

*From Bilateralism to Community Interest:
Essays in Honour of Judge Bruno Simma*

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A book review is perhaps not the most appropriate place for a (double) confession, but it happened in June 2012 when I was sitting in the Christchurch office of the then Editor of the *New Zealand Yearbook of International Law*, Professor Karen Scott. I noticed a book on her shelf and envy overtook me; I had to have a copy of that book! Surely no self-respecting international legal scholar could possibly claim to have a reputable personal or office library without one. Was it that a collection of essays in honour of Bruno Simma, *inter alia* judge at the International Court of Justice between 2003 and 2012, was invariably going to be a significant contribution to the literature? Possibly. Was it that the book's title (*From Bilateralism to Community Interest*) touched upon one of the great themes of our age? Again, likely. But – and here is the second part of the confession – was it because the book was immense in size, possessed a gigantic spine, and clearly well-over one thousand pages in length (actually over 1300 pages)? Well, yes of course. Now that I have revealed my superficiality, I may as well add that it has a nice abstract painting of a sailing boat on the front cover, for good measure.

But here's the thing. I'm not a great fan of festschriften. I find them often rather worthy in tone, random in content and on occasion poorly edited, both conceptually and grammatically. And this does not seem a personal prejudice of mine alone. There is a general view that publishers have gradually awoken to the limitations of the festschrift. Certainly, when I was involved in a collection a number of years ago, the message was to concentrate upon the coherency of the content and to downplay the personal. In fact, I think there is a very sensible middle position, whereby apart from some passing references to the object of respect (and a biography of his or her publications), the academic quality of the book is the best tribute that can be made. And having met Bruno Simma only once personally, as he had sat through a presentation I had just given, I can very clearly remember that he was incredibly generous with his comments, as well as with his suggestions as to where I might seek its publication.

Let me start by saying that on the whole the academic quality of this particular festschrift is excellent. Though invariably a collection of this length varies – and with over 75, yes 75(!), chapters, surely that is inevitable, nevertheless this is a book which benefits from significant intellectual input. Indeed, the reputation and stature of some of the authors is as great as the man to whom the book is dedicated. With contributions from Koskenniemi, Crawford, Owada, Shaw, Keith, Wolfrum, Alston and Weiler *inter alia* – you can probably see why I wanted a copy as it becomes close to being a who's who

of public international law. Moreover, unlike my complaint of some other festschriften, this has been a well-edited collection, which has undoubtedly also benefited from the expertise at Oxford University Press.

So how can one even begin to review a book of this length, with that many chapters? In truth, it is almost impossible. The first point to note is that this is a festschrift in the usual sense; there is a full-page photograph of the dedicatee, a list of his publications, a preface from a very prominent individual – in this case, the German Federal Minister of Justice – and the opening part contains chapters on Simma the academic, the judge, whether he was a positivist, and as is often the case in a festschrift a chapter entitled something along the lines of the “friend, an academic teacher, and a partner before Court”. This however is churlish; I actually found most of these chapters very interesting, especially the chapter by Rosalyn Higgins on Simma’s reluctance to transform himself from academic to judge. I had failed to grasp just how unusual he had been as a judge at the International Court of Justice – my own failings in reading sufficiently closely his separate and dissenting opinions. Higgins is brutally frank; “[t]his unusual colleague – perhaps happier as an academic than as a judge” (p 14).

Substantively, the collection is subsequently divided into six further parts; “From Westphalia to World Community”, “Institutional Dimensions of Community Interest”, “Placing Human Rights Centre-Stage”, “The Law-Making Function: The Progressive Development of International Law”, “The Judicial Function: Balancing Individual and Community Interest”, and “International Law in Various Contexts”. Within these parts, there are real gems and truly excellent chapters covering a broad range of topics. Indeed, it is almost impossible to identify a subject that is not covered somewhere in some shape or form. Importantly, there is much that is of current importance; the law on targeted killings, climate change, sovereign immunity and human rights, the European Union’s legal relationship with public international law, the financial crisis, and so on.

At one level, almost all chapters are engaged in the search for how international law can be used in the community interest, though equally on another, *From Bilateralism to Community Interest* becomes strained when there are such – admittedly interesting, but equally bespoke – chapters as on the Austrian contribution to the codification of international law, European civil procedure and a chapter entitled “Abraham, Jesus and the Western Culture of Justice”. Less of a chapter, and more of a concluding sermon by Joseph Weiler, this sums up for me the conundrum of a festschrift. It makes an important, if rather abstract, point about justice, both personal and normative. But who is it written for? The reader? This would seem self-evident. As a homily for the dedicatee? Perhaps. As something that is a little different but invariably should find a place in a festschrift? Well, this is where I have some difficulty. As a piece on the continuing importance of Christianity in Western ideas of justice I have no difficulty, its relevance to international law however is left floating almost for the reader to determine for him-/herself. Perhaps that is its purpose.

