.² There are profound ideological disputes at the heart of the interpretation of rights in relation to freedom of communication, and yet the authors do little to reveal them. Of all areas ripe for more robust intellectual analysis, especially in the light of the brakes applied by *Lange v ABC*,³ this is surely it. Most importantly, the influence of ideas of popular sovereignty on the justification and meaning of implied rights needs to be explored in relation to those judgments that have sought to corral the scope of constitutional rights by an appeal to the Constitution's 'text and structure'.

The first chapter does introduce some of the philosophical issues at the heart of constitutional law and it is an improvement on the first edition to introduce these themes at the outset. However, it remains a cut-and-paste approach to theoretical context. The authors are right to imply that the shallow brand of legal positivism that has sustained Australian constitutional law has largely ignored the theoretical context that explains prevailing and possible approaches to constitutional interpretation. More particularly in Chapter Six they express doubts about an apolitical

literalism and a confined legalistic approach to constitutional interpretation (Blackshield & Williams 1998: 245, 251ff). Courts, they insist from the outset, do not simply expound objective doctrine that students should uncritically learn (Blackshield & Williams 1998: vi). It is for this reason that one detects the promise of a non-positivist or 'non-interpretivist' approach with the casebook. (Ely 1980: 1 aligns positivism and interpretivism as both indicating that constitutional issues can be resolved by enforcing clear norms in the 'text' of the Constitution and without reference to other principles.) One also senses a sympathy with Foucauldian postmodernism and the casebook in this edition now begins with a quote from *The Archaeology of Knowledge* (1972) where Foucault opines that 'commentary's only role is to say *finally*, what has silently been articulated *deep down*' (quoted at Blackshield & Williams 1998: v). In the light of this hermeneutical perspective one can understand the authors' claim that there is no determinate body of doctrine in law. However if one accepts that as their starting point, that does not explain the authors' inconsistent approach to articulating the philosophies that have been used by jurists *deep down* to justify prevailing legal doctrine. The suggestive comments by Blackshield and Williams to challenge an apolitical legalism in constitutional law remain that; hints rather than a fully expounded approach to organising the cases and commentary. One can fairly say that the casebook is not a philosophical tract. Yet even so, should not one at least know what principles mould the authors' choice of material they include? Does not this choice too reflect premises *deep down*? There is a rigour demanded of articulating and exposing prevailing philosophies, and while some of these philosophies are identified in Chapter One, the rigorous exercise of articulating their

influence in judicial approaches is not carried through into all the chapters that follow.

1. A Postmodernist Approach To Theory?

I should reveal that I remain uncertain about the efficacy of a Foucauldian analysis of constitutional interpretation. I say this as a critical scholar. There are grave difficulties, I believe, in tying Foucault's philosophy to a theoretical undertaking which seeks to challenge dominant modes of legal thinking. It has been said of deconstructionist method – often invoked on behalf of groups who are disadvantaged by dominant modes of thinking – that:

it is hard to see how it can come to the aid of anyone. The argument is self-undermining ... deconstructionism has nothing more to say for the view that intellectual standards are masks for the will to power than that *it too reflects* the will to power for deconstructionists. But why then bother with intellectual life at all, which is not the fastest, surest, or even most satisfying path to political power, if it is political power that one is really after (Gutmann 1994: 18-9, my emphasis)?

Here, then, is the trouble with seeing Foucault's hermeneutical analysis as a renunciation of normative judgments. It is a renunciation Blackshield and Williams appear to share when they say forthrightly that they have contestable assumptions, just as everyone does, but these cannot shed light on ambiguities or claim to authoritatively organise the materials; they are just contestable assumptions that one either holds or does not (Blackshield & Williams 1998: vii). Yet, if there are no normative standards of evaluation to be preferred we will no longer be able

to advance justified reasons for opposing specific techniques of power, including when those techniques are tools of constitutional interpretation. The danger of Foucault's analysis is a complete surrender of the theoretical reference to norms, and, at their most extreme, this has led some postmodernists to eschew theory altogether (Honneth 1993: xxiv). This 'deconstructionist trap' may ultimately deprive critical scholars of sustainable intellectual tools to oppose positivist or interpretivist thinking. Ironically, as I shall go on to argue, this very danger seems highlighted in the approach to case law in the casebook.

2. A Sporadic Approach To Theory

There are many interesting themes introduced in the first chapter's eclectic mix but their presentation is descriptive. It will be eye-opening to many readers to have had them presented at all and some of them are novel for their appearance in a constitutional law casebook – for instance, *The State*, *The Liberal Tradition*, *The Critique of Individualism*, *Citizenship* – but their mere inclusion take us no closer to explaining the very first conundrum raised: what is 'constitutionalism' (Blackshield & Williams 1998: 2)? True it is that the authors politely say they do not wish to foist their ideological view on us (Blackshield & Williams 1998: vii), but is it not Foucault's point that in order to avoid the silent hold of ideologies we must expose the linking themes of ideological discourses, 'their clusters of relations' (Foucault 1978: 23 at Blackshield & Williams 1998: 13)?

