

BOOK REVIEW

The Ultimate Rule of Law by David M Beatty (Oxford: Oxford University Press, 2004) pages i–xvii, 1–193. Price A\$135.00 (hardcover). ISBN 0 19 926980 7.

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The title of this book, ‘The Ultimate Rule of Law’, is intended, no doubt, to intrigue. It also has more than a hint of the grandiose. That effect is not diminished by the table of contents, which shows that the monograph is divided into five chapters, of which the middle three are ‘Liberty’, ‘Equality’ and ‘Fraternity’. According to the preface, ‘the rule of law has come to represent an ideal around which systems of government should be organised’,¹ suggesting that the text will be firmly grounded in political science. By contrast, the dust jacket suggests that the subject matter is judicial method as revealed by review of legislation for conformity with fundamental human rights. This description implies a social science approach to jurisprudence reminiscent of the US realist school of analysing ‘what judges do’.

In truth, the book is an exercise in comparative constitutional law which seeks to identify an appropriate judicial methodology for applying constitutional provisions guaranteeing fundamental human rights and freedoms. The breadth of the inquiry is impressive: the table of cases reveals that the author draws upon the work of courts in North America, Europe, Africa, India, Japan, Singapore, New Zealand and Ireland, but not the UK. I have omitted Australia from that list, but there is indeed passing reference to *Australian Capital Television Ltd v Commonwealth*² and *Nationwide News Pty Ltd v Wills*,³ dealing with the implied freedom of political communication, and even *Attorney-General (Vic) ex rel Black v Commonwealth*,⁴ which relates to the public funding of church schools. Once one grasps the provenance of the book, the absence of reference to Australian jurisprudence is unsurprising. Nevertheless, by the time one finishes the book, the omission may appear to demonstrate a weakness in the thesis, to which I will return.

The first chapter of the text covers, in clear but concise terms, the leading theories of constitutional interpretation developed in the US. Beatty concludes that none of the theories adequately explains what judges do in exercising constitutional powers of review, thus suggesting that a better understanding of ‘constitutional theory’ might be achieved by the inductive method of studying

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¹ David M Beatty, *The Ultimate Rule of Law* (2004) vi.

² (1992) 177 CLR 106.

³ (1992) 177 CLR 1.

⁴ (1981) 146 CLR 559 (‘*DOGS Case*’).

‘how courts actually exercise their powers of review’.⁵ Beatty describes this approach as part of the common law methodology: ‘The great genius of this ancient legal tradition is its pursuit of theory and overarching principles from the bottom up.’⁶

He seeks to apply that approach through an analysis of select cases derived from different jurisdictions and over long periods of time, ending up with the conclusion that underlying all is a principle of proportionality.⁷ This is clearly not an exercise for the weak-hearted, and even if one feels at the end that Professor Beatty has failed in his bold endeavour, one may learn much from his clear and perspicacious account of the journey upon which he has set himself.

However, the description of his purpose invites scepticism for three broad reasons. First, there is an interesting debate in this country about the use and function of the inductive method of reasoning in the law.⁸ Like most legal systems, the common law tradition strives for coherence and consistency. This flows from the basic principle that justice requires equal treatment of equals and the recognition of relevant differences. Overarching principles are not ends in themselves, but tools in the judicial store, to be used, or put to one side, as circumstances require. Second, a level of anxiety is raised by the assumption of the common law method (assuming that one is not guilty of cultural arrogance in claiming the method for one’s own legal culture) and its application to many differing legal traditions, an exercise which must be undertaken with some care and a sufficient understanding of the social and legal context of each. The same concern might arise in relation to constitutional rights differently defined and differently approached over time. The widespread rejection of ‘originalism’ as an adequate principle of constitutional interpretation demonstrates the need for such care.⁹ Third, one fears that to derive a single principle from such a broad canvas may either involve high selectivity or produce a result which is too all-encompassing to greatly improve our understanding of methods of judicial review.

Insofar as one’s initial scepticism is based on selectivity, Beatty overcomes the difficulty by embracing it, as a text that seeks to establish its high purpose in less than 200 pages must. My concern is not that he has selected examples to suit his purpose, but rather that he has forced the judgments into his mould. To do this he has adopted a concept which is too ill-defined and vague to be serviceable. The results are, in my view, counterproductive.