So, in conclusion how do I rate this book – was it worth carrying the book back from New Zealand to the United Kingdom? There are aspects of this book that still bemuse me; the poetry by Hugh Thirlway based on the ICJ cases of *Oil Platforms*, *Certain Property (Liechtenstein v Germany)* and *Pulp Mills (Request for Provisional Measures)* is novel; let me leave it at that. And as the collection progresses, the link to the overarching theme of the book fluctuates progressively. And whether the decision of the editors not to seek to present either an introduction or a conclusion was wise, must be a matter of debate. Certainly, the size of the collection would militate against such inclusion. But for the most detailed overview of the central theme of a book this length to be two sentences included on the blurb on the inside flap seems, at best, curious.

I began by saying that a festschrift should stand on its intellectual content, and despite structural misgivings, it does do that. But here comes a third confession, I didn't want the book so badly that I would carry it home ... in fact, Professor Scott was very generous and posted it to me.

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International Prosecutors

Edited by: LUC REYDAMS, JAN WOUTERS and CEDRIC RYNGAERT

[Oxford: Oxford University Press, 2012, 968 pp. ISBN-10: 0199554293. USD190.00]

Drawing upon the academic expertise and professional legal experience of its 18 contributing authors, and taking five years to research, write, and publish, *International Prosecutors* is a much-anticipated volume which, as its title unambiguously signals, gives focus to the office of the international prosecutor. Holders of this office become politico-legal actors, constituting an important topic for consideration by those of us interested in the inter-relationships among international law, war and politics. As the book's editors observe in their introduction, international prosecutors often shape a tribunal's practice and legacy more than any other actor, functioning as the public face of international criminal justice, as the principal strategist within tribunals, and as an important locus of power within and beyond the courtroom. By exploring the evolving, multi-faceted roles played by these prosecutors, this book helps fill a significant gap in the secondary literature cohering around the evolution of international criminal law.

International Prosecutors opens with a very useful chapter that analyses the politics of establishing international criminal tribunals while also providing a general overview of the unfolding politico-historical context. The ensuing 13 substantive chapters cover most of the prosecutorial effort's major aspects as main themes: that is, their mandates; resources; structure and management; independence and impartiality; accountability and ethics; procedural regimes; selection of defendants; investigations; indictments; arrest and detention; trial; appeal; and completion strategy. This multi-faceted exploration offers the reader a fairly comprehensive treatment of the topic-at-hand, though given the introduction's claim that "outside-the-courtroom activity sets international prosecutors apart from the bench and the defence," a chapter analysing the prosecutors' issuance of public statements, seemingly warranted, is a noteworthy omission.

For the most part, chapters follow a chronological approach in treating their respective themes, beginning with the Nuremberg and Tokyo International Military Tribunals in the immediate aftermath of the Second World War and ending with the current caseload of the International Criminal Court at The Hague. Accordingly, the institutional scope of each chapter is sweeping, especially as the book's editors take a broad view of institutions of international criminal law that includes "tribunals established by treaty, international agreement, Security Council resolution, or regulation or order from an occupying power or international administrative authority. The category therefore includes 'internationalised', 'hybrid', or 'mixed' institutions." These chapters stop short – correctly in my view – of examining domestic courts' enforcement of international criminal law.

This common format underpinning the main chapters encourages the reader to form very specific expectations of the book's content. By and large, readers will not be disappointed. Content here is encyclopaedic in range, with contributing authors favouring comprehensiveness ahead of concision. Consequently, the book is an excellent archival vehicle, as authoritative as it is rich in detail. The quality of the prose is generally high and easily accessible for the lay reader. While I was anticipating the contributing authors' differing styles to jar as I made my way through the book's chapters, their varying authorial voices sustained my reading efforts.