Even the first article extracted, Sartori's 1962 article on *Constitutionalism*, is uncritically accepted by the authors' as elaborating the meaning, let alone relevance, of a constitution

being characterised as *garantiste*, nominal or façade. If this is to be the starting point for doubting the positivist conception of constitutions – even if one thinks it an anomalous starting point for a postmodernist – then surely we are entitled to have articulated Sartori’s teleological approach to constitutionalism and how this contrasts with the dominant liberal deontological approach to limit state power through constitutional rights that has so influenced ‘liberal’ judges on the High Court this decade.

Chapter Two is very strong in the intelligent array of articles chosen to shed light on Diceyan theory and Westminster notions of parliamentary sovereignty. But it concludes by throwing no light at all on where these notions stand in Australian constitutional interpretation today. As the authors note at the outset, our Constitution is notorious for its uneasy mix of Westminster-styled responsible government and American-influenced federalism and ideas of limited government. What is the contemporary interplay of these philosophies? In particular, since American constitutional jurisprudence has exerted a greater influence on the Court’s development of ideas about delimiting parliament’s power, a clear schism has developed in the approach taken by High Court judges towards ascertaining the scope of what the parliament may do. One might have thought this a central theme for the authors to explore, but they do not. It comes centrally in to play in the recent controversy about the role of ‘proportionality’ in characterising Commonwealth laws as within power or not. Blackshield and Williams provide us with the pertinent case extracts in Chapter 13 but no thematic context that would help explain the position Mason CJ took in *Nationwide News v Wills*,⁴ Dawson J’s conservative intransigence

or Kirby J's continued flirtation with this idea as a new tool of characterisation in *Leask v Commonwealth*.⁵

In order to understand the opposing doctrinal positions on the High Court in regard to parliamentary power one might, for instance, compare the radically divergent conception in Deane J's judgment in *Polyukhovich v The Commonwealth* with the judgments of Dawson or McHugh JJ.⁶ Indeed Toohey J in that case draws on compelling rule of law themes to constrain parliament very similar to those of T R S Allen and Eric Barendt which are extracted.⁷ Those themes in turn may have significant bearing on the implicit nature of rights to be drawn from the Constitution's structure not to mention the role electors play in a parliamentary system. Such ideas are expressly involved in how one conceives the scope of judicial review and the separation of judicial from legislative power. The relevant *Polyukhovich* judgments are extracted in Chapter 27 on The Implied Right of Due Process, one of the most sophisticated chapters, but the authors draw no thematic links with the early works of theory they include. Chapter Six (Approaches to Constitutional Interpretation) does canvass the issues of judicial activism and restraint yet the new Chapter 12 (The Separation of Judicial Power) is one of the more pedestrian. The one theoretical piece, Tony Blackshield's own, and I must say very useful, extract on the definition of judicial power (Blackshield 1981: 183-88 at Blackshield & Williams: 532-5) that is carried over from the first edition is still offered hesitantly; the authors seem unsure what to do with it other than saying 'and here's a piece of theory'. One reads this chapter not so much with the sense of philosophical assumptions being exposed as one senses the presentation of *the case law*, much as a judge would ask from

counsel or much as one of my old constitutional law lecturers would have expected me to have simply learned.

Chapter Nine is clear in the legal issues of state legislative procedure and manner and form requirements, but, again, the opportunity to expound on the larger themes about how parliamentary power might be justified or constrained has gone wanting. The authors have maintained a very traditional approach to presenting the notoriously opaque judgments in this area and give none of the political context in which they occur. The use to which conservative legal philosophies might put manner and form requirements is clearly expounded, for instance, in articles by J Goldsworthy and H P Lee (Goldsworthy 1987, Lee 1992). Their approach stands at odds with that of Blackshield and William's chapter and yet we are not exposed to the contestable assumptions or provided with the philosophies that might explain and justify when and why judges have decided that the will of parliament cannot be fettered, when it can be, and the dividing lines for disagreement.

The omission of such assumptions about the role of parliamentary power at the Federal level is even more apparent in the section on interpretation of s 57. The authors do provide us with the clash of approaches of Barwick CJ and Gibbs J against Jacobs and Murphy JJ but with no elucidation of the way the clashing philosophies of responsible government and federalism, introduced in Chapter Five, might be assessed. They tantalise us by questioning Fraser and Kerr's reliance on s 57 in the 1975 crisis but suggest no interpretative tools to help answer it. Indeed the section in Chapter Ten on the 1975 crisis is strangely limp. Again it is an instance of the absence of theory. *The crisis itself is*

not a discrete event or curiosity but is an organising theme about the deficiencies of democratic safeguards in the Constitution and the collision of Westminster conventions of responsible government with federalism. While it is so often thought, no doubt correctly, that it was an impetus towards our becoming a Republic, the main ramifications for parliamentary democracy have been glossed over in the republican debate and they are here too. The uncertain role of the House of Representatives vis-a-vis the Senate and the Executive, so radically undermined in the crisis, remains with us as an issue bearing on a claim Australia makes to constitutional democracy.

