

## Fresh Perspectives on Judicial Independence

*Helen Cunningham (ed.), Fragile Bastion: Judicial Independence in the Nineties and Beyond, Judicial Commission of New South Wales, Sydney, 1997*

*Reviewed by Brian R. Opeskin*

IN the wake of the Australian High Court's recent controversial decisions on native title and implied rights, conservative politicians have lambasted members of the Court, collectively and individually, for their excessive creativity in judicial law-making, their usurpation of legislative functions, and their allegedly poor grasp of Australian pastoral history. In addition, the Commonwealth Attorney-General, Daryl Williams, who by tradition bears responsibility for defending the federal judiciary from political attack, has denied that this is a proper function of his office. The courts have thus been left to fend for themselves in the face of intense political and public scrutiny. Unaccustomed to the harsh glare of the media's attention, and seemingly unprepared for the task, the High Court mounted a somewhat timid defence in which it both accepted the legitimacy of fair public criticism and stressed the importance of restraint in treating the Court as a political player. As the former Chief Justice of Australia, Sir Anthony Mason, remarked in 1997, some of the attacks on the Court 'reflected a lamentable failure to respect the independence of the judiciary and a failure to appreciate the importance of the rule of law as a central pillar in our society' (*Sydney Morning Herald*, 28 February 1997).

*Fragile Bastion* is thus a timely publication. Taking its title from Sir Ninian Stephen's 1981 Southey Memorial lecture, the book is an interesting but somewhat quirky collection of six chapters on the theme of judicial independence. Three of the contributors are past or present judges (Sir Anthony Mason, Chief Justice John Doyle and Lord Justice Brooke), two are legal academics (Pat Lane and Bron McKillop), and one (Daryl Williams) is a politician. Despite the diversity of perspectives that these contributors bring to the subject, it might have been useful to include other views, for example by including a chapter by a political scientist or other expert on Australia's political institutions. In that way, the almost uniform acclamation of judicial independence by the contributors might have been tempered by a discussion of the trade-off in values that is inherent in the relationship between the judiciary and other branches of government.

One laudable feature of the collection is its willingness to view judicial independence in historical and comparative perspective. Lord Justice Brooke's chapter on the history of judicial independence in England and Wales provides a wealth of information on the use of judges as pawns in the long-drawn battle between King and Parliament, leading eventually to the Act of Settlement in 1701, upon which the modern conception of judicial independence is founded. Bron McKillop's chapter charts the fascinating history of judicial independence in pre- and post-revolutionary France, and in particular its rise since 1958 under the Fifth Republic. The Attorney-General's chapter also has an international flavour in its description of Austra-

lia's initiative to chair a working party of law ministers from the Commonwealth of Nations. The purpose of the exercise is to gather information on law and administration relating to judicial independence in each of the countries comprising the Commonwealth, with the aim of facilitating practical steps to promote judicial independence and the rule of law.

Judicial independence is a concept with both external and internal aspects. The external aspects concern the relationship between the judiciary and other branches of government — the executive and the legislature. Particular issues arising in that context are the way in which judges are appointed and removed from office, their ability to hold extra-judicial appointments, the remuneration of judges, the financing of the judicial system, and the relationship between the courts, the media and the public. The internal aspects concern the relationship between judges and litigants in individual cases. Here, independence is protected by rules relating to bias, impartiality, and immunity from suit in relation to the exercise of judicial functions. Each of these issues would provide the basis for an interesting study in its own right. For example, Lord Justice Brooke reminds us that, historically, the King of England paid his judges such low and intermittent wages that it was customary for them to take bribes to supplement their income. Lingered concern over the executive's control over judges' salaries finds expression in the Australian Constitution and in legislation or custom that sets judicial salaries in accordance with the recommendations of independent remuneration tribunals. Additionally, Chief Justice Doyle addresses the issue of the relationship between the courts, the media and the public by strongly urging judges to work with the media to help them provide accurate and balanced coverage of the work of the courts, and to educate the community about the work that judges do. Some courts have already appointed media officers for this purpose, but many appellate courts have a long way to go in terms of encouraging greater use of joint judgments, reducing the prolixity of judicial reasoning, and providing a short statement with each decided case on the relevant facts and findings for consumption by the media and the public alike.

The appointment and removal of judges, as discussed in the stimulating chapter by Sir Anthony Mason, has generated much recent debate. This is even more the case now than when *Fragile Bastion* was published. There have been recent calls for an inquiry into the conduct of Justice Callinan of the High Court. And in June 1998 the New South Wales Legislative Council considered, but rejected, an historic motion to dismiss Justice Vince Bruce of the New South Wales Supreme Court on the ground that his extensive delays in delivering judgment made him unsuitable to hold judicial office. This was apparently only the second time in Australia's federal history that a parliament had considered an address for removal of a judge from office. The significant media coverage of Justice Bruce's attempted dismissal signals a growing public interest in the processes and procedures by which judges are appointed and removed, and highlights the need for greater transparency in determining who shall comprise the 'third arm of government'.

Judicial appointments in Australia have always been a secretive affair. Formally, appointments are made by the Governor in Council for State appointments and by

the Governor General in Council for federal appointments. In practice, this means that Cabinet makes the appointment, usually on the advice of the relevant Attorney-General. The processes are accordingly informal, ad hoc and opaque. Only in relation to High Court appointments is there a legislative requirement to consult more widely, but even then the States, the intended beneficiaries of this provision, complain about their lack of effective participation in the process. Arguments for changes to the appointments process find support in the fact that judges exercise considerable public power but are in many respects unrepresentative of the community they serve. To take the example of gender balance, over the life of the Federal Court of Australia only five out of 85 appointees have been women, while only three out of approximately 180 appointees to the New South Wales Supreme Court have been women. This may be contrasted with the situation in France, where (as Bron McKillop relates) 46 per cent of the judiciary are women, though even there men still predominate at the higher levels.

Few people would subscribe to the view that a judge of a particular gender, race or religion should be appointed in a representative capacity for members of that class; after all, judges must do justice to all manner of litigants before the court. But this leaves open the question whether the composition of the judiciary should nonetheless be representative of the community that it serves. On this issue, Sir Anthony treads a delicate line in which he accepts that the composition of the judiciary ought to be 'reasonably balanced' (p. 8) but rejects the claim that the judiciary should approximate the composition of society as a whole. Yet it is difficult to see why that degree of approximation would not be achieved (over time, and over a large enough sample of judges) if there were true equality of opportunity in education, employment and professional development for all members of the community.

The real impediments to such equality are not just the method of selecting judges, but those social and economic factors, operating at an earlier point in time, which restrict the diversity of individuals comprising the pool of those who would (by any reasonable criteria) be eligible for appointment to the bench. Sir Anthony advocates continuing the practice of appointing judges predominantly from the bar because, in his view, the professionally skilled barrister is more likely to be a successful judge in the cut and thrust of the court room than would a lawyer from other backgrounds. This view has merit, but it is still necessary to ask why the pool of potentially appointable barristers is comprised overwhelmingly of white Anglo-Celtic males. Plausible explanations include the nature of work practices at the bar (which make it difficult for women to reconcile paid work with family responsibilities) and the propensity of individuals to see as meritorious those attributes of another person which replicate their own social experience. The status quo is thus reproduced in a club-like atmosphere that is highly resistant to infiltration by outsiders. If the composition of the bar were to change significantly over time, one might dare hope that the composition of the judiciary would chart the same course.

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