Indigenous Australians, Social Justice and Legal Reform: Honouring Elliott Johnston

edited by Hossein Ismaeili, Gus Worby and Simone Tur

xx + 314 pp., The Federation Press, Sydney, 2016,
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Constitutional Recognition of First Peoples in Australia: Theories and Comparative Perspectives

edited by Simon Young, Jennifer Nielson and Jeremy Patrick

xxiv + 280 pp., The Federation Press, Sydney, 2016,
ISBN: 9781760020781 (pbk), $84.95.

Treaty and Statehood: Aboriginal Self-determination

by Michael Mansell

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Reviews by Peter Cane
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I approach these books as a lawyer with interests in history, governance and the development of law and legal systems, but very little background in Indigenous studies. My hope, in reading and reviewing this substantial body of work, was that I would learn more about Indigenous law. That hope has not been disappointed.

In the literature, including the books under review, Indigenous law is commonly referred to as 'customary', to distinguish it from the law of the dominant Australian legal system. This usage reflects mainstream, contemporary non-Indigenous legal theory, which understands law, at least in its central case, to be highly institutionalised, equipped with formal legislatures, executives and courts. I prefer to adopt a broader understanding of law as one of various normative, social practices

for maximising the benefits of living in groups. Normative, social practices reflect a species-universal human capacity and propensity to interpret the world in terms of values. A distinguishing feature of law is its claim to authority over all the members of a social group. A plausible historical hypothesis is that law in this sense emerges from social and economic stratification consequent upon the growth of human social groups beyond a certain size and, perhaps, the transition from a subsistence lifestyle to surplus-wealth production. It is undisputed that at some stage during their very long occupation of Australia, its first inhabitants developed law in this sense, dealing with matters such as land use, kinship and violence. It is also undisputed that such law continued to be practised by Aboriginal Australians after 1788 and that it is still practised today.

Indigenous Australians, Social Justice and Legal Reform presents versions of lectures given annually between 1998 and 2015 to honour (the memory of) Elliott Johnston, lawyer and chair of the Royal Commission into Aboriginal Deaths in Custody, which reported in 1991. Thirteen of the 18 lectures in this volume were given by lawyers. Ten lecturers identify as Indigenous. The lectures are diverse. Michael Kirby's eulogises Johnston. Several draw inspiration from the royal commission's report: Frank Brennan's, Pat O'Shane's, Marcia Langton's and Martin Hinton's, among others. Some strike a personal note – Sue Gordon's, for instance, and Mark McMillan's. Of course, dispossession, reconciliation, recognition, rights and self-determination receive significant attention, and, fittingly, most of the lecturers adopt an activist stance.

As for law, unsurprisingly (perhaps), there is much more in this volume about Australian law than about Indigenous law, and much more about Aboriginal people as subjects of law than as legal actors. Still, Marcia Langton tells us of Aboriginal people in the Northern Territory wanting 'minor offenders brought to book under customary law mechanisms' (p. 64). Jacqui Katona says that 'there must be a reconstruction of the relationships between Aboriginal people and … organisations [that exercise jurisdiction over them] and this reconstruction involves a greater recognition of Aboriginal law and culture' (p. 78). She goes on to observe, however, that Aboriginal 'laws should only be explained by particular traditional owners and custodians to particular people at particular times' (p. 82). Larissa Behrendt is sensitive to the dangers of transplanting law from the non-Indigenous system to the Indigenous system without properly understanding differences between the cultures of the two systems that may affect the reception and operation of the transplants in the new system (pp. 100–01). This, of course, is one of the basic lessons and benefits of comparative law. Tom Calma raises the thorny issue of how to manage value disagreements across two legal systems and cultures rather than within one (pp. 144–45). Graeme Neate spells out the fundamental challenges to meaningful legal pluralism presented by the domination of one system over the other(s) (p. 201), and by the passage of time (p. 205).

Mark McMillan looks such challenges directly in the face. As he sees things, there never was, and there is not now, one Aboriginal nation and one Aboriginal legal system but many, living in peaceful coexistence with one another: legal pluralism in action. The British disrupted that equilibrium by introducing a new, intolerant system that overwhelmed the others by force. To the authorities of that system, he says: 'we are still Aboriginal and Torres Strait Islander people. It is your legal system that is in a state of flux … we hope that it gets better for you' (p. 287). Giving the point a practical spin, Jacinta Ruru's lecture ends the volume with a cautiously optimistic discussion of ways in which New Zealand law has attempted to accommodate Māori law.

Constitutional Recognition of First Peoples in Australia presents 13 papers delivered at a colloquium in Townsville in 2015. All the authors are lawyers, but I could identify only three or four as Indigenous. For me, the five comparative essays stood out. They deal, respectively, with the United States, Canada, Solomon Islands and Vanuatu, the United Kingdom, and New Zealand and Ecuador. Their value, I think, is that they suggest feasible models of legal pluralism and recognition of Indigenous law. Referring to American experience, Jennifer Hendry and Melissa L. Tatum carefully explain the difference treaties can make. Referring to Canada, Sharon Mascher and Simon Young explore the potential of 'rights' as a vehicle of Indigenous empowerment – a matter raised in several of the lectures in *Indigenous Australians, Social Justice and Legal Reform*. Jennifer Corrin explains how explicit constitutional and statutory recognition of Indigenous law does (or does not) work in two Pacific nations. Benjamen Franklen Gussen compares and contrasts the experience in New Zealand with that in Ecuador, within the framework of a useful distinction between the width and the dynamism of the two regimes of recognition. The one disappointment in this part of the book was Vito Breda's valiant attempt to draw lessons from Scottish devolution, thereby (negatively) illustrating the importance of choosing as comparators systems that have enough in common to make comparison worthwhile and culturally sensitive.