To start with the concept, it is true that ‘proportionality’ is a term with a sound judicial lineage, but it can serve different purposes. For example, it is apt to describe the approach to the imposition of a penalty — the need for the punish-

⁵ Beatty, above n 1, 34.

⁶ *Ibid.*

⁷ *Ibid.* 160, 163.

⁸ See, eg, Justice Keith Mason, ‘What Is Wrong with Top-Down Legal Reasoning?’ (2004) 78 *Australian Law Journal* 574, 577, 583, discussing the writings of Judge Posner in Richard A Posner, ‘Legal Reasoning from the Top Down and from the Bottom Up: The Question of Un-enumerated Constitutional Rights’ (1992) 59 *University of Chicago Law Review* 433.

⁹ See, eg, *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104, 171 (Deane J); *Eastman v The Queen* (2000) 203 CLR 1, 79–80 (Kirby J); *Brownlee v The Queen* (2001) 207 CLR 278, 314, 320–3 (Kirby J). *Contra Eastman v The Queen* (2000) 203 CLR 1, 44–51 (McHugh J); *Re Wakim; Ex parte McNally* (1999) 198 CLR 511, 549, 552–3 (McHugh J).

ment to ‘fit’ the crime. In other circumstances, it may be used to identify the limits of executive power. A power conferred in apparently untrammelled terms, which allows for the diminution of human rights or fundamental freedoms, may need to be understood as subject to implied limits, so that any diminution is not disproportionate to the legitimate purpose for which the power is conferred. Of course, judicial sentencing may be seen as simply one manifestation of the broader principle. In our constitutional writings, proportionality is used to identify the connection between legislation and a purposive power or, more particularly, the ‘incidental power’.¹⁰

As understood by Beatty, proportionality is a principle of distributive justice, but one that operates in all constitutional contexts. This causes some difficulty if attention is paid to the reasoning of the judges. Beatty, however, brushes this aside, stating:

Although, as we have seen, it often goes by different names, ‘reasonableness’ in India and Japan, ‘toleration’ in Israel, ‘strict scrutiny’ in the United States, its meaning never changes. The caselaw shows proportionality can be and usually is formulated at the highest level of generality that the words and structure of the constitution logically support.¹¹

This is slippery ground, and the risks are not appreciated. Beatty considers the possibility that the concept may be broken down into three distinct principles: rationality; necessity; and proportionality, in the strict or narrow sense. The first two are dismissed as ‘really just clear and easy applications of the third’.¹² The slope continues to get steeper so that in the end we are left with the following conclusion:

However it is defined, in all its formulations, it is all about moderation and mutual respect from beginning to end. As a general principle, proportionality tells governments and their officials that they have to have stronger and more compelling reasons for decisions that inflict heavy burdens and disadvantages on people than when the infringements of rights and liberties are not as serious or painful.¹³

At the bottom of the slope one finds a swamp, with no clear test for deciding constitutional cases. Nevertheless, Beatty is able to conclude: ‘The only conceptual apparatus judges have, and all that they need, to harmonise the autonomy of each person with the general will of the community is the formal principle of proportionality.’¹⁴

How, then, does Beatty think judges will respond to this conclusion? Professor Beatty wants to have it both ways. At times he asks judges ‘to stop trying to make sense of words on a page, events in the past, and/or earlier opinions.’¹⁵ Of

¹⁰ See, eg, *Leask v Commonwealth* (1996) 187 CLR 579; *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1.

¹¹ Beatty, above n 1, 163 (citations omitted).

¹² *Ibid.*

¹³ *Ibid* 163–4.

¹⁴ *Ibid* 116.

¹⁵ *Ibid* 176.

US judges, he says that this exercise ‘will be beyond their legal imagination’.¹⁶ Despite this provocative language, at other times Professor Beatty seems to take a more optimistic approach. Thus he states:

As a practical matter, proportionality is a legal standard that is very familiar to the judiciary. It has a proven record of success. Of all the theories that have offered justifications for a process of judicial review, the proportionality model is unquestionably the most compatible with current practice.¹⁷

Despite this ambivalence, Beatty appears to be firm on three points.

