BOOK REVIEW

Megan Davis and Marcia Langton (eds), *It's Our Country: Indigenous Arguments for Meaningful Constitutional Recognition and Reform* (Melbourne University Press, 2016)

Introduction

In January 1834, Robert Lyon, a well-known English settler and humanitarian, wrote a letter to the editor of the *Perth Gazette* stating:

> The sooner the national rights of the Aboriginal inhabitants are recognised by some regular deed or charter, the better it will be for them, and the British colonies in this hemisphere. It is an act of justice as well as humanity, and therefore ought not to be delayed.[1]

Lyon would no doubt be dismayed to hear that more than 180 years later, this act of justice and humanity continues to be delayed. And although constitutional recognition currently has bipartisan support, indeed multi-party support at the political level, as well as support in the general community, after five years and four separate processes there is still no clear way forward, with the process appearing to have stalled.[2]

This book, however, may help shift the process back into gear. It brings together the diverse opinions of 17 Indigenous Australians in a collection of essays about the future of constitutional recognition and reform. But it is not limited to big 'C' constitutional recognition; in commissioning the essays, the editors did not seek to constrain the contributors to the narrow field of constitutional recognition by textual amendment, but invited them to put forward their own vision as to what recognition should look like. Some took the opportunity to discuss constitutional recognition and reform in the context of the current debate about amending the text of the *Constitution*, but many chose to look beyond that limited framework, seeing constitutional reform as only part of, or even a distraction from, a wider package of recognition measures.

The Contributors

The 17 contributors encompass a broad spectrum of Australia's First Nations peoples, ranging from politics, academia, and law to grass roots campaigners and those with a long history of working in Indigenous affairs or in Indigenous

1 Robert Lyon, 'To the Editor of the Perth Gazette', *The Perth Gazette, and Western Australian Journal* (Western Australia), 11 January 1884, 215.

2 Megan Davis, 'Ships That Pass in the Night' in Megan Davis and Marcia Langton (eds), *It's Our Country: Indigenous Arguments for Meaningful Constitutional Recognition and Reform* (Melbourne University Press, 2016) 86, 90–1.

community organisations. They include many familiar names, such as Patrick Dodson, Noel Pearson, Nyunggai Warren Mundine, and indeed the editors themselves, Professors Megan Davis and Marcia Langton.

The editors introduce us to the views of all of the contributors in their comprehensive introduction, adeptly highlighting the key elements of each essay. They identify a common consensus that recognition, whatever form it takes, must be more than symbolic, more than minimalist, and must involve Indigenous peoples as equal partners in discussions; and a consensus that the policy settings need to change.

The Essays

Marcia Langton opens the collection by reminding us of the historical context in which the *Constitution* was developed, and the significance of the 1967 referendum. Her essay focuses on the concept of race, the role it has played in the *Constitution*, and the importance of removing it.

Harold Ludwick makes the plea in his essay for governments to listen more effectively to Indigenous voices, and to allow Indigenous Australians to take responsibility for their affairs. He argues that this can be achieved by amending the *Constitution* to guarantee Indigenous people a say in decisions made by Parliament that affect them. And to that end he is implicitly supportive of Noel Pearson's proposal, outlined in chapter 16, for a constitutionally recognised Indigenous advisory body.

Tony McAvoy, Australia's first Indigenous SC, goes beyond mere amendment of the *Constitution*. He is not afraid to condemn the *Mabo v Queensland [No 2]*[3] decision for perpetuating the myth that Australia was settled, despite its rejection of the doctrine of terra nullius. Yet changing the native title regime is not his answer, based as it is on the 'immovable rock' that is this aspect of *Mabo [No 2]*. Instead, he, like most of the contributors, focuses on political solutions, including treaties. He wants Aboriginal and Torres Strait Islander people to be able to reach the highest level of self-determination as their circumstances will allow, acknowledging that there will be differences between remote and urban Indigenous communities. To that end, he suggests the creation of a national Assembly of First Nations, to assist communities to negotiate agreements or treaties on land for which they have the 'cultural authority' to speak. But he includes a cautionary note, warning of the difficulties of ensuring that such agreements are adhered to in both spirit and content. His final suggestion is, however, a simple amendment to the *Constitution* to recognise that the sovereign status of the state is burdened by prior ownership by Aboriginal and Torres Strait Islander people in existence at the time of the establishment of the colonies.