The 14 substantive chapters are enclosed by a very brief, pragmatic introduction, and a more self-reflective conclusion. The introduction fulfils its function by explaining the topic's relevance, positioning the book against other existing literature, and justifying the thematic-based chronological approach because it "should make it possible to read the book either vertically, chapter after chapter, or horizontally by focusing on a specific tribunal across topics." It delineates the book's scope of enquiry and outlines its basic structure. No single thesis is advanced, however. The absence of a central argument is taken up by the conclusion, conceding that "[a] rich picture emerges from these analyses, which is impossible to summarize." Instead, the editors reflect upon the politico-legal nature of the international prosecutor, as well as upon his or her position within the wider international community, membership of which includes other judicial organs of tribunals, states, intergovernmental organisations, the academy, and the seemingly catch-all categories of transitional justice actors and the wider public. A best-practices list is provided here too, presumably for its policy relevance.

Two features of this book are particularly noteworthy. First, 20 organisational charts provided by Gregory Townsend help illustrate the ways in which the offices of the international prosecutor are "dynamic organizations subject to continuous change," enabling useful comparisons among 11 different offices over a 60 year period. Second, content summaries provided at the beginning of each substantive chapter help the reader to quickly navigate within each chapter's theme and across the prosecutorial efforts occurring within each particular tribunal or court.

Given the book's obvious strengths, a few quibbles are easily forgiven. Readers with a sound understanding of disciplinary international relations may lament the unduly narrow state-based notion of politics circulating throughout much of the book at the expense of wider considerations of significant politico-economic and politico-social dimensions. Eighteen contributing authors possibly precluded the book's editors from offering the reader a single, sustained argument. Although the chronological approach worked well within each chapter, the reader repeatedly traversed the same politico-historical terrain, considered overlapping material from a discrete pool of primary sources, and laboured through analysis conducted on the same institution-by-institution basis on 14 successive occasions. Moreover, chapter length varied and it was not clear why the chapter on structure and

management merited over a hundred pages more than chapters devoted to the following themes: mandates; selection of defendants; investigations; or completion strategies.

The book's strengths and weaknesses illuminate further avenues for fruitful research. On the one hand, the abovementioned quibbles – and they are by no means regarded as serious flaws – signal the need for a companion piece containing oft-cited primary documents. (Most of these documents are available, but are not yet collected within a single, easily accessible volume.) On the other hand, the book's successful exploration of the international prosecutors' evolving, multi-faceted roles calls for similar, complementary studies focusing on the roles of the defence and of the bench, both of which would prove useful contributions to the secondary literature devoted to international criminal law. The editors themselves close the volume with a challenge to other interested researchers to undertake empirical research relating to “the actual impact of the prosecutor's decisions on the political situation in the (post-)conflict in question.”

Here, then, in spite of its prolonged gestation period, the resulting *International Prosecutors* was well worth the wait and now occupies a space on my bookshelf reserved for a very few “must have” texts. While the book's primary use will be as a rich archival treasure for researchers, its substantive chapters could easily find use as valuable teaching aids supporting postgraduate courses and as a reference for professional litigators. Significantly, readers of this book will be far better equipped to understand and explain the significant, multi-faceted, and evolving role played by the international prosecutor in the conduct of contemporary world affairs, particularly in matters of war and peace, and the politics thereof.

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The Trans-Pacific Partnership. A Quest for a Twenty-first-Century Trade Agreement

Edited by: CL LIM, DEBORAH K ELMS and PATRICK LOW

[Cambridge: Cambridge University Press, 2012, 353 pp.

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The stated aim of this book is to capture the state of the negotiations for the Trans-Pacific Partnership agreement (TPPA), highlighting actual and emerging roadblocks to achieving the goal of a high quality, twenty-first century agreement that can provide a new platform for the Asia Pacific and beyond.

Writing about international trade and investment negotiations while they are still underway is fraught with peril. Deadlines are inevitably missed and it is impossible to predict when, or even if, they will conclude. When numerous countries are involved and periodically increase, as in the TPPA, and the 20 chapters explore uncharted territory, it becomes even more complex. Add to that the paucity of official information available and absence of draft texts, except for out-dated versions that were leaked, and it becomes a high-risk task.

Given those realities, this book makes an important contribution to the debate, approaching the issues through a largely uncritical, pro-liberalisation lens. The three main parts examine the overall context and prospects for the TPPA to achieve its objective, a number of specific issues, and the implications of this ambitious, multi-party agreement for other regional and multilateral arenas, notably the World Trade Organization and Asia Pacific Economic Cooperation forum.

The 19 authors assess the technical issues and negotiating constraints from economic, legal, international relations and trade policy perspectives. Many do this very well; some, such as those on development, investment and services, are quite weak. The astuteness of the commentary may be related to how close the authors are to the actual negotiations.