Certainly some of these themes are aired in Chapter Eight on The Parliament and the authors in that chapter have skilfully juxtaposed extracts from judgments to convey the cut and thrust of judicial debate about the power of the Commonwealth and the role of the electors in the constitutional scheme, but again they give little political context or ideological dimension. The authors seem to justify this by reciting the ‘indeterminacy’ of constitutional law which leaves a fundamental conflict between the values of democracy and federalism, revealed in a case such as the *First Territory Senators Case*,⁸ as simply a matter of judicial choice (Blackshield & Williams 1998: 350). In the preface the authors state: ‘the ambiguities and indeterminacies of the authoritative legal materials ... compel the judge ... to draw upon deeper and ultimately more personal conceptions’ of the constitution and judicial process and, then later, they contend that judges ‘marshal any arguments’ to support conclusions already arrived at (Blackshield and Williams 1998: vii, 256). But are the choices here really just matters of personal preference like choosing one’s favourite flavour of ice cream? ‘Hmmm ... this

week I'll have my democracy with one vote-one value'. As Stephen J pointed out in the *Second Territory Senators Case*⁹ reasonable minds can disagree over the principles to apply to constitutional imperatives. Are we not entitled, then, to learn of the competing philosophical principles and theoretical positions which have influenced judges and commentators and even why some should be preferred?

Through the inconsistent application of a theoretical approach one actually sees a consistent problem in the book. Without articulating their own normative premises and argument the authors have in fact cleared the stage for, and peppered their pages with, the positivist approach they questioned at the outset. One might note the double sense of irony that this – unless I have underestimated the subversive force of the High Court extracts as genealogy – is the result of the 'deconstructionist trap' mentioned above. More importantly, the casebook does not expose readers to critical theory that disputes the deconstructionist approach and suggests that through critique new normative standards can be developed. The fact that legal meanings do not have the rigid certainty that positivists have suggested does not mean that all normative judgments are lost (Alexy 1989: 293). Below I shall mention a reconstructive theory that has attempted to provide a critical standpoint from which one might judge constitutionalism.

The Critical Use Of Theory

Constitutionalism has at its heart questions about the legitimate use of power. How to justify the use of power, denoting its legitimacy, requires a theoretical stance to be taken; a normative

argument that defends actions and institutions as just (in the sense of a claim that they are able to be justified; Benhabib 1989: 143). The very idea of having a constitutional state, and so having a law that institutionalises and regulates it, is precisely the modern idea that power needs to be justified. (Heller 1990: 1380). There is, of course, significant dispute even within the tradition I take to be modernist or Enlightenment in origin about how and when to identify the use of power. One should also point out that the insistence on giving justificatory reasons is precisely the Enlightenment legacy which Foucault wishes to contest (Foucault 1984: 32-50). Yet whether one seeks to merely offer an explication or seek a justification of constitutional power, I think it is fair to assume that acts of governments, legislatures and courts involve its use. The authors' too easy use of the 'indeterminacy' thesis obscures this. The other aspect about the use of power the authors insufficiently acknowledge is the way that interpretation itself operates as ideological power, and all the more so when it goes unacknowledged. One of the great values of the extracts in the casebook, especially in the new Chapter Six, is where the idea is introduced that meanings are precarious, always requiring justification and scrutiny and reappraisal. There is not language or text that is neutral or innocent or obvious, that does not carry presuppositions inseparable from philosophical positions (McCarthy 1994: 33-4). Part of the task, then, I suggest of an examination of constitutional law must involve identifying its normative claims and assumptions, as well as that of the examiner's.

If this were more widely appreciated judges might not be so ready to imply, as, for instance, McHugh J does in *McGinty v Commonwealth*, that by resiling from the question about the role

of democracy in the Constitution they will avoid contentious political matters.¹⁰ Of course, McHugh J's assumption, which he does not express, is the classically positivist one that there is some certain meaning that can be given to the 'text and structure' of the Constitution that will avoid controversial political interpretations in which courts should not engage. Yet the meaning of the Constitution's 'text and structure' is not fixed as has been perfectly apparent throughout the course of High Court judgments this century. If politics simply denotes the realm in which power is contested then one can see such a manoeuvre as McHugh J's in *McGinty* as simply an attempt to obscure a political act and attempt to withdraw it from scrutiny. For writers on constitutional law the implications are that our subject involves the structuring of political power and our approach draws no less on powerful discourses we use as interpretative devices.