Josephine Bourne focuses not on any particular form of constitutional recognition, but instead on what it should achieve. Recognition for her means hope, capacity,

3 (1992) 175 CLR 1 ('*Mabo [No 2]*').

and potential. Any form of constitutional recognition has to be about all of Australia recognising the value of recognition and, continuing with a theme constant throughout the book, not just symbolic recognition, as this would only provide a 'feel good' moment for non-Indigenous Australians without necessarily resulting in any enhanced protection of Indigenous rights. Her essay highlights the importance of individual stories as part of a bigger story, the story of how Indigenous Australians have contributed to the building of the nation. Bourne's essay, although not shying away from the difficulties in effecting change, is ultimately positive in its outlook.

The Commonwealth's power to make racist laws under the *Constitution* is arguably one major flaw on which many, if not most, Australians can agree. It is this particular aspect that Eddie Cubillo focuses on, especially since it has only ever been used against Aboriginal people. But like many, Cubillo worries that the time frame for constitutional reform is too short, because not enough meaningful and culturally appropriate consultation has occurred with Indigenous communities.

Geoff Scott focuses on the policy environment, noting that the recognition process has gone off track. He is harsh in his criticism, but rightly so, setting out in detail a catalogue of policy failures that have contributed to the current state of affairs. As the editors note, his essay is not easy reading,[4] but it is compelling.

Megan Davis' essay highlights the 'perils of patronising Aboriginal people' with an unhelpful focus on 'the predictable and well-rehearsed roadblocks' to constitutional reform.[5] These roadblocks are that Aboriginal people's aspirations are too ambitious, and that the history of referenda means that constitutional reform is doomed to fail. She recalls a discussion with Professor Hilary Charlesworth about 'exercis[ing] our imagination, to imagine the world as a better place',[6] and how to achieve that. We can draw an important point from this. Ambition should be seen as a positive attribute, particularly when combined with imagination, because without them we would remain stagnant. Meaningful constitutional reform may be ambitious, but, as Davis goes on to point out, '[w]e survived frontier wars, we survived compulsory racial segregation; a near-impossible-to-amend *Constitution* is hardly a deterrent'.[7]

Davis also points out that minimal or symbolic reform will not necessarily work as leverage for more reform, and that even the successful 1967 referendum did not produce the anticipated outcomes. She also cautions against reinventing the wheel in setting up principles for engagement with Indigenous polities and concludes by reminding us that reconciliation is a process, not a destination.

4 Megan Davis and Marcia Langton, 'Introduction' in Megan Davis and Marcia Langton (eds), *It's Our Country: Indigenous Arguments for Meaningful Constitutional Recognition and Reform* (Melbourne University Press, 2016) 1, 21.

5 Davis, above n 2, 87.

6 Ibid 88.

7 Ibid.

Kirstie Parker, like Geoff Scott, paints a bleak picture of Indigenous policy failure; setting out a dot point litany of the assaults on Indigenous peoples' existence, connection to country, and cultures. The snubbing of the National Congress of Australia's First Peoples is particularly galling, calling into question Australia's endorsement of the *United Nations Declaration of the Rights of Indigenous Peoples*.[8] She also questions whether an unsuccessful referendum would be as catastrophic to the national psyche and reconciliation as some predict. Catastrophic perhaps for non-Indigenous Australia who might be embarrassed on the world stage, but not for Indigenous people 'who live catastrophe virtually every day'.[9] Like many of her fellow contributors, Parker notes the lack of progress — five years of numerous committees and recommendations, and still no concrete proposal to consider.

Asmi Wood sits squarely in the minimalist camp, his essay being the one most likely to resonate with constitutional conservatives. His focus is on making the *Constitution* internally consistent, and to end race-based discrimination by removing the race power. But he goes on to note that ultimately this is just one step in the thousand-mile journey to rectifying the wrongs of the past. In that respect his view can be seen as consistent with the other contributors in that constitutional reform is just one of many options for recognition.

Nolan Hunter focuses on Australia's failure to implement the principles of the *UN Declaration on the Rights of Indigenous Peoples*, particularly with respect to the involvement of Indigenous peoples in decisions which affect them. He seeks a formal place for Indigenous people at the decision-making table. For Hunter, it is a procedural right; a right to participate and be consulted, and in that respect he is supportive of Noel Pearson's proposal for an Indigenous advisory body.

Dawn Casey's essay highlights the precariousness of legislation intended to protect the rights of Indigenous Australians, noting the abolition of the Aboriginal and Torres Strait Islander Commission, the 1998 amendments to the *Native Title Act 1993* (Cth), along with attempts to amend the *Racial Discrimination Act 1975* (Cth) and the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth). The vulnerability of the Indigenous Land Corporation, the subject of a recent review, is for her symptomatic of wider problems. Indigenous policy, according to Casey, has become too centralised and not responsive to the needs of individual communities. She points to an overwhelming consensus in the Indigenous community that, despite differing opinions on many issues, any change must be more than symbolic, thus echoing the views of her co-contributors.