Newcomers will find Part Two on the genesis of the agreement and its ambitions, and Part Four entitled “The future: high-quality meets regional and global realities”, accessible and informative. Of the chapters that deal with specific issues, those on goods, rules of origin, intellectual property, regulatory coherence, environment and labour are especially thoughtful.

The book also offers some interesting insights for those who are following the TPPA, although the lack of engagement with some of the key controversies and the social implications of the authors’ positions will frustrate critics of the agreement.

Perhaps the most interesting reflection that runs through much of the book is on the prospects for other countries to accede to this treaty and achieve the goal of a high quality Asia-Pacific-wide free trade agreement. Different levels of development, flexibilities for sensitive sectors and issues, capacity to implement complex rules and obligations, the interface of the TPPA with other agreements, and exceptionalism in favour of the major powers, are all

recognised as obstacles. So are the exclusion of China and the United States' strategic objective to re-assert its authority in Asia that is the foreign policy subtext of the TPPA. Some authors think these difficulties can be overcome and the TPPA could become a genuine "living agreement"; others are less sanguine.

An underlying scepticism that the agreement can achieve its ambitions is clear from the start: "While officials have laboured mightily, the quest for a high standard quickly collided with the political and economic realities on the ground. ... Early efforts to reach for new solutions to old problems have generally resulted in a return to fairly standard [preferential trade agreement] approaches. The result ... is an interim agreement that is more comprehensive and far-reaching than many [preferential trade agreements], but not nearly as grand as the rhetoric suggests" (p 4).

The editors conclude by identifying two clear risks. One is that the final agreement will be significantly diluted from the goal of a twenty-first century outcome, as officials struggle to reconcile two largely incompatible goals: to negotiate a high-standard economic agreement and to fulfil a broader strategic imperative. The second is the potential for collapse, as the sense of shared purpose and norms gives way to the impact on sensitive issues for very little tangible economic return.

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Contemporary Perspectives on Human Rights Law in Australia

Edited by: PAULA GERBER and MELISSA CASTAN

[Pymont, NSW: Thomson Reuters, 2013, 578 pp. ISBN 9780455229973. AUD85.00]

If a nation's laws are a window to its soul, its human rights laws give special insight into its character. How does a State reckon with the claim of each individual, no matter his or her circumstances, to equal dignity and respect? How does it protect the weak, the poor, the disabled, the prisoner, minorities of various sorts? What institutions does the State empower to protect these human rights? Do its efforts succeed?

It is conceivable, of course, that even without human rights laws, a State can perform creditably. After all, it is a truism that respect for at least some fundamental rights is woven into the fabric of most nations' laws. The common law, for its part, has long protected bodily autonomy and integrity through the law of torts, and through its high regard for due process rights in criminal cases. These rights pre-date the modern human rights movement. But in modern times these human rights have, demonstrably, not been enough. Experience demonstrates that aspirational and standard-setting human rights laws, at least in the field of civil and political rights, are necessary – if only to prompt revision and renewal of our understandings of what dignity and equality require. The transformation in recent years of laws affecting gay and lesbian persons is but one instance. In any event, international law in the form of human rights treaties now positively requires domestic human rights laws and rights-consistent outcomes for citizens as they engage with their State, and with each other. So it is that the subject of “human rights law” is firmly established in the pantheon of legal subjects, of legal practice, and law school courses. It is a core concern of the modern state.

That makes this interesting and well-constructed collection of essays about Australian human rights law all the more helpful. The book provides a snapshot of Australia's *modus operandi* in producing rights-consistent outcomes for its citizenry. It will be of interest to all who seek a quick introduction to the Australian position. The book's 22 chapters combine description, commentary and critique across a diverse range of topics and controversies, all of interest to readers elsewhere in the world who share similar problems and may have similar approaches. Some chapters deal with the legal structures within which human rights are enforced; others address specific human rights and particular fields of state action. In this latter category are chapters about, for example, boat people, children, the disabled, marriage equality, mental health, abortion and terrorism.

It is probably no great surprise that the combined authors maintain, to varying extent, a tone of criticism of Australian law and practice. Most of their criticisms seem fair and measured. Even so, the first thing that struck this reviewer, as an outsider from across the Tasman, is that – despite its lacking a federal bill of rights – things in Australia are not quite so bad. For Australians, the human rights glass may not be not quite full, but it is

far from half-empty. Or, changing the metaphor, while the grass may not be greener on the Australian side of the fence, the Australian sub-soil still contains some valuable gems.