I believe the main theoretical failing of the book is the failure to identify the arguments and visions about constitutional law presented as part of ideological discourses of power. I take ideological discourses to be the exchange of ideas and use of language that prejudicially structures the way we are able to see and understand the world and our place in it (Habermas 1988: 169-70). Foucault's own insight here, extracted by the authors in Chapter One, is very apt: 'there are manifold relations of power which permeate, characterise and constitute the social body, and these relations of power cannot themselves be established, consolidated nor implemented without the production, accumulation, circulation and functioning of a discourse ...' (Foucault 1980: 93 at Blackshield & Williams 1998: 17-8). A critical legal theory, as I understand the concept, at least recognises law as such a discourse, in contrast to positivist theory which

sees legal discourses as politically 'inert', having no positive relation to the ideological structuring of our mind's horizon. In this respect, note again the project Foucault announces and which is reprinted by the authors:

I am anxious to show you just one thing: how what I am attempting to bring out through my analysis – the *positivity* of discourses ... the systems which regulate their emergence, their functioning and their transformations – can concern political practice ... can be objects of a political practice, and in what system of dependency they can be in relation to it (Foucault 1978: 23 at Blackshield & Williams: 14).

My criticism of the chapters above is that the streams of interpretation and judgments extracted have not been shown adequately to be part of political discourses nor where they stand in relation to political practices. Indeed in the section in Chapter Six on postmodern constitutionalism the cadences of Foucault's project have become slight indeed and now pushed to the fore is simply the idea that postmodernism means confronting objectivity by supplying the law's context (for instance the use of Balkin 1992 at Blackshield & Williams 1998: 293-94). The doubt I have expressed above about Foucault's project against positivism is that it is not surprising that it collapses into this.¹¹ The more specific concern I have as a critical theorist is that Foucault's analysis may be able to aspire to no more than contextualisation in law because of his apparent view that there is a sense in which law's power can only be explained not *justified*; he suggests that law can only operate oppressively. 'The system of right, the domain of the law ... should be viewed, I believe, not in terms of a legitimacy to be established, but in terms of the methods of subjugation that it instigates' (Foucault 1980: 96 at Blackshield

& Williams 1998: 18). This seems to suggest a turn away from law if one is interested in challenging dominant discourses of power: '[W]e should direct our researches on the nature of power not towards the juridical edifice of sovereignty, the State apparatuses and the ideologies which accompany them, but towards domination and the material operators of power ...' (Foucault 1980: 102 at Blackshield & Williams 1998: 20).

3. Understanding The Constitution's Claim To Authority

If one is unwilling to abandon the idea that legal and constitutional power can be justified there is a necessary starting point for constitutional theory that many positivists and postmodernists have neatly elided. It is this: the Constitution structures and regulates the use of power in the Australian polity; what is its authority for doing so? One can identify in descriptive terms that the Constitution claims to be authoritative – the foundational legal document – and one can identify that it is part of the State's authoritative apparatus. However I use authority here in its normative sense of a claim to be the *legitimate* legal foundation and the *legitimate* regulation of government which courts can *legitimately* interpret. Critical theory, in the reconstructive sense I indicate below, takes this aim of seeking a justification for authority to heart. It is drawn from so-called Frankfurt School critical theory and its idealistic critique of positivism (Horkheimer 1995 and Wellmer 1971: 128-39). It insists that accounting for legitimacy is the blind spot of positivism and the neglect of postmodernism. Law is more than a fact, an actually operating coercive and binding system, it involves an inherent claim to be legitimate coercion – rules that *should be*

followed – and this claim can be normatively assessed. The challenge, then, is to provide the standards (norms) by which it may be assessed.

In Australian constitutional law theory there is a radical schism developing between conservative and radical normative responses to the ‘legitimation crisis’ of the Australian constitution. The crisis involves the transfer of sovereignty from the UK Parliament to the Australian people. For conservatives the issue is whether there has been such a transfer and, if there has, how to contain its consequences. For radicals the issue is how the concept of ‘popular sovereignty’ can reinterpret Australia’s constitution as a democratic document. (Contrast the approach by Lindell 1986: 44 with Deane J in *University of Wollongong v Metwally*.¹²) For all the centrality of this issue since the passage of the *Australia Acts* in 1986, the *Mabo* decision, the implied rights cases and the movement towards a republic the discussion of popular sovereignty and what that might mean in a constitutional sense is the most underdeveloped theme in the casebook. There is no normatively neutral position to take in relation to the emerging schism. The authors adopt a position even as their methodology obscures the centrality of the debate to explaining the recent High Court jurisprudence; an outcome, one suspects, that belies their sympathies.

