BOOK REVIEW: JURISPRUDENCE OF LIBERTY

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From the title *Jurisprudence of Liberty* it is apparent that the editors of this work, Suri Ratnapala and Gabriël A Moens, intend to explore the connection between law and liberty. However, they go beyond merely recognising the interplay between the two concepts and instead attempt to demonstrate how 'the abstract concept of law that prevails in a society may have a profound bearing on liberty in that society'.[1] Therefore it is unsurprising that two major themes of this work are constitutionalism and natural law. These two themes are also complemented by a brief but thorough examination of the merits of Hayek and Dworkin's works.

M Sellers examines how the roots of republican liberty can be traced back to the period of the Roman republic. He views the notion of liberty in Italy, England, America and France as a 'series of variations'[2] upon the ancient model with all sharing a commitment to popular sovereignty, pursuit of the common good and the rule of law. These, he argues, can only be achieved

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1 Suri Ratnapala and Gabriël A Moens (eds), *Jurisprudence of Liberty* (LexisNexis Butterworths, 2nd ed, 2011) 1.

2 M N S Sellers, 'Republican Liberty' in Suri Ratnapala and Gabriël A Moens (eds), *Jurisprudence of Liberty* (LexisNexis Butterworths, 2nd ed, 2011) 19, 51.

through a constitution aimed at 'balancing the power of private avarice and ambition', at safeguarding liberty.[3]

The issue of balance continues in Suri Ratnapala's clear account of the doctrine of separation of powers as the 'cornerstone of liberty'.[4] By splitting the doctrine into two components, methodological and diffusion, Ratnapala explores the influence of these ideas with particular emphasis on the Ancient Constitution of England. Lastly he examines the issue of a new constitutional equilibrium under parliamentary government, within Australia. Unfortunately Ratnapala fails to address exactly what is required to ensure the enshrinement of the methodological thesis and not just its 'practical survival'.[5]

The consequences for liberty of failure to adhere to a belief in constitutionalism, rule of law or even legal culture itself is highlighted by the works of Geoffrey Walker, Lael Daniel Weinberger, Augusto Zimmermann and Lorraine Finlay. Of these I found the last three most interesting because of their assessment of topical issues. Lael Weinberger examines what an increase in Bill of Rights litigation means for liberty and for the federalist structure of America. Augusto Zimmermann addresses the rule of law and legal culture in Latin America by identifying obstacles to the rule of law in the region and showing their impact in Brazil and Cuba, highlighting the need to recreate a culture of legality in which the rule of law flourishes.

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[3] Ibid 52.

[4] Suri Ratnpala, 'Separation of Powers: The Cornerstone of Liberty under Law' in Suri Ratnapala and Gabriël A Moens (eds), *Jurisprudence of Liberty* (LexisNexis Butterworths, 2nd ed, 2011) 53.

[5] Ibid 81.

Similarly Lorraine Finlay's chapter explains the need to create a culture of respecting and valuing the rights of private property within Australia.[6] She persuasively argues this is required because of erosion by judicial decisions, especially of the High Court of Australia, numerous statutes across different jurisdictions and the failure of constitutional protections.

The second major theme on natural law and liberty is dealt with in chapters by Nicholas Aroney and Bradley Miller, Gabriël Moens, William Wagner and James Allan.

Aroney and Miller analyse Finnis's conception of liberty by breaking it down into existential, moral, legal and political dimensions. They see Finnis's notion of liberty as an individual having the freedom to choose among ascertainable goods provided the options are morally permissible.[7] The authors also briefly comment on the rule of law and its role in securing the dignity of autonomy for an individual. Although this chapter is accessible, because of the helpful but necessarily brief overviews provided, a prior acquaintance with Finnis's work by the reader would aid in interpreting Aroney and Miller's conclusion.

The other chapters dealing with natural law are well explained and convincing. Gabriël Moens examines the German Border Guard cases to illustrate how societal cost must be assessed before obeying a precept of

[6] Lorraine Finlay, 'The Erosion of Property Rights and its Effect on Individual Liberty' in Suri Ratnapala and Gabriël A Moens (eds), *Jurisprudence of Liberty* (LexisNexis Butterworths, 2nd ed, 2011) 465, 493.

[7] Nicholas Aroney and Bradley Miller, 'Finnis on Liberty' in Suri Ratnapala and Gabriël A Moens (eds), *Jurisprudence of Liberty* (LexisNexis Butterworths, 2nd ed, 2011) 247, 268.

natural law, as in these cases 'legal certainty and the legitimate expectations of the border guards' were eroded. William Wagner's work explores the interplay between alienable and unalienable world views in American jurisprudence and concludes that ultimately a choice must be made between natural law and liberty and the tyranny of legal positivism as embodied in the alienable world view. Although I agree with Professor Wagner's view that morality and natural law are indispensable to both society and liberty, his framing of the issue paints it as either black or white. Regardless of this, his contribution is certainly thought provoking and intriguing.

Lastly, James Allan's defence of liberty critiques natural law and proposes that utilitarianism would protect liberty with greater success. It provides a refreshing counterpoint to the majority of other works in the book as he himself acknowledges[8] and succeeds in casting aside possible misperceptions about utilitarianism and its impact upon liberty.

The last major theme of Hayek and Dworkin was identified by Jeffrey Goldsworthy in his review of the first edition.[9] Like Professor Goldsworthy I found Ratnapala's chapter on law as a knowledge process enjoyable for its criticism of postmodernism, found Alan Fogg's comparison of Hayek, Dworkin and others difficult in parts and appreciated Neil MacCormick's criticism of the methods used by some to return to Hayek's spontaneous order.

[8] James Allan, 'Utilitarianism and Liberty' in Suri Ratnapala and Gabriël A Moens (eds), *Jurisprudence of Liberty* (LexisNexis Butterworths, 2nd ed, 2011) 331, 332.
[9] Jeffrey Goldsworthy, 'Jurisprudence of Liberty' (1996) 18 *Adelaide Law Review* 337.

The remaining chapters were of a high quality especially the work by Kamenka and Tay on contemporary radicalism in legal theory, and Mark de Vos's article on the financial meltdown and its impact on financial liberty.

Overall the second edition of *Jurisprudence of Liberty* provides a more diverse range of chapters from different aspects of jurisprudence. It goes beyond merely detailing a relationship between law and liberty and poses questions about how and why we need to safeguard liberty in the twenty first century. As such it provides a well rounded introduction to the essential topic of liberty.