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Full Issue

Articles

Constitutional Human Rights and Private Law Justice
Aharon Barak

Abstract

The question whether constitutional human rights merely define and delimit the relationship between citizen and state or whether such rights also apply to relations between citizens is fundamental to any constitutional democracy. The author examines the scope of the application of constitutional human rights to private law with a view to resolving the issue for the Israeli context. He sets out and analyses four models for defining the appropriate scope of the application of constitutional human rights and roots these models in the jurisprudence of various countries. The author goes on to make a case for the model in which constitutional human rights apply, albeit indirectly, to relations between private citizens. Such an approach, he argues, is the one most consistent with the guiding impulses that drive human rights: respect for equality, dignity and individual autonomy. In addition, the author argues, the tools for facilitating his model of choice already exist in private law, in the form of concepts like "good faith," "public policy" and "unconscionability."

Impartiality after Difference
Christine Sypnowich

Abstract

Much contemporary political theory has been concerned with articulating the reasons for basic constitutional rights and regimes that promote equality and respect for difference. In his latest contribution, John Rawls articulates a political justification for the public culture of pluralism which accommodates a diversity of reasonable and comprehensive views about political life. In this essay reviewing Rawl's latest work, Christine Sypnowich engages Rawlsian liberalism with the idea of difference. Theorists of difference have questioned the precepts of Rawlsian liberalism as it concerns such concepts as reason, impartiality and cooperation. In tracing this encounter between Rawls and the theorists of difference, Sypnowich suggests that Rawls' project is better recast as a defence of the comprehensive ideal of impartiality, an ideal which can best accommodate claims to difference and diversity.

***R. v. Daviault:* A Principled Approach to Drunkenness or A Lapse of Common Sense?**
Martha Shaffer

Abstract

The Daviault decision has caused intense public controversy. While the author recognizes that the decision itself is consistent with contemporary conceptions of actus reus and mens rea, the author challenges the court's treatment of the drunken accused. The paper criticizes the Daviault decision from three different perspectives. First, from a doctrinal point of view, the author questions the retention by the court of the specific/general intent dichotomy as well as the reversal of the onus of proof onto the drunken accused. Second, the decision is filtered through a feminist lens to reveal the specific impact on women. Some concerns include: the absence of detailed facts in the case, triers of fact too readily accepting the Daviault defence in cases of sexual assault, discouragement of the reporting of male violence by the victims when alcohol is involved, and less prosecutions undertaken because the police and prosecutors will mistakenly believe that the Daviault standard of drunkenness has been achieved. Third, the author disagrees with the vision of moral responsibility the court endorses in that accuseds can be absolved of moral responsibility for their actions by engaging in socially irresponsible behaviour. In conclusion, the paper examines Bill C-72 whose purpose is to reverse the Daviault decision.

Book Reviews

The Empire (of Law) Strikes Back: Constitutional Law in Theory and Practice
Thomas M.J. Bateman

Confederation Without Tears, Without Fears, Without Canada: Chilly-Climate Historiography: Britain and The Origins of Canadian Confederation, 1837-67
Janet Ajzenstat