Let us start with the question of bills of rights – a subject addressed in chapter 3 by Julie Debeljak (“Does Australia Need a Bill of Rights?”). Here, Australia is perceived, internationally, as an outlier. It has no constitutional bill of rights – save for a few limited “rights clauses” in its federal Constitution dating from 1900. And, as Debeljak points out, these have generally received a narrow construction. Philip Lynch in chapter 2 (“Australia’s Human Rights Framework”) explains that the 2009 National Human Rights Consultation chaired by Father Frank Brennan, had recommended enactment of a federal human rights law of the “dialogue” type, popularised in the United Kingdom and already present in Victoria and the Australian Capital Territory (ACT), which allow a judicial role in rights-enforcement while preserving an ultimate Parliamentary supremacy. The Australian Government rejected that particular recommendation, but committed to a range of other significant responses. These include: a commitment to community human rights education, a National Action Plan on Human Rights, a Joint Parliamentary Committee to make inquiries and oversee pre-enactment human rights scrutiny of legislative bills, and a comprehensive review of extant legislation and polices against human rights standards. As Lynch points out, the Joint Committee’s mandate is drawn from all human rights treaties to which Australia is a party, and this includes (for example) the International Covenant on Economic, Social and Cultural Rights. That is progress, as Andrew Byrnes explains in his important and measured chapter on the place of economic and social rights (chapter 6).

But despite the lack of a bill of rights, the fact is that the High Court of Australia (HCA) has inferred some significant rights protections from the text and structure of the Australian Constitution, most notably in its landmark cases from 1992 holding there to be an implied constitutional right to freedom of political communication.¹ These and other rights protections are discussed in an interesting and informative chapter 4 by co-editor Melissa Castan (“The High Court and Human Rights: Contemporary Approaches”).² For those seeking an introduction to that topic, the early chapters of this book are a valuable resource.

- 1 *Australian Capital Television Ltd v Commonwealth* (1992) 177 CLR 106 (HCA); *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 (HCA).
- 2 Former New Zealand Prime Minister David Lange has the distinction of making law on both sides of the Tasman in his defamation cases, each leading to a greater freedom of expression for media in criticising public figures. In *Lange v Atkinson* [2000] 3 NZLR 385 (CA) this development rested on the New Zealand Court of Appeal developing a defamation defence as a matter of common law so as to reflect the importance of freedom of expression. In *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 (HCA) it rested on the freedom implied in the Constitution.

From a New Zealand perspective the High Court's "freedom of political expression" rulings have affinity with the view famously advanced in this country by Lord Cooke of Thorndon in the 1980s – that some rights are intrinsic in our democracy and go "so deep" that even Parliament cannot be taken to have power to take them away.³ For a legislature to use its legislative power so as to limit citizens' access to the information they need for fair elections might be seen in that light. And if the Australian High Court could infer such a right from Australia's commitment to democratic rule, why should the same not follow in New Zealand? Certainly Lord Cooke is on record as seeing the 1992 cases as support for his views. Writing in 1995 in a chapter entitled "The Dream of an International Common Law", he asked:⁴

May it be that the implied limitations are in essence natural and fundamental rights in a democracy, albeit tied by the Mason Court to the Australian Constitution, partly for reader acceptability within this nation and partly to negotiate the obstacle that the framers of the Constitution rejected the inclusion of comprehensive guaranteed individual rights?

And, as he noted,⁵ Sir Anthony Mason had himself raised, but left for another day, the question whether the High Court's approach to political communication was any different from a more generalised implied freedom of speech.

It is at least possible, then, that (to quote Lord Cooke again) "the implied limitation propounded in *Australian Capital Television* may be implicit in democracy itself, one of those fundamental and overriding necessities for whose recognition support is gradually growing."⁶

In New Zealand it is, perhaps, the great irony of our New Zealand Bill of Rights Act 1990 that, while affirming fundamental rights and freedoms, it also affirms (in s 4 of the Bill of Rights) a continuing power to legislate inconsistently with those rights – even to the point of an inconsistency that is not justifiable in "a free and democratic society". Perhaps it was this oddity that led to Lord Cooke's unexpected and idiosyncratic approach to the New Zealand Bill of Rights,⁷ in which he eschewed the idea of judicial review of the reasonableness of legislated limits when using the Bill of Rights to ascribe meaning to statutes. Perhaps this was to avoid the unpalatable conclusion that might follow such review – that an enactment might be found to fall below the minimum standards affirmed by the Bill of Rights (and hence democracy itself), yet the court would be required by the Bill of Rights to apply that enactment nonetheless.