8 GA Res 61/295, UN GAOR, 61st sess, 107th plen mtg, Supp No 49, UN Doc A/RES/61/295 (13 September 2007) ('*UN Declaration on the Rights of Indigenous Peoples*').

9 Kirstie Parker, 'Building a New, Better Legacy' in Megan Davis and Marcia Langton (eds), *It's Our Country: Indigenous Arguments for Meaningful Constitutional Recognition and Reform* (Melbourne University Press, 2016) 97, 100.

Nyunggai Warren Mundine argues that the focus on race in the *Constitution* is a 'red herring'[10] and seeks to revisit the idea of a treaty. Not just one treaty between Indigenous and non-Indigenous Australia, but a series of treaties between Australia and each First Nation. He points out that this idea is not as radical as it might seem, as much of the work in identifying the country of each First Nation has already been done via the native title process. He also points out that Indigenous Land Use Agreements ('ILUAs') are already being entered into between government and native title groups. These ILUAs, according to Mundine, 'are, in a sense, a form of treaty'.[11]

Sean Gordon is another contributor who supports Pearson's constitutionally entrenched Indigenous advisory body, provided that it is designed properly to allow local communities to connect with government. He also draws upon his work with the Empowered Communities initiative, which he believes would complement such a structure, because it was born out of Indigenous desire to do what government had not done. Policies should not be designed wholly by government and simply delivered to Aboriginal people, ie a top-down approach. Any solution has to 'give Indigenous people a say, and increased authority and responsibility, over the decisions that affect us'.[12]

Michael Mansell on the other hand sees little value in having an Indigenous advisory body in the *Constitution*, as its advice is not binding and, in any event, would duplicate the work of the Social Justice Commissioner. He also sees little value in constitutional change, preferring to use ordinary legislation to deal with discrimination, dispossession, or treaty because it 'is the normal legal tool for changing rights and responsibilities in Western society'.[13] Mansell is wary of the term 'recognise' in this context, making the important point that it infers that unless Indigenous people are 'somehow proclaimed by white people we are incomplete' which 'has a tinge of inferiority about it'.[14] He would like to see a new Indigenous state and dedicated seats in the Senate, and sees proposals for constitutional change as distracting from these and other more important issues.

Teela Reid from the outset clearly states that recognition cannot be limited to constitutional reform. Her vision consists of three ideas: treaty (or treaties), a bill of rights, and a republic Australia. She worries that symbolic recognition in the *Constitution* risks a tacit acceptance of the presumption that Australia was settled, and could delay (although not override) treaty negotiations. For her, a

10 Nyunggai Warren Mundine, 'Unfinished Business' in Megan Davis and Marcia Langton (eds), *It's Our Country: Indigenous Arguments for Meaningful Constitutional Recognition and Reform* (Melbourne University Press, 2016) 128, 133.

11 Ibid 136.

12 Sean Gordon, 'Constitutional Recognition Is Not a Feel-Good Exercise' in Megan Davis and Marcia Langton (eds), *It's Our Country: Indigenous Arguments for Meaningful Constitutional Recognition and Reform* (Melbourne University Press, 2016) 138, 144.

13 Michael Mansell, 'Is the Constitution a Better Tool than Simple Legislation to Advance the Cause of Aboriginal Peoples?' in Megan Davis and Marcia Langton (eds), *It's Our Country: Indigenous Arguments for Meaningful Constitutional Recognition and Reform* (Melbourne University Press, 2016) 145, 147.

14 Ibid 146.

treaty is 'relevant and achievable and should not be dismissed as too ambitious'.[15] This has some parallels with Mundine, who sees ILUAs, already in existence, as a form of treaty. For Reid, a bill of rights and a republic Australia could then follow, thus creating, in her view, a more unified nation.

In his eloquent and moving essay, Noel Pearson asks us to reimagine what the *Constitution* would have looked like had Indigenous people been at the negotiation table during the years leading up to its adoption in 1901: 'We would have negotiated ourselves some power. We would have negotiated ourselves some freedom to continue to exist in the new nation,' he says.[16] And that, in his view, is the test of recognition which is worth fighting for. But Pearson is a pragmatist, acknowledging both the political realities and the inherent difficulties of constitutional change. One of the political realities he notes is the racial discrimination problem, and the 'one clause bill of rights' argument favoured by the constitutional conservatives against including a non-discrimination clause in the *Constitution*. His answer lies in a constitutionally entrenched Indigenous advisory body, mentioned by other contributors, and which has attracted much interest in the media and amongst constitutional scholars.[17] He points out that as it would provide non-binding advice, it would not undermine parliamentary sovereignty, and, unlike a non-discrimination clause, it would not see a transfer of power to the High Court. But it would guarantee Indigenous people an authoritative voice in political affairs, thus 'creating an ongoing dialogue between Indigenous peoples and the parliament, rather than the courts and the parliament'.[18]