In this respect there is another noticeable weakness. The leading philosopher who has developed a critical theory of popular sovereignty with direct application to constitutional law, Jürgen Habermas, is omitted by the authors entirely from their collection. (There was an extract from his *Legitimation Crisis* (1976) in the first edition but that has now been lost.) In particular, the latest

work by Habermas to be translated into English, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (1996), is of seminal importance to constitutional theory and while his writing is notoriously dense no serious commentary in the area can afford to ignore it. Habermas has been described, from a radical perspective, as the most formidable critic of Foucault (Bernstein 1992: 281), and in contrast to Foucault he regards law as one of the central mechanisms to oppose discourses of domination. He says that his hunch – which he seeks to justify in *Between Facts and Norms* – is that the rule of law in a constitutional state (*Rechtsstaat*) cannot be had or maintained without radical democracy (Habermas 1996: xlii).

I should say that there is one passing reference to Habermas in the text in relation to freedom of expression (Blackshield & Williams 1998: 1084), although none in the index, but, with respect, the authors have misinterpreted (and typographically miscited) his work even in this instance. Although this is aside from my main comments below, the misinterpretation is an egregious one and needs to be corrected. In Habermas' work the term 'language' or 'speech' or 'communication' must be understood in its broadest sense as the use of meaningful symbols, the way that understandings are created in a 'communication community' (Habermas 1996: 14-6, Habermas 1992: 90). This draws on the notion of the 'illocutionary force' of language (what is done *in* saying something), ie. the reference to the conventions of meaning that operate on an interlocutor at a deeper 'uptake' level than just the 'propositional content' (what is said) or 'perlocutionary effects' (what is done *by* saying something) of an utterance. (Austin 1975: 117, Searle 1969: 42-50, Habermas 1987: 77). This indicates that a right of free speech is not restricted

to protecting 'propositionally structured' expression, as the authors imply, but *broadened* to protecting communicative competence, viz the ability to contribute equally to generating norms of understanding in a communication community (Habermas 1992: 108-09 and Habermas 1970).

A Challenge To The Positivist Conception Of Law

Habermas' reference to democracy as the standard by which to judge the legitimacy of the constitutional state is the challenge laid down to those positivist conceptions of law that have specifically sought to deny law's connection to morality and politics. The discussion of legal positivism by the authors is all too glib and their description of its use of the concept of 'power' highly ambiguous (Blackshield & Williams 1998: 8, 256-57). In their section in Chapter One on Legal Foundations and Discourse digestible references to H L A Hart (or the ANU's Tom Campbell) may be more enlightening than just the large slabs of Hans Kelsen we are given. Legal positivists have viewed the law as a system of rules whose validity is a question not of moral evaluation but of adherence to settled 'rules of recognition' (Hart 1994: 100-10). Law is thus conceived as neutral and non-ideological, 'a matter of social fact' (Raz 1979: 38). One might recognise that there are reasons for obedience from the 'internal perspective' Hart described, but not go behind those reasons to assess them. Habermas insists that the empirical account of positivists is tautological: it only accounts for de facto validity.

Why not be content with the *empirical* account of positivism? The authors provide no reason to accept an alternative *theoretical* account, although they themselves seem implicitly to

adopt – without applying – a deconstructionist hermeneutics or at least a radical indeterminacy thesis. Why bother if there are no justified positions to adopt? Habermas suggests in understanding the deficiencies of positivism and the ideological nature of legal discourses we can reconceive the democratic potential of law. In this way it will be returned to its social role. Coercible laws must prove their legitimacy as laws of freedom in the process – and by the kind of process – of lawmaking. Habermas insists that legal norms and acts suppose a rationally motivated process of reaching understanding within an association of legal consociates. This is said to be the illocutionary nature of the validity claim that laws make. Clearly I cannot fully expound on these concepts here. Suffice it to say that in coming to this understanding Habermas draws on ordinary language philosophy and ‘speech act’ theory and its insights into how meaning is established (Habermas 1994a), including the meaning of what it is to be bound by a norm. For Habermas this assessment of the reasons for law’s bindingness is not optional; inherent within laws is the ‘promise’ of rational acceptability which positivism does not capture (Habermas 1996: 32-33). Enacted law cannot secure the bases of its legitimacy simply through a legality which leaves attitudes and motives up to the addressees, as is the claim of positivists. In other words, one would not know that it was not just habit or custom or force or apathy which governed compliance and so the so-called ‘background consensus’ must be scrutinised to see of what it consists. Failing this the ideological force of law will not be examined at all.

That is, one would not examine law as *power*. What is its necessary power? The power to bind us to its norms. Positivism discounts law as an ideological force but Habermas examines the

nature of law to show that it necessarily has an ideological dimension to explain its claim of bindingness and its socially bonding effect: 'without religious or metaphysical support, the coercive law tailored for the self-interested use of individual rights can preserve its socially integrating force only insofar as the addressees of legal norms may at the same time understand themselves, taken as a whole, as the rational *authors* of those norms' (Habermas 1996: 33).