First, he would abandon reliance on statutory interpretation: use of the principle of proportionality as a basis for judicial review of the legality of both legislative and administrative actions ‘entails very little interpretation and makes the concept of rights almost irrelevant.’¹⁸

Second, he would have the courts abandon the doctrine of precedent in the exercise of constitutional interpretation. He is unequivocal on this point: ‘Psychologically the loyalty and commitment of common lawyers to the practice of reasoning from prior cases is easy to understand but intellectually it is incoherent and unprincipled and so impossible to defend.’¹⁹ Earlier opinions ‘are at best superfluous and at worst they purport to defy the supremacy of the constitution’.²⁰ He is undoubtedly right to think that without reliance on the legal text and without the assistance of prior opinions, the underpinnings of current judicial method will be forsaken.

However, Professor Beatty’s third point of reference for the courts is an insistence that they will get the answers right if they uphold the judicial role of a ‘detached and disinterested perspective’ in making a thorough and accurate assessment of the facts.²¹ He treats reasoning by analogy, correctly, as dangerous because it is ‘notoriously soft in its treatment of facts.’²² Nevertheless, in one of the examples to which he pays much attention — namely the discriminatory nature of opposition to same-sex marriages — he is anxious to emphasise the analogy between sexism and racism: ‘The sexist bias of our traditional rules of marriage is precisely the same as the racism that infected the anti-miscegenation laws that were struck down by the US Supreme Court. Sex, like race, determines who each person can marry.’²³

He continues:

The argument that traditional marriage and family laws do not discriminate on the basis of sex because men and women are treated the same is so clearly wrong as an empirical fact it is not surprising that it does not figure prominently in the jurisprudence on gay rights.²⁴

¹⁶ Ibid.

¹⁷ Ibid 171.

¹⁸ Ibid 160.

¹⁹ Ibid 90.

²⁰ Ibid.

²¹ Ibid 96.

²² Ibid 111.

²³ Ibid 106.

²⁴ Ibid.

To reduce the debate about same-sex marriages to a factual question is a startling approach. First, the proposition that a prohibition on same-sex marriages is an example of sex discrimination is by no means self-evident, as a matter of logic, whatever the facts. It is true that the ban focuses on the gender of the proposed partner; but it does not necessarily follow that any reference to gender in a legal test involves unequal treatment on the basis of gender. In New South Wales such a proposition was accepted, in a somewhat different context, by Street CJ in the school discrimination case *Haines v Leves*.²⁵ However, that was a minority view and has not been generally followed in this country. The very fact that laws throughout Australia treat discrimination against gays and lesbians as an example of unequal treatment on the basis of gender preference, rather than gender itself, demonstrates that, at least in this country, such discrimination is not treated as an example of sex discrimination.²⁶ More importantly, Beatty's reliance on facts as determinative of constitutional issues relating to human rights is remarkably flexible: for example, the factual assessment required in relation to marriage laws requires attention to the suffering caused to gays and lesbians by such a prohibition. Professor Beatty assesses the matter in the following way:

By contrast, those who regard conjugal relationships of people of the same sex as an immoral and grotesque perversion of the core ideas of marriage or family, have little or nothing, other than their prejudices, to lose. In an era when lesbians and gays can and do live openly in intimate relationships, and enjoy virtually all the other benefits of the traditional family life, it is no longer possible to argue that allowing them to swear a legal oath of marriage will have a tangible effect on anyone else's welfare or well-being. The fact that a majority of people feel that allowing gays and lesbians to marry defiles the ideals and values that underlie the institution can't be enough to tip the scales in their favour if there are no other harmful effects.²⁷

And he concludes tellingly: 'Because constitutions are at the apex of every legal system, popular opinion must conform to the rules they lay down, not the other way around.'²⁸

This approach sits awkwardly with his treatment of abortion. In that context, he states that

more restrictive laws can be justified in Ireland, where the religious faith of the people attaches infinite value to human life from the moment of conception, than in Japan where the morality of foetal life and death is understood very differently.²⁹

²⁵ (1987) 8 NSWLR 442, 457–8.