Patrick Dodson provides the final essay in this collection. His preferred recognition option is for a treaty, or agreements, to resolve historical grievances. But he also sees constitutional recognition as providing a different set of opportunities; opportunities in particular to deal with racial discrimination. Accordingly, treaty and constitutional reform are not mutually exclusive. Indeed, Dodson sees constitutional reform as necessary in order firstly to acknowledge the prior occupation of Australia by Aboriginal and Torres Strait Islander people, but also to address the issue of racial discrimination, particularly against Aboriginal and Torres Strait Islander people. He is cognisant, as are all of the contributors, of the inherent political and procedural difficulties of constitutional amendment, but does not see them as insurmountable, nor does it mean settling for minimalist or symbolic reform.

15 Teela Reid, 'Keeping the Fight Alive' in Megan Davis and Marcia Langton (eds), *It's Our Country: Indigenous Arguments for Meaningful Constitutional Recognition and Reform* (Melbourne University Press, 2016) 155, 159.

16 Noel Pearson, 'There's No Such Thing as Minimal Recognition — There Is Only *Recognition*' in Megan Davis and Marcia Langton (eds), *It's Our Country: Indigenous Arguments for Meaningful Constitutional Recognition and Reform* (Melbourne University Press, 2016) 163, 168.

17 See, eg, Anne Twomey, 'Putting Words to the Tune of Constitutional Recognition', *The Conversation* (online), 20 May 2015 <http://theconversation.com/putting-words-to-the-tune-of-indigenous-constitutional-recognition-42038>; Shireen Morris, 'The Argument for a Constitutional Procedure for Parliament to Consult with Indigenous Peoples when Making Laws for Indigenous Affairs' (2015) 26 *Public Law Review* 166.

18 Pearson, above n 16, 174.

The Messages

The editors deliberately avoided grouping the essays into themes. Nonetheless there was much common ground, and, as they note, an 'unrehearsed symmetry' to the essays.[19] The essays point out a lot of uncomfortable truths: dispossession, mistreatment, incarceration, and murder; along with broken promises and policy failures. Despite the success of the 1967 referendum, the statistics on Indigenous disadvantage still paint a bleak picture. Accordingly, the contributors share a mutual mistrust of Australia's system of government, and the ability of the *Constitution* to protect their interests. Hence the many proposals and ideas which seek to go beyond or even bypass constitutional recognition, focusing instead on creating respectful relationships. The contributors all seek deeper structural changes to the way that government makes and implements Indigenous policy; changes which elevate Indigenous people into an equal partnership.

All of the contributors are united in that the status quo should not be maintained, and that any recognition must be more than merely symbolic, whether it be in the *Constitution* or elsewhere. There is also a consensus that there has been an enormous policy failure, with millions of dollars having been spent with little return. But what emerges from the essays is that a major underlying feature of this policy failure is the fact that Indigenous peoples do not have a meaningful voice in determining government policies and programs which affect them. As the editors note in their introduction, 'we, as a nation, need to learn how to listen and *hear* what it is the first peoples are saying'.[20] How to make the government and the nation hear what Indigenous people are saying forms the basis for the various proposals put forward in this compelling collection.

The Verdict

This book is an important, indeed vital, contribution to the discussion about constitutional recognition and reform, not the least because it documents Indigenous opinions, which are too often marginalised.

Although a number of the contributors are senior academics, lawyers, and others well-versed in the art of scholarly writing, this is not a collection of scholarly essays heavy with theory and overburdened with footnotes. Nor should it be, as this would detract from the messages that each of the contributors is trying to send. These are not bland, emotionless essays; the contributors are all speaking from the heart, reminding us of the lived experiences of Indigenous Australians and that recognition and reform, whatever they look like, will have a real impact on real people.

Accordingly, the book is eminently readable as well as thought-provoking, each of the essays reminding non-Indigenous Australians that, to make use of the editors'

19 Davis and Langton, 'Introduction', above n 4, 7.

20 Ibid 6 (emphasis in original).

own words, they not only need to listen, but also to hear. It is also a reminder of the many differing viewpoints within the wider Indigenous community of how best to achieve recognition for Australia's First Peoples. Constitutional recognition is just one of many ways forward, and not the exclusive or even the main one. And the rich variety of alternatives proposed and opinions expressed in this collection is reflective of the rich variety of Indigenous communities seeking to ensure the ongoing vibrancy of the world's oldest continuous living cultures.

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