Because the law at once binds as a fact (one expects average compliance) and holds itself out as a norm (as legitimate), Habermas' point is that law is therefore the medium that mediates between facticity (a forcibly stabilised order) and validity (a rationally legitimated order) and so provides the crucial connection Kant saw between coercion and freedom in society. By holding itself out as validly binding on all, the inherent claim of law is that this bindingness (its authority) is justified when its genesis is in, and it in turn protects, conditions 'under which the will of one person can be unified with the will of another in accordance with a universal law of freedom' (Kant 1965 at Habermas 1996: 29 fn 21). What does this mean? Law must be able to instantiate the conditions under which we can all be self-governing and yet govern ourselves collectively. One can only unify the free will of each with that of others on the basis of normatively valid rules that deserve the addressee's uncoerced – which is to say, rationally motivated – recognition and acceptance. Thus it must always be open to subjects to comply with law on account of law's normative validity, ie. through 'respect for the law' (Habermas 1996: 29). This is called a *performative* or *communicative* attitude – one seeks to reach understanding with others about the common conditions for each successfully to act

and live – as opposed to an *objectivating* or *strategic* attitude where one merely calculates the consequences for obedience. Rational or performative acceptance is possible through ‘discursive redeemability’ of law’s normative validity claims, ie. a legislative process open to the contestation of all norms by all people.

Only those norms are valid to which all affected persons could agree as participants in rational discourses (Habermas 1996: 107).

For positivists the authority of law resides in its ‘peremptory’ nature; law, it is said, does not initiate, it ‘precludes conversation and deliberation’ (Hart 1982: 243, Macedo 1990: 82). Habermas inverts that conclusion with his discourse theory of law. As I have indicated, he does that by asking what it is about the reasons for obedience that supplies the law’s *binding* quality. Positivism, by detaching the legal system from these reasons and so all internal connection to morality and politics,

prejudices the analysis in such a way that “law” is reduced to the special function of the administration of law. One thereby loses sight of the *internal function between law and the constitutional organisation of the origin, acquisition, and use of political power* (Habermas 1996: 50).

By ignoring this central aspect of what law does law is reduced to a system of coordination, supported by legal arguments and analysis ‘exhausted by their function of reducing the surprise value of court decisions ... and increasing their actual acceptance of such decisions by clients’ (Habermas 1996: 50). This functionalist point of view focuses merely on the perlocutionary effects that

can be achieved by reason-giving: 'they are the means by which the legal system convinces itself of its own decisions'. In such a closed, self-referential or 'autopoietic' system law's high-priced culture of argumentation is, to the uninitiated, at best a mystery and at worst a fiction, 'narcissistically marginalised' (Habermas 1996: 51). This is the problem with presenting law as simply 'what the cases say'. One overlooks the ideological force of law – and the democratic impetus that can be reconstructed from it – by focusing merely on the facticity of legal decisions, the artificial layer, of *constructed reality*. Ultimately, one must conclude, this is just the impression the authors have conveyed in the presentation of law in their casebook.

Politics And Theory: A Critical Account Of Popular Sovereignty

Habermas seeks to refound Kant's Categorical Imperative and Rousseau's conception of the 'general will' as the basis for a just society (cf Habermas 1996: 103). Because the communicative perspective must always be possible, *the process* of legitimate lawmaking cannot simply allow for strategic action but allow for the communicatively engaged citizen, one who can be autonomous. Habermas' claim is that this possibility is inherent in the concept of modern law which 'already harbors the democratic idea developed by Rousseau and Kant: the claim to legitimacy on the part of a legal order built on rights can be redeemed only through the socially integrative force of the "concurring and united will of all" free and equal citizens' (Habermas 1996: 32). One can make more sense of this if one thinks of the general will as a universal consensus. However, it should not be thought of as a consensus that has already been

established (simply to be found or deduced as Rousseau (1993: 200, 213) and other social contractarians suggest) but rather as *ahead of us*; ie. we can only seek its realisation, and thus we should act and reflect in order to realise it. This is certainly, as Habermas suggests, an idealistic orientation, but one that a legitimate constitutional order needs to ensure at least is not impossible. Hence, a legitimate constitutional order would need to establish conditions so that *consensus – the conditions of association* upon which there could be mutual agreement – could be reached. These conditions regulate the processes of ‘opinion and will-formation’ that take place in public discourse. In a practical sense what this means is that political participation – meaning the articulation of interests and subjecting them to scrutiny and critique – is as broadly open and radically thorough-going as possible. Institutionalised as a system of fundamental rights this constitutional structure is called a ‘proceduralised popular sovereignty’ (Habermas 1994b: 1 and 1996: chapters 3, 4 and Appendix 1). One can see the immediate relevance of this approach to current controversies in Australian constitutional law as it explains why rights of communication and participation, as well as equal treatment and due process, are the necessarily implicit foundation for a constitution based on popular sovereignty.