That dilemma of Lord Cooke in relation to the New Zealand Bill of Rights would be but a minor footnote in our own Bill of Rights history, were it not that the same issue has now surfaced in the Australian High Court, in the context of the Victoria Charter of Human Rights and Responsibilities, in *R v*

3 *Fraser v State Services Commission* [1984] 1 NZLR 116 (CA) at 121.

4 C Saunders (ed) *Courts of Final Jurisdiction* (Federation Press, Annandale NSW, 1996) at 139.

5 At 139.

6 At 139.

7 In *Ministry of Transport v Noort* [1992] 3 NZLR 560 (CA).

Momcilovic.⁸ There, as Julie Debeljak explains in chapter 3, the HCA divided equally over a very similar point – namely, whether the interpretive mandate in the Victoria Charter (to prefer rights-consistent meanings) required a court first to inquire whether the impugned meaning (the one a litigant seeks to avoid as arguably inconsistent) would in fact be an *unjustifiable* restriction on her right in a free and democratic society? Again, this implies a power of judicial review for rights-consistency, albeit followed by a duty to apply the impugned law even if it be deemed inconsistent. Perhaps that seemed unpalatable to the three judges in *Momcilovic* who so held, for similar reasons.

It would have been nice to have had a lengthier discussion by Debeljak of the perplexing *Momcilovic* decision, especially as a similar division had occurred in the Supreme Court of New Zealand in *R v Hansen*.⁹ There Elias CJ had broadly agreed with Lord Cooke's approach, while the four other members of the Court had been content to hold that judicial review of an impugned meaning (so as to determine whether it was a reasonable limit on a protected right) was a necessary component of Bill of Rights methodology. But Debeljak reports that the divergent *Momcilovic* judgments have now been construed by the Victorian Court of Appeal to leave that Court's own approach to the Victorian Charter undisturbed.

Overall, it can be said that the approach of the HCA to implied constitutional rights has been robust and solicitous for human rights protection, especially in the field of freedom of expression and fair trial rights. Results in free speech cases are comparable on both sides of the Tasman (compare *Coleman v Power*¹⁰ and *Morse v Police*¹¹). And, when compared to New Zealand, the Australian approach has the added feature that the implied rights are constitutional in status and have the effect of trumping, if necessary, inconsistent statutory provisions. This is not necessary when what is at stake is the meaning to be ascribed to vague phrases such as "offensive and disorderly". Add to that the robust protection of judicial independence seen in the Australian case law and there is much to applaud.

But there is also ample room for criticism, as subsequent chapters explain. Beth Gaze in chapter 7 gives an insightful account and critique of Australian anti-discrimination law at federal and state level. As she points out, discrimination cases can take on the character of criminal cases insofar as a finding of discrimination will often be harmful to a person's reputation. And they may have large fiscal consequences. For both reasons, discrimination cases can be keenly fought. This can lead, as Gaze points out, to somewhat cautious and apparently technical judgments. Gaze is critical of some of these cases, positing that the underlying difficulty lies in competing visions of anti-discrimination law's aspirations (is it equality of outcome, or of opportunity; is it formal or substantive equality?). She points to the limits of litigation in

8 *R v Momcilovic* (2011) HCA 34, (2011) 280 ALR 221.

9 *Hansen v R* [2007] 3 NZLR 1 (SC).

10 *Coleman v Power* [2004] HCA 39, (2004) 220 CLR 1.

11 *Morse v Police* [2011] NZSC 45, [2012] 2 NZLR 1.

discrimination cases, and wonders if, by maintaining the focus on complaint-driven litigation involving individuals, discrimination law has failed to move with the times. She points to the United Kingdom Equality Act 2010 and its requirement for public authorities to consider the needs of the disadvantaged in their policies. This is a thoughtful and interesting chapter, raising many issues about what is possible through court-centred adjudication (even if it has the new dimension to which Gaze alludes).

