

BOOK REVIEW*

Achieving Social Justice: Indigenous Rights and Australia's Future

By LARISSA BEHRENDT

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On finishing Larissa Behrendt's book, *Achieving Social Justice: Indigenous Rights and Australia's Future*, I was reminded of a quote from Helen Irving lamenting Australians' ambivalence toward their own history. She said she felt

a deep melancholy when I contemplate the approaching centenary of Federation. ... Although I am certain that there is a much greater level of 'product recognition' in the Australian community than there was at the beginning of the 1990s, it is also clear that Australians remain almost entirely unmoved by political history and even more so by constitutional history.¹

The same could not be said of Indigenous Australia. Indigenous Australia has continually been moved (both physically and emotionally) by our political history and even more so by Australia's constitutional history. This fact is clearly evident in Larissa Behrendt's latest book. Behrendt is a young Aboriginal law professor, a Harvard graduate and a respected scholar, who engages articulately and powerfully with Australia's political and constitutional system in formulating a framework for institutional change to improve the lives of Indigenous Australians.

Law and its history has been a constant in Indigenous communities and Indigenous peoples' lives, always. This extends far beyond the perennially grave arrest rates or incarceration statistics of Aboriginal people, or even the ubiquitous references to High Court decisions in *Hindmarsh*,² *Kruger*³ and *Mabo*.⁴ It

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1 Helen Irving in Mike Steketee, 'History and Our Neglect', *The Australian* (Sydney), 1 July 2000, <<http://www.theaustralian.news.com.au>> at 20 November 2003.

2 *Kartinyeri v Commonwealth* (1998) 195 CLR 337.

3 *Kruger v Commonwealth* (1997) 190 CLR 1.

4 *Mabo v Queensland* (No 2) (1992) 175 CLR 1 ('*Mabo*').

encompasses lives lived under the *Protection Acts*⁵ and equally those lives exempted; those who were removed (*Cubillo v Commonwealth*)⁶ and those relocated (like the Wik peoples in Mapoon on 15 November 1963 in the interests of Comalco and bauxite);⁷ those whose wages were stolen after decades of hard labour only to be offered a few thousand dollars for the effort (Stolen Wages Campaign; *Bligh v State of Queensland*);⁸ the Wave Hill strikes; the massacres; the 1967 referendum; the Freedom rides; deaths in custody (in Queensland we still talk of Daniel Yok) and the precarious intersection of Aboriginal customary law and the Australian legal system.

These are the stories, the policies and the decisions that contribute to our difference. The message from Behrendt's book is that difference has to be recognised for it to be addressed. The conundrum of Indigenous health or education cannot simply be fixed with money, social entrepreneurial skills or with 'practical reconciliation' which has been shown to have no effect upon Indigenous welfare, despite the rhetoric. A recent study has shown that while

practical reconciliation forms the rhetorical basis for Indigenous policy development since 1996, there is no evidence that the Howard governments have delivered better outcomes for Indigenous Australians than their predecessors. Indigenous socioeconomic problems are deeply entrenched and do not seem to be abating even during a period of rapid economic growth at the national level. It is of particular concern that some of the relative gains made between 1991 and 1996 appear to have been offset by the relatively poor performance of Indigenous outcomes between 1996 and 2001.⁹

More importantly, reconciliation cannot be achieved by eschewing symbolism. It is symbols that define and unite white Australia. The mythologies of war, ANZAC, the 'rite of passage' of middle Australian youth to Gallipoli, the war memorials, the wattle on the lapel or the bush. Symbols and gestures have an equally powerful impact upon aboriginal peoples. These are the images of nationhood.

Behrendt uses these images and mythologies skilfully in juxtaposing the romantic notion of settlement myths of 'Australia's land being tamed by brave men who struggle to make a living off the land',¹⁰ against the demands of Aboriginal Australia during the aftermath of the *Mabo* and *Wik* decisions. Never mind that these were legitimate claims to property rights, the hysteria following

5 *Aboriginal Protection and Restriction of the Sale of Opium Act 1897* (Qld); *Aboriginal Protections Act 1909* (NSW); *Northern Territory Aboriginals Act 1910* (NT); *Aboriginals Ordinance 1911* (NT); *Aboriginals Ordinance 1918* (NT); *Welfare Ordinance 1953* (NT); *Aboriginal and Torres Strait Islanders Affairs Act 1965* (Qld); *Aborigines Act 1911* (SA); *Aborigines Act 1934* (SA); *Aboriginal Affairs Act 1962* (SA); *Aborigines Protection Act 1886* (WA); *Aborigines Act 1905* (WA); *Native Welfare Act 1963* (WA); *Natives Administration Act 1905-1936*; *Aborigines Act 1890* (Vic); *Cape Barren Island Reserve Act 1912* (Tas).

6 (2000) 103 FCR 1.

7 See Neva Collings, 'The Wik: A History of Their 400 Year Struggle' (1997) 4 *Indigenous Law Bulletin* 1, <<http://www.austlii.edu.au/au/special/rsjproject/rsjlibrary/ilb/vol4/no14/no1/2.html>> at 20 November 2003.

