

## LAW &amp; CULTURE



### *JUDICIAL INDEPENDENCE IN AUSTRALIA: Contemporary Challenges, Future Directions*

Rebecca Ananian-Welsh and Jonathan Crowe (eds);  
The Federation Press, 2016; 272 pages;  
\$165.00 (hardback)

On 1 August this year, former Northern Territory Supreme Court Justice Brian Martin stood down as head of the Royal Commission into Detention of Children in the Northern Territory. In announcing that he had requested the Governor-General to revoke the Letters Patent, Martin declared that 'it is essential' that the community has 'full confidence in the independence and competence of the Commissioner' as well as the findings of the Commissioner. Appointed only a few days previously, concern was mounting — particularly among the Indigenous community — that Martin was too closely connected to the Northern Territory corrections systems. There was no suggestion that Martin would not be scrupulously independent in carrying out his duties as Royal Commissioner, and his long judicial service evidences the contrary. Rather, the perception of a lack of independence was critical.

Similar criticisms of judicial officers have been raised over the last several years in Australia. In August 2015, former High Court Justice Dyson Heydon dismissed an application that he recuse himself as head of the Royal Commission into Trade Union Governance and Corruption, after it was revealed that he had accepted an invitation to speak at a Liberal Party function. Earlier, in June that year, Tim Carmody resigned as Chief Justice of the Supreme Court of Queensland. Since his appointment in July 2014, Carmody had weathered scathing attacks from within and outside the profession over both his inexperience and his relationship with the Queensland Government. Perhaps most significant, however, was his decision to meet with child protection advocate Hetty Johnson while deliberating on an appeal by Brett Cowan, the man convicted of killing 13-year old Daniel Morcombe. Further (and not finally), in August 2014, Northern Territory Magistrate Peter Maley resigned after a photo surfaced showing him handing out Country Liberals how-to-vote cards in an April 12 by-election.

In light of these recurring challenges surrounding judicial independence, it is curious that there has been, as Rebecca Ananian-Welsh and Jonathan Crowe note, 'relatively little investigation of the conceptual and philosophical foundations of judicial independence from a distinctively Australian standpoint' (p 2). Thankfully, this excellent edited collection fits the bill.

It is frequently stated that justice must not only be done, but must also be seen to be done. Indeed, judicial independence has two dimensions: independence from the apparatus of

the state, and impartiality towards the parties at issue. The former institutionally secures the latter, and both, as HP Lee notes in Chapter 4, are recognized across the globe as of paramount importance. This volume explores the 'multi-faced and complex character of judicial independence' (p 6), situating its theoretical underpinnings before examining a number of practical challenges, including both personal and institutional independence.

While each chapter is both well-researched and engaging to read, a few stand out. It is instructive to contrast Heather Douglas and Francesca Bartlett's contribution with Andrew Lynch's chapter. Douglas and Bartlett examine the impact of feminism and feminist legal theory on decision-making through qualitative interviews with 41 'feminist' judicial officers. They report that the presence of female judges has a perceptible influence on both the culture of judicial decision-making, and decisions themselves (p 87–88). In contrast, Andrew Lynch analyses the 'sustained public conversation' amongst High Court Justices sparked by the publication of a lecture by Dyson Heydon on the eve of his retirement in 2013 (p 156). Lynch explores Heydon's central claim that judicial independence is sacrificed by the delivery of joint opinions and artificial consensus. Together these two chapters illuminate the difficult and complex character of 'personal' independence. Does judicial independence necessitate not just seriatim judgments, but a monastic existence separated from the community and one's fellow judges? As Alysia Blackham and George Williams's chapter on social media and the judiciary suggests, this standard may not only be impossible today, but undesirable (p 240). Those advocating such a conception of judicial independence may benefit by reading Jonathan Crowe's contribution on human fallibility (p 37), as well as David Tomkins and Katherine Lindsay's excellent chapter on extra-curial writing and intellectual independence (p 168).

The institutional dimension of judicial independence is not ignored. Suri Ratnapala explores two elements of the doctrine of separation of powers, arguing it involves a diffusion of powers among branches of government, and a methodological component concerning the nature and proper exercise of those powers (p 23). Ratnapala's chapter situates later discussion on 'institutional' independence, ably explored via a number of themes. In particular, Rebecca Ananian-Welsh examines the use of judges and courts in anti-terrorism schemes (p 241). She concludes that the institutional independence of courts makes them ideal participants in such liberty-intrusive schemes, enabling them to remain vigilant to executive overreach. Conversely, individual judges lack this dimension of institutional independence, meaning that their conscription via the doctrine of *persona designata* is problematic. Gabrielle Appleby also explores institutional independence, but does so

by inverting the book's theme and examining challenges posed by judicial independence, reminding us that principles of judicial independence have the potential to restrict innovative policy making (p 142). Where these principles are constitutionalised, but their content is uncertain, as in the High Court's jurisprudence on Ch III limitations on state legislative power, democratic dangers arise. For example, as Appleby notes, Parliaments may fail to enact the community's policy preferences, instead legislating to avoid (unlikely) constitutional vulnerability.