Unsurprisingly, there is a chapter on marriage equality (that is, same-sex marriage), obviously a major human rights issue in recent times. This chapter, by Paula Gerber and Adiva Sifris, is a sustained argument for same-sex marriage premised on the idea of a right to marry, the right to equality, and on the rights of children of gay couples not to have their parents prevented from marrying. These are set out against what are termed the “traditional arguments” for heterosexual marriage (an argument from history and tradition, and an argument from procreative capacity). In form, the chapter is an argument addressed to legislators and not Australian courts (or to advocates, as a suggested litigation strategy). This focus is appropriate. The world has moved on from the early 2000s when the subject of same-sex marriage was being approached through the lens of constitutional equality rights (and when the Ontario Court of Appeal and the Massachusetts Supreme Court each found in favour of same-sex marriage on an equal protection basis). This particular debate has not truly been resolved by the logic of legal argument developed from the text of constitutions, bills of rights, or treaties. It revolves around presuppositions that are not amenable to logical or scientific proof. The more recent trend is for the citizens of a state to enact a law for same-sex marriage through the democratic process, rather than for judges to hold that it is a human rights compulsion. That more direct route has been recently taken, for example, in the United Kingdom, France, New Zealand and a number of American states. Of course, proponents for such legislative reforms can legitimately invoke the language of constitutional rights as support in the political sphere. And that is the approach the authors take here.

Tania Penovic discusses Australia’s reckoning with asylum seekers in her chapter “Boat People and the Body Politic”. This difficult subject is a perennial issue for Australia given its proximity to Indonesia as a stopping off point. Indeed, as this review is being written, the latest iteration of Australian refugee policy is in place: all asylum seekers will be transferred to detention in Papua New Guinea where refuge will be offered to those successful in their claim (and repatriation to the others). No successful claimant will attain refuge in Australia. Penovic explores the record of the Australian courts in reckoning with refugee claims and the powers of the State to detain claimants. This is a very helpful account for those wishing to get an overview of the various important administrative law cases that have arisen out of refugee processes. These cases exemplify some broad and pervasive themes in administrative law in the era of human rights.

Standing back, and from a New Zealand perspective, one ought to acknowledge that the Australian baseline (how many United Nations Refugee Convention refugees it routinely accepts, proportionally to its population) makes it significantly more generous than New Zealand despite what may be said about its treatment of boat people. Our relative isolation (and immunity from boat arrivals) has spared us the dilemma that Australian politicians face – on the one hand, treating asylum seekers who arrive with compassion, on the other, recognising that the number of persons who would wish to live in Australia is likely to be large indeed. Underlying this chapter, but not discussed, are the larger questions of compassion – why should the impulse towards helping such persons depend upon their first having risked dangerous sea voyages and managed an Australian landing? What is to be done about conditions in the places whence they come? Big questions indeed; another book perhaps.

Ronli Sifris explores reproductive rights and argues that a woman's right to an abortion dictates that abortion in general ought not to be a matter regulated by *criminal* law. This is set against the backdrop of what appears a particularly difficult case where a young migrant couple were charged with a criminal offence for importing abortifacients to end the female's pregnancy. It is difficult not to agree with the assessment that this whole case was unfortunate, given that the woman would presumably have been able to gain a lawful abortion in the circumstances. That said, for this reviewer, the solution to such unusual cases lies in prosecutorial or sentencing discretion. In New Zealand and Australia, the background criminalisation of abortion (save where necessary certificates of eligibility are not attained) reflects a judgment about human life, or at least potential human life, that formed part of a "settlement" negotiated between two very different views. In New Zealand at least, the "pro-life" side of that debate now nurses a grievance that eligibility for abortion is much more readily approved than was intended. Its attempts to have something done about that have stumbled on the hurdle of patient confidentiality – that *post hoc* inquiries into the reasons for particular abortions cannot be made.¹² The idea that a fresh imperative, now for complete removal of criminal sanctions, lies hidden in the interstices of generally-expressed human rights laws is likely only to fuel wariness of bills of rights generally, especially of the supreme law type. In this regard, it is interesting to note that the Victoria Charter explicitly provides that nothing it contains "affects any law relating to abortion of child destruction". Presumably, that was a necessary precaution to gain its political acceptance.

That said, Victoria, notes Sifris, has since decriminalised abortion in 2008, but maintains some restriction on abortions later than 24 weeks (namely, that two medical practitioners must agree that the abortion is appropriate in all the circumstances). In arguing that this restriction itself ought to be removed, the author briefly alludes to opposing viewpoints in

12 *Right to Life New Zealand Inc v The Abortion Supervisory Committee* [2012] NZSC 68.

the abortion debate, now focused in Victoria around the requirement that doctors with conscientious objections to abortion must refer a patient to a doctor with no such objection.