The implications for constitutional law theory are profound at both the substantive and methodological levels, both of which are ignored in this casebook. At the methodological level, Habermas anchors the legitimacy of law in a democratic discourse principle that is conceptually prior to the distinction between law and morality and so seeks to undercut that positivist dichotomy that has bedevilled modern jurisprudence. In direct

The Place of Theory in Australian Constitutional Law

opposition to positivism, the idea of justice is located within the 'modern idea' of law because of the inherent claim to legitimacy law makes, a claim that can be redeemed in practical terms through the democratic conditions of law-making. This leads to the substantive conception of public discourse. It is conceived not merely as a cognitive exercise but as a communicative process that mobilises reasons and arguments that draw on citizens' interests, values and identities. Protecting the authenticity of these interests, values and identities – the way they come to be known and realised as one's own – and the informed and engaged citizen is at the heart of what the constitutional state must be able to guarantee to its addressees (Habermas 1996: xxviii, 169, 39). This is why Habermas' discourse theory is so at odds with liberal discourse theories conceived as a neutral procedure for contesting norms (for instance, contrast Post 1990: 639-640). The authors, while discussing 'proceduralist' theories of constitutional interpretation and judicial decision-making (Blackshield & Williams 1998: 261-62), have overlooked entirely this substantive proceduralism that bears so directly on the issues confronting Australian constitutional law today.

Habermas' approach directly confronts the 'legalistic' view that law is 'a conservatising ideal' (Shklar 1964 at Blackshield & Williams 1998: 248). Instead critical discourse theory insists that, of all forms of laws, it is in constitutional law where the idealistic moment is most obvious, viz. to bring 'idealistic' pressure to counter law being 'instrumentalised for the strategic deployment of power' (Habermas 1996: 41, 168). The idea of constitutional government is one which requires the state apparatus to be organised to legitimate publicly authorised power, ie. to provide for legitimate law-making. Hence building the democratic self-

organisation of a legal community, including rights and participatory structures, is said to be the necessary aim of constitutional law.

It is no part of this review to mention all the implications of Habermas' discourse theory for the power of legislatures, government, or the role of judges. However the challenge of his critical theory to positivism, which dialectically leads to his theory of popular sovereignty, reveals the need for a rigorous normative theory to pervade one's approach to constitutional law whatever stance one takes on these issues. As T R S Allan has written, constitutional principles 'might usefully be understood as a continuing process of argument about the requirements of justice and reason – a process in which every citizen should be encouraged to participate as an integral part of conscientious citizenship' (Allan 1993: 16 at Blackshield & Williams 1998: 102). Blackshield and Williams have contributed to this continuing process of argument. However, it is ironic given their apparent sympathies, that they have done so with what too often amounts to a legalistic presentation of case law, admittedly a presentation which is sometimes contextualised. My concern is that this actually undermines conveying to their readers the utility of theory in constitutional law. A public law needs to articulate and expose the assumptions of our jurisprudence and this I have mentioned as the critical task of theory. I have great faith in the selection of the extracts by the authors (and I hope my utilisation of some of them in this review has shown that), but to that broader critical project the contribution of this casebook is disappointing.

The Place of Theory in Australian Constitutional Law

Notes

- ¹ *Levy v Victoria* (1997) 146 ALR 248.
- ² See *Brown v Classification Review Board* (1998) 154 ALR 67.
- ³ *Lange v Australian Broadcasting Corporation* (1997) 145 ALR 96.
- ⁴ *Nationwide News v Wills* (1992) 177 CLR 1, 27-34.
- ⁵ *Leask v Commonwealth*. (1996) 140 ALR 1, per Dawson J at 13-19 and Kirby J at 42.
- ⁶ *Polyukhovich v The Commonwealth* (1991) 172 CLR 501.
- ⁷ Toohey J, *Polyukhovich v The Queen* 688; cf Blackshield & Williams 1998: 93-94, 101-02 & 109-11.
- ⁸ *Western Australia v Commonwealth* (1975) 134 CLR 201.
- ⁹ *Queensland v Commonwealth* (1977) 139 CLR 585, 603.
- ¹⁰ *McGinty v Commonwealth* (1996) 186 CLR 140 at 231-236.
- ¹¹ Note James Boyle's comments that this version of the indeterminacy thesis has "Legal Theory – Contemporary Issues", ANU Faculty of Law Conference in association with the Australian Society for Legal Philosophy, Canberra, 19 July, 1998.
- ¹² Deane J, *University of Wollongong v Metwally* (1985) 59 ALJR 48, 59.