²⁶ See, eg, *Anti-Discrimination Act 1991* (ACT) s 7(1)(b); *Anti-Discrimination Act 1977* (NSW) s 49ZG; *Anti-Discrimination Act 1992* (NT) s 19(c); *Anti-Discrimination Act 1991* (Qld) s 7(n); *Equal Opportunity Act 1984* (SA) s 29(b); *Anti-Discrimination Act 1998* (Tas) s 16(c); *Equal Opportunity Act 1995* (Vic) s 6(l).

²⁷ Beatty, above n 1, 114.

²⁸ *Ibid* 115.

²⁹ *Ibid* 168.

Facts, it appears, can readily be assumed from a distance:

In many cases, including those reviewing laws that prohibit women from terminating their pregnancies, the evidence of the significance of the law for those it affects most is clear and unambiguous and not a matter of dispute. No one doubts the sincerity and intensity of Irish Catholics regarding the sanctity of foetal life.³⁰

No doubt a reasonable argument can be made to dismiss overwhelming public opinion opposing same-sex marriage as simply ‘prejudice’, whilst upholding the effect of religious beliefs which will not countenance abortion at any stage of a pregnancy. Nevertheless, the point of distinction requires careful attention; Beatty gives it little or none.

One other aspect of Beatty’s argument requires attention. He is anxious to note that the widely-drawn distinction between civil and political rights on the one hand, and social and economic rights on the other, is neither as clear-cut nor significant as some people assume.³¹ That point is well taken. Moreover, it was also succinctly made by the ACT Bill of Rights Consultative Committee, chaired by Professor Hilary Charlesworth, which recommended the inclusion of economic and social rights in the proposed Human Rights Bill for the Australian Capital Territory.³² The argument appears to have been rejected out of an excess of caution; a caution which, as Beatty correctly points out, is not justified by experience in other countries. Nevertheless, such political circumspection is unlikely to be overcome by Beatty’s conclusion that

[o]verall, this comparative jurisprudence shows that a lot of judges think that the legal enforcement of social and economic rights isn’t so different from the protection that is provided by the more traditional civil and political guarantees. The reasoning that the judges employ in the two sets of cases, in fact, is virtually the same.³³

In reaching this conclusion, Beatty places some weight on what he identifies as ‘a landmark case’ in the South African Constitutional Court: *Government of the Republic of South Africa v Grootboom*.³⁴ It is a case which undoubtedly rewards study. The judgment of the Court, delivered by Yacoob J, is a model of clarity and careful judicial reasoning. However, it is surprising that Beatty finds in it support for his claims. The case involved a claim by a number of homeless people asserting that the government (at all levels) had failed, in breach of the *South African Constitution*, to provide them with housing that they desperately needed. This claim was based on s 26 of the *Constitution*, which provides:

- (1) Everyone has the right to have access to adequate housing.
- (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.

³⁰ Ibid.

³¹ Ibid 129.

³² ACT Bill of Rights Consultative Committee, *Towards an ACT Human Rights Act* (2003) 3, 6.

³³ Beatty, above n 1, 129.

³⁴ [2001] 1 SALR 46.

- (3) No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary eviction.

The Court addressed the claims before it with careful attention to the precise language of the section. It considered the correct construction of the provision by reading it in its constitutional context, to require that the obligation it imposed affected all levels of government, which could act in concert to fulfil the obligation; and, further, in its social context, noting the widespread lack of adequate housing in South Africa at the end of the era of apartheid (when the *Constitution* was adopted). The Court also took note of the similar, though not identical, terms of the *International Covenant on Economic, Social and Cultural Rights*³⁵ and the authoritative reports of the United Nations Committee on Economic, Social and Cultural Rights. The Committee is required to monitor implementation of the *ICESCR* and, through its general comments, provides a guide as to the obligations imposed by the *ICESCR*.