The intersection of religious liberty with other human rights also features in Carolyn Evans' account of two current controversies affecting freedom of religion ("Balancing Religious Freedom Rights and Other Human Rights"). As in other countries, courts of Australia are increasingly reckoning with religiously motivated discrimination. The two case studies offered by Evans take this form – one, where a Christian trust that owned an outdoors camp refused to allow a booking to a group that counselled gay teenagers, the other concerning a Methodist social agency that refused to allow a same-sex couple to register as approved foster carers for children. Each case involved statutes that would permit a defence for this type of discrimination only if their refusal could be shown to be required by a "doctrine" of the respondent's "religion". These are strange and uncharted waters for a secular court, requiring it to rule both on what a respondent's religion truly *is* and what its *doctrines* are. So, in the Methodist case (*OV v Wesley Mission*¹³) there was actually a first instance finding that the respondent's religion was a generic "Christianity" and that, given the existence of different views on sexual orientation within the broad "Christian" faith, there was no relevant "doctrine" on sexual orientation to which the respondent could point. On appeal that ruling was overturned, it being held, first, that the relevant religion was in fact the Wesleyanism to which the respondent organisation adhered, and, second, that the organisation's leaders were entitled to adduce evidence of what its doctrines actually were. On that basis, the respondent gained the benefit of the defence.

As Evans says, these cases take a form that we will see more of around the world as the impetus behind protecting equality brings more conflicts with religious belief. But, to some extent, these cases must take their colour from the underlying law that imposes the basic prohibition in the first place. In relation to the Victorian camp case¹⁴ – the other Evans case-study – on similar facts in New Zealand, there would be no defence to a discrimination complaint were a campground, otherwise available to the public, made unavailable to a group on the basis of the group's beliefs about sexual orientation.

Mick Gooda, the Aboriginal and Torres Strait Islander Social Justice Commissioner, gives an account of Australia's record in relation to indigenous peoples. He places the subject in its international law context – noting in particular the Declaration on the Rights of Indigenous Peoples (DRIP) endorsed by Australia in April 2009 – then traces the constitutional evolution in Australia (the removal of racist references in the Constitution, and the ending of the terra nullius doctrine in the well-known *Mabo* decision¹⁵). Of special interest is the Northern Territory Emergency Response orchestrated by the Australian Government in 2007 to deal with sexual abuse, alcoholism

13 *OV v Wesley Mission Council* [2010] NSWCA 155.

14 *Cobaw Community Health Services v Christian Youth Camps Ltd* [2010] VCAT 1613.

15 *Mabo v Queensland (No 2)* (1992) 175 CLR 1 (HCA).

and child protection in aboriginal communities. Gooda gives an account of the origins and the review of the intervention, leading to its redesign, noting the remaining human rights concerns of a race-based approach. He makes the plea for consultation and empowerment that reflects and promotes aboriginal culture. Gooda points to human rights law and the DRIP in particular as providing a framework for that sort of approach.

Remaining chapters traverse Australia's engagement with the United Nations, rights of disabled people, gender equality, children's rights, mental health law, prisoners, counter-terrorism and the place of Muslims in Australia.

A book such as this prompts thoughts about the idea of the edited collection of essays and its place in the pantheon of legal scholarship. This book is a successful undertaking, a fact that owes much to a good choice of topics and very competent authors as well as the inherent interest of the field. For non-Australians, the book is especially helpful. As a federation of states, each with its own human rights laws, and having a somewhat complex form of constitutional rights adjudication, Australia can be something of a closed book to those without the time for detailed inquiry. This book assists because it traverses a lot of recent Australian legal history and evolving legal doctrine in an accessible way, organised by subject matter in discrete chapters. The authors do not confine themselves to mere description, but extend to commentary and some vigorous critique and advocacy. It is far from exhaustive, but there are plenty of avenues for further research provided in footnotes and helpful references to further readings at the end of each chapter.

Sometimes books such as this arise out of conferences. It is not unknown for the resulting book to be bedevilled by the unevenness of the conference contributions. But that does not apply here. This book was designed as a set of essays to tell a story of Australian human rights law, and in that it succeeds. Its editors are Deputy Directors of Monash University's Castan Centre for Human Rights Law at Monash University, an institution whose members are widely respected toilers in the field of human rights law. They have ensured that the book paints the picture of Australia's general human rights performance, while offering resources for those who wish to go deeper. It is therefore a good book for libraries to hold, and for students and advocates to consult.

Finally, it contains a foreword by the Hon Michael Kirby, characteristically elegant. He says there are to be future editions of the book, and sets out what further topics will likely be added (notably end-of-life decisions, bio-ethics, and rights of the aged). Because this is a good and useful book, any future edition is to be welcomed and the promised additions will make it all the more valuable.

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