References

- Alexy R 1989 *A Theory of Legal Argumentation. The Theory of Rational Discourse as Theory of Legal Justification* Trans R Adler and N MacCormick Clarendon Press Oxford

- Austin J L 1975 *How To Do Things With Words* Harvard University Press Cambridge MA (2nd edn)
- Balkin J M 1992 'What is Postmodern Constitutionalism?' *Mich L R* 90: 1966
- Benhabib S 1989 'Liberal Dialogue Versus A Critical Theory of Discursive Legitimation', in N L Rosenblum ed *Liberalism and the Moral Life* Harvard University Press Cambridge MA
- Bernstein R J 1992 'Foucault: Critique as a Philosophical Ethos' in A Honneth et al eds *Philosophical Interventions in the Unfinished Project of Enlightenment* MIT Press Cambridge MA
- Blackshield A R 1981 *'The Law' in Power in Australia: Directions of Change* Centre for Continuing Education Australian National University
- Blackshield T and Williams G 1998 *Australian Constitutional Law and Theory Commentary and Materials* Federation Press Sydney (2nd edn)
- Ely J H 1980 *Democracy and Distrust A Theory of Judicial Review* Harvard University Press Cambridge MA
- Foucault M 1972 *The Archaeology of Knowledge* Trans A M Sheridan Pantheon Books New York
- 1978 'Politics and the Study of Discourse' (1978) *Ideology and Consciousness* 47
- 1980 *Power/Knowledge* Harvester Press London & New York
- 1984 'What is Enlightenment?' in P Rabinow ed *The Foucault Reader* Pantheon Books New York
- Goldsworthy J 1987 'Manner and Form in the Australian States' (1987) *Melb L R* 16: 403

The Place of Theory in Australian Constitutional Law

- Gutmann A 1994 'Introduction' in A Gutmann ed *Multiculturalism: Examining the Politics of Recognition* Princeton University Press Princeton
- Habermas J 1970 'Towards a Theory of Communicative Competence' *Inquiry* 13: 360
- 1976 *Legitimation Crisis* Trans T McCarthy Heinemann London
- 1987 *The Theory of Communicative Action* Trans T McCarthy Vol 2 Polity Press Cambridge & Oxford
- 1988 *On the Logic of the Social Sciences* Trans S Weber NicholSEN & J A Stark Polity Press Cambridge & Oxford
- 1992 'Peirce and Communication' in *Postmetaphysical Thinking* Trans W M Hohengarten Polity Press Cambridge & Oxford
- 1994a 'Actions, Speech Acts, Linguistically Mediated Interactions and the Lifeworld' in G Fløistad ed *Philosophical Problems Today* Vol 1 Boston
- 1994b 'Three Normative Models of Democracy' *Constellations* 1: 1
- 1996 *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* Trans W Rehg MIT Press Cambridge MA
- Hart H L A 1982 *Essays on Bentham* Clarendon Press Oxford
- 1994 *The Concept of Law* Clarendon Press Oxford (2nd edn)
- Heller A 1990 'Rights, Modernity, Democracy' *Cardozo L R* 11: 1377
- Honneth A 1993 *The Critique of Power. Reflective Stages in a Critical Social Theory* Trans K Baynes MIT Press Cambridge MA
- Horkheimer M 1995 'Traditional and Critical Theory' in M Horkheimer *Critical Theory: Selected Essays* Trans M J O'Connell Continuum New York

- Kant I 1965 *The Metaphysical Elements of Justice* Trans J Ladd New York
- Lee H P 1992 "Manner and Form": An Imbroglia in Victoria' *UNSW LJ* 15/2: 516
- Lindell G J 1986 'Why is Australia's Constitution Binding? – The Reasons in 1900 and Now, and the Effect of Independence' *Federal L R* 16:29
- Macedo S 1990 *Liberal Virtues. Citizenship, Virtue and Community in Liberal Constitutionalism* Clarendon Press Oxford
- McCarthy T 1994 'Philosophy and Critical Theory: A Reprise' in D Couzens Hoy and T McCarthy *Critical Theory* Blackwell Oxford
- Post R C 1990 'The Constitutional Concept of Public Discourse, Outrageous Opinion, Democratic Deliberation and Hustler Magazine v Falwell' *Harv L R* 103: 601
- Raz J 1979 *The Authority of Law* Clarendon Press Oxford
- Rousseau J-J 1993 *The Social Contract* Trans G D H Cole J M Dent Everyman Library London
- Searle J 1969 *Speech Acts* Cambridge University Press Cambridge
- Shklar J 1964 *Legalism: Law, Morals, and Political Trials* Harvard University Press Cambridge MA
- Wellmer A 1971 *Critical Theory of Society* Trans J Cumming Continuum New York