The Court was careful to note two things in this context: first, that the language of s 26 did not precisely reflect the terms of the *ICESCR*;³⁶ further, the Court noted that the Committee — which provided guidance in relation to the operation of the *ICESCR* — had available to it material from the many signatories to the *ICESCR*, which allowed it to comment on a basis that was simply not available to the Court.³⁷ Nevertheless, taking the *ICESCR* into account, together with the structure of the *Constitution* — including other similar provisions and the contextual background — the Court construed the apparently absolute obligation in s 26(1) as conditioned by the terms of s 26(2).³⁸ So understood, the obligation in relation to housing was not absolute, nor merely aspirational, but imposed a legal obligation on the government to take ‘reasonable’ steps, within its ‘available resources’ to achieve the ‘progressive realisation’ of the right ‘to have access to adequate housing’. The government satisfied the Court that it had taken not merely legislative but administrative measures, which led the Court to conclude that what had been done was a ‘major achievement’.³⁹ The Court was critical of the absence, at the time the proceedings commenced, of an adequate programme to provide relief for those in ‘desperate need’.⁴⁰ Nevertheless, by the time the proceedings had reached a hearing before the Constitutional Court, steps had been taken to fill the gap in the existing programme.⁴¹

To suggest that the Constitutional Court adopted some broad principle of proportionality to assist it in providing ‘distributive justice’ to the people of South Africa with respect to housing is to do the Court an injustice. It paid careful attention to the text of the specific provisions of the *Constitution* that it

³⁵ Opened for signature 16 December 1966, 999 UNTS 3 (entered into force 3 January 1976) (*ICESCR*).

³⁶ *Government of the Republic of South Africa v Grootboom* [2001] 1 SALR 46, 64.

³⁷ *Ibid* 65.

³⁸ *Ibid* 66.

³⁹ *Ibid* 76.

⁴⁰ *Ibid* 79–80.

⁴¹ *Ibid* 79.

was required to address, and to such authorities as were available to assist it in its exercise of construction of the *Constitution*. The Court did not treat ‘positive’ and ‘negative’ rights as indistinguishable: rather, it identified s 26(1) as imposing, at least by implication, a negative obligation to desist from preventing or impairing the right of access to adequate housing;⁴² and further, in combination with s 26(2), as imposing a positive obligation in the terms noted above.⁴³ It spoke of ‘reasonableness’, not as a synonym for proportionality, but because s 26 requires ‘reasonable measures’.

At one stage, Professor Beatty accuses judges (apparently in the US) of being subject to ‘xenophobia’.⁴⁴ Xenophobia may not be the right word, but it is understandable that American judges tend not to look beyond their own borders, in part because of the massive volume of case law that they have already developed under their *Constitution*. Any suggestion that the Supreme Court, when asked to rule on a constitutional question, should ignore precedent is both unprincipled and unrealistic. Nevertheless, there is merit in encouraging the senior courts of all countries to pay greater attention to international developments. The approach of the Australian High Court in this respect is ambivalent. In some areas, the Court has been more than willing to consider the jurisprudence of other signatories to international instruments to which Australia is a party; for example, in the growing number of cases dealing with the *Convention relating to the Status of Refugees*.⁴⁵ As a result, it has made a significant contribution of its own to that jurisprudence, as recognised by publications of the United Nations High Commissioner for Refugees.⁴⁶ In other areas, the Court has been more cautious.⁴⁷ Such caution is undoubtedly appropriate because any court must be conscious of the need to understand the legal and social context that may govern decision-making in other countries in subtle ways, which are not revealed by the text of the judgments and that may well require a deeper understanding of the social, political and cultural ways of the country in question than most judges enjoy. In this context, the work of a comparative constitutional lawyer is of great importance. It is his or her task to help judges bridge that gap and obtain a better understanding of global influences in areas that have widespread recognition, including human rights and fundamental freedoms. However, I am afraid that

⁴² Ibid 66.

⁴³ Ibid 70.

⁴⁴ Beatty, above n 1, 176–7.

⁴⁵ Opened for signature 28 July 1951, 189 UNTS 150 (entered into force 22 April 1954). See, eg, *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225; *Minister for Immigration and Multicultural Affairs v Khawar* (2002) 210 CLR 1; *Appellant S395/2002 v Minister for Immigration and Multicultural Affairs* (2003) 216 CLR 473; *Applicant S v Minister for Immigration and Multicultural Affairs* (2004) 217 CLR 387.