In any edited collection it is impossible to cover all bases, and no chapter tackles head-on the process of appointment of judicial officers and its connection with judicial independence (though James Allan does so 'somewhat circuitously') (p 64). This is a shame for two reasons. First, as Canada's recent decision to revamp its appointment process by establishing an independent and non-partisan advisory appointments board and increasing transparency around nominations indicates, Australia is increasingly alone in maintaining strict executive control over judicial appointments. Second, as Chief Justice French prepares to retire in January 2017, the government will be forced to appoint a new member of the Court. While we should take seriously Allan's warning that judicial appointments commissions will appoint judicial 'clones', I am unconvinced that the 'old-fashioned Westminster procedure' (p 72) is better. Attorney-General George Brandis would do well to reestablish the minimal consultation model adopted by his predecessor Robert McClelland.

Ultimately, this is a stimulating collection of papers exploring new and emerging challenges to judicial independence. It will be useful for students, academics and legal professionals interested in this most important of principles.

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### *INDIGENOUS PEOPLES AND HUMAN RIGHTS: International and Regional Jurisprudence*

Ben Saul; Bloomsbury/Hart Publishing, 2016; 248 pp; \$74.99 (paperback)

The human rights of Indigenous peoples came into clear focus with the adoption of the United Nations Declaration on the Rights of Indigenous Peoples ('UNDRIP') in 2007. But it was not until 2009 that Australia came to the party, despite Indigenous Australians having a significant input into its development. Yet Indigenous peoples around the world had already been using various existing human rights mechanisms to promote and protect their rights, albeit with mixed results. In this book, Ben Saul draws together, in an accessible and readable form, the international and regional jurisprudence on human rights as it relates specifically to Indigenous peoples, and which was influential in the development of the UNDRIP.

The book covers the whole gamut of rights, from civil and political rights and the right to self-determination, to rights relating to culture and language, labour rights, children and family rights, and rights relating to land and natural resource management, to name a few.

Commencing with an outline of the institutions and influences on the development of international and regional human rights law as it applies to Indigenous peoples, the book is then divided

into five chapters. Chapter one deals with the task of identifying Indigenous peoples, and discusses the attempts at defining them at the international and regional levels. It also considers the question of who is a minority, and the relationship between Indigenous communities and the individuals within those communities. This chapter was particularly engaging and illuminating, thereby setting the scene for the rest of the book.

The book then moves into an analysis of the jurisprudence, beginning at the international level with a chapter devoted to the UN Human Rights Committee. The next chapter then considers five other UN human rights treaty bodies. It then drills down to the regional level, with chapter four focusing in particular on Indigenous property rights and rights in land and natural resources. The spotlight in this regard is on the Inter-American Commission on Human Rights, the Inter-American Court of Human Rights, and the African Commission on Human and Peoples' Rights. Chapter five remains at the regional level, but moves into a consideration of Indigenous cultural, socio-economic and physical integrity rights. This chapter also moves beyond the Americas and Africa, with a section on the European Human Rights System. One might wonder though why there is no discussion of the Asian region, given that approximately two thirds of the world's Indigenous peoples live in Asia. This, however, is clearly explained in chapter one, so in that respect, the book has it covered.

The four chapters covering the jurisprudence are comprehensive in their coverage, and provide a wealth of information. This is important material, but at times can be quite dense, which may result in information overload if one is reading the book chapter by chapter. However, the book's clear and logical structure with many subheadings means that the reader can focus on a particular theme, a particular region, a particular human rights institution, or a particular type of right, and will easily be able to locate the relevant material. It is also comprehensively footnoted, so that readers who are interested in delving further into the various issues and cases discussed can find the relevant documents.

The book concludes with a summary of the main conclusions from each of the chapters, and then considers future normative and implementation challenges for Indigenous rights following the adoption of UNDRIP and the political momentum that it, along with other UN human rights mechanisms, has created. This final conclusion is succinctly and intelligibly written, leaving the reader with much upon which to reflect.

Saul's book provides a valuable insight into the international and regional human rights jurisprudence on Indigenous peoples. It is written in a clear and accessible style and is comprehensive in its coverage. Saul's international law expertise is evident. This would be an ideal book to prescribe for any law subject that looks at the human rights of Indigenous peoples, and for those interested in how the UN and various regional human rights institutions have operated in practice. It is not the only book around devoted to the topic of Indigenous peoples and human rights, but it is the only one which focuses specifically on the jurisprudence, and in that regard it is a valuable addition to any library, personal or otherwise.

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