Of the remaining essays in *Constitutional Recognition of First Peoples in Australia*, Ambelin Kwaymullina's exploration of 'the significance of constitutional change from an Indigenous perspective' (p. 31) utilises a fruitful distinction between 'holistic, relationship-focused and non-linear' Indigenous 'ways of knowing' on the one hand, and 'reductionist, rights-focused and linear', 'Eurocentric' thinking on the other. Kwaymullina focuses on land law, but the contrast between worldviews surely has wide and deep significance, both theoretical and practical, for understanding and promoting legal pluralism in Australia. Jeremy Patrick's careful analysis of common arguments against constitutional recognition of Indigenous people operates at a similar level, raising deep issues about culturally specific concepts of equality and discrimination that lie at the heart of European law and legal theory. The other essays in the volume are more utilitarian in orientation, concerned with

law primarily as a tool of social policy rather than a repository of human values. From this perspective, the basic question is not how well law expresses the identities and aspirations of Indigenous people but how law can improve their lives.

Treaty and Statehood is the work of a single author. This (combined with Michael Mansell's credentials as lawyer and activist) gives it a degree of coherence and vision sometimes lacking in the other two volumes under review. Mansell paints on a large canvas with bold and creative strokes, unconstrained by current legal and political environments. Basic to Mansell's discussion of 'Aboriginal sovereignty' (in Chapter 5 and elsewhere) are two crucial points. The first is captured in words of Pat Dodson, quoted by Mansell at the beginning of the chapter: 'In 1788 Aboriginal people were a sovereign people who governed this land with a complex societal structure of law, language and culture' (p. 74). The second point is Mansell's: 'Sovereignty today cannot be what it was before … Sovereignty is no longer absolute … it is now burdened by external and internal relations' (p. 95). Law is a dynamic practice, mediating between continuity and change. The meaning of and possibilities for legal pluralism in Australia are different now than in 1788. Understanding the implications of legal pluralism in twenty-first-century Australia is hindered by the reality that most Australians know (and care) much less about Indigenous law than about Australian law, and very little about the interactions between them. These ideas inform Mansell's discussion of the treaty as a vehicle of recognition. A treaty, he says, quoting the Canadian Royal Commission on Aboriginal Peoples (1996), does not involve 'submission' but rather an agreement 'on rules of coexistence' that allows each side to retain 'their own ways of living and governing themselves' (p. 97). 'The starting point', according to Mansell, 'is to restore all Aboriginal and Torres Strait Islanders' rights and interests in existence in 1788, except where it is entirely unrealistic. The challenge is to examine whether, and in what form, Aboriginal interests have survived and are capable of being exercised' (p. 144).

This is a mighty challenge, which there is no hope of meeting without a sound understanding of Indigenous law in 1788 and how that law has fared since then. As Mansell points out, for instance, 'The notion of self-determination as a right for distinct peoples was borne [sic] out of a new international order, developed rapidly in the twentieth century, and in consequence of the war to end all wars in 1914–1918' (p. 165). The basic question for proponents of legal pluralism is how to find an integral place for Indigenous law in twenty-first-century Australia without ignoring the past 250 years of history.

Mansell's head-on consideration of this question is brief (pp. 227–32). He refers to the 1986 *Report on Recognition of Aboriginal Customary Laws* by the Australian Law Reform Commission and the 2006 report of the Law Reform Commission of Western Australia on *Aboriginal Customary Laws*, both of which saw selective recognition of customary law as an important element of recognition more widely. Mansell himself associates recognition of 'traditional law' with the idea of an Indigenous state within

the Commonwealth – 'internal self-determination', as he calls it. I would suggest that not far below the surface here lurk two quite different understandings of 'legal pluralism' that we might refer to, respectively, as an 'incorporation model' and a 'coexistence model'.

An incorporation model, which underpins the Law Commission Reports, is exemplified by the native title regime. It involves treating Indigenous laws as (static) facts (about the past) relevant to the application of living legal norms of the dominant legal system. By contrast, a coexistence model recognises Indigenous laws (like norms of the dominant legal system) as living norms embedded within an autonomous political system. Incorporation assumes and preserves legal 'singularism'. Coexistence, on the other hand, assumes and promotes legal pluralism. An Indigenous state within the Commonwealth would provide a technically feasible arrangement for realising legal pluralism within Australia by creating an Indigenous political community (or 'polity'). Legal pluralism without political pluralism would be much more difficult. Either way, significant progress towards legal pluralism is unlikely before we know much more than we currently do, not only about the past of Indigenous law but also about its living present and its possible futures. Like law generally, Indigenous law, present, contains Indigenous law, past, and looks forward to Indigenous law, future. Living Indigenous law, past, present and future, is the elephant in the room. Until it is much better understood, particularly by non-Indigenous lawyers, the prospects for meaningful legal pluralism in Australia are unknowable.

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