⁴⁶ See, eg, United Nations High Commissioner for Refugees, ‘The International Protection of Refugees: Interpreting Article 1 of the 1951 *Convention relating to the Status of Refugees*’ (2001) 20(3) *Refugee Survey Quarterly* 77. See also T Alexander Aleinikoff, ‘Protected Characteristics and Social Perceptions: An Analysis of the Meaning of “Membership of a Particular Social Group”’ in Erika Feller, Volker Türk and Frances Nicholson (eds), *Refugee Protection in International Law* (2003) 263, 271–3.

⁴⁷ See, eg, *Purvis v New South Wales (Department of Education and Training)* (2003) 217 CLR 92, 155–6 (Gummow, Hayne and Heydon JJ); cf 118–19 (McHugh and Kirby JJ).

Professor Beatty's text is unlikely to lessen the level of caution, even over-caution, which attends this area of legal cross-fertilisation.

I noted earlier that the Australian experience in dealing with human rights was not necessarily irrelevant to the task Professor Beatty undertook. The same might be said of the English experience, which is also ignored in this text, except when cases reach the European Court of Human Rights. In relation to the US, the focus is firmly on the constitutional cases and not the jurisprudence developed under the *Civil Rights Act of 1964*, particularly Title VII.⁴⁸ In Australia, of course, there is also widespread legislative protection for human rights, but in statutes, not in constitutions.⁴⁹ The task of comparative jurisprudence is undoubtedly vast, without seeking to expand the exercise unnecessarily. Nevertheless, for an Australian lawyer, there are lessons to be learnt from the extent to which our equal opportunity and anti-discrimination law has provided a measure of protection to human rights in Australia, and the extent to which the protection is inadequate because of the absence of constitutional guarantees.

The point is important in the present context, however, because it would give some basis for understanding the extent to which the protection of human rights is truly subject to some different regime of judicial activity. Where human rights depend on statutory protection, that argument is less easily made. Unless, that is, the protection of human rights and fundamental freedoms is driven by some common basic understanding which is reflected in written Bills of Rights, but which is not dependent on express documentation. The 'ultimate rule of law' may be understood as a description of the constitutional structure by which acts of the legislative and executive arms of government are subjected to judicial review, to ensure that they conform to the requirements of legality, whether the legal principles are to be found in the general law, legislation, or the Constitution itself. On the other hand, the 'ultimate rule of law' may be understood also to import substantive content, by which judicial review must be governed. Those who enjoy the protection of written Bills of Rights readily assume that, in this broader sense, their Bills of Rights (when properly understood) incorporate the substantive standards that constitute the ultimate rule of law. In Australia — as in the UK in the past — being without such a constitutional text, we seek to derive from our political, social and legal history principles of interpretation which reflect a general belief that human rights and fundamental freedoms should ultimately be protected. The formulation of principles of construction by Gleeson CJ in *Plaintiff S157/2002 v Commonwealth*⁵⁰ is but a recent example of that process at work.

This last comment brings one back to the proposition that Professor Beatty is seeking to establish: namely, that there is a particular approach required in relation to constitutional interpretation when dealing with a Bill of Rights. In my view, that remains an open question. However, it is one that Australian lawyers could usefully address, given the absence of established and agreed principles of

⁴⁸ 42 USC § 2000e (1991). Title VII deals with Equal Employment Opportunities.

⁴⁹ See, eg, *Human Rights and Equal Opportunity Commission Act 1986* (Cth); *Human Rights Act 2004* (ACT).

⁵⁰ (2003) 211 CLR 476, 492–3.

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constitutional interpretation.⁵¹ Anyone assaying that task would find much stimulation in Professor Beatty's monograph, whether or not they agreed with his conclusions.

⁵¹ See generally Leslie Zines, 'The Interpretation of the *Constitution*' in Suzanne Corcoran and Stephen Bottomley (eds), *Interpreting Statutes* (2005) 64.