8 [1996] EOC 92-848 (Unreported, Carter QC, 24 September 1996).

9 Jon Altman and Boyd Hunter, 'Monitoring "Practical" Reconciliation: Evidence from the Reconciliation Decade, 1991-2001' (Discussion Paper No 254, Centre for Aboriginal Economic Policy Research, 2003) v.

10 Larissa Behrendt, *Achieving Social Justice: Indigenous Rights and Australia's Future* (2003) 3.

the decisions was embodied in the language of formal equality. As Behrendt observes, it resulted in the employment of one of the great Australian mythologies that Aboriginal people find so bewildering: 'We have clung tenaciously to the principle that no group in the Australian community should have rights that are not enjoyed by another group'.¹¹

For Indigenous people, Australian history clearly contradicts this. The story of native title as told by John Howard, the Prime Minister, was that somehow Indigenous people were receiving or demanding something above and beyond the rights of all Australians, while Australian farmers, who 'have always occupied a very special place in our heart ... often endure the heartbreak of drought, the disappointment of bad international prices after a hard-worked season'¹² were the victims of the 'politics of guilt'.¹³ As Behrendt argues, the rhetoric of this period encompassed powerful nationalistic imagery and was conducted in the absence of 'the historical context in which dispossession took place'.¹⁴ And indeed, this historical context continues to be mauled in a sulphurous manner with newly emerging mythologies depicting early settlers as Christians and thus unlikely to engage in widespread and systemic violence and killing of Indigenous people, or claiming that Aboriginal oral histories lack the cogency of police reports from that era.

Behrendt also importantly engages with Indigenous notions of identity and culture. There is a lot of confusion in the Australian community as to what constitutes 'Aboriginality'. It is interesting to consider the 2002 controversy over the *Jackie Pascoe* decision in the Northern Territory.¹⁵ Not only had this type of defence (mitigation based on customary law) been used for decades by white lawyers, but sentencing decisions are full of derogatory comments about Aboriginal women, such as this: 'Forcing women to have sexual intercourse is not socially acceptable but it is not regarded with the seriousness that it is by the white people'.¹⁶

The reconciliation of group rights, Aboriginal law and the inviolable nature of universal human rights desperately require greater political thought, empathy and legal attention than they are currently given. Yet, for over two centuries, with countless customary law inquiries, with a Northern Territory inquiry just completed and a Western Australian inquiry commencing, the relationship between Aboriginal law and Australian law remains unresolved. The media and public debate last year, while important, highlighted that Australian notions of

11 John Howard quoted in 'Racing towards an election', *Sydney Morning Herald* (Sydney) 27 May 1997 in Behrendt, above n 10, 3.

12 John Howard quoted in 'The sooner we get this debate over the better for all of us', *The Age* (Melbourne), 1 December 1997 in Behrendt, above n 10, 3.

13 John Howard quoted in 'Mr Howard Unreconciled', *Sydney Morning Herald* (Sydney), 27 May 1997 in Behrendt, above n 10, 3.

14 *Ibid.*

15 *Pascoe v Hales* (Unreported, Northern Territory Supreme Court, Gallop A/J, 8 October 2002).

16 *Mungkilli, Martin and Mintuma* (Unreported, Supreme Court of South Australia, Millhouse J, 20 March 1991).

Aboriginal people and Aboriginal customary law¹⁷ have not moved much beyond sensational images of payback and spearing. Customary Aboriginal law, however, encompasses much more. It is being used in different contexts nationally: circle sentencing in New South Wales, the Koori Court in Victoria, the Murri Court in Queensland, the law and justice committee process trialled in the in Lajamanu, Ali-Curung and Yuendumu (NT), Community Justice groups in Queensland, (trialled in Hopevale, Kowanyama and Palm Island since 1993), the Ngunga Court and the Ngunga Youth Court in South Australia.

Behrendt tries to combat this lack of understanding by canvassing the role of education in the context of remaking or redefining 'the national self-image', and urging that space be made within the Australian story and Australian mythology for Indigenous people. White Australia must learn about Indigenous Australia.

It is when dealing with the notion of liberal democracy and liberalism that Behrendt is at her best. The assertion of the neutrality and objectivity of liberalism has for a long time been a source of incredulity for Aboriginal people. The most interesting aspect of Behrendt's writing is her discussion of liberalism and her argument that the recognition of difference can only enhance Australia and Australians' sense of national identity:

Difference-blind liberalism rejects multicultural liberalism because it appears to violate the principle of non-discrimination. Multi-cultural liberalism is critical of difference-blind liberalism because of the way that it desires and perpetuates homogeneity; its difference-blind principles reflect one set of values and one culture, alienating those who do not share them.¹⁸

This goes to the heart of what 'symbolic' reconciliation is about. It is about inclusion and the psychology of gestures such as an apology that would have an enormous impact upon the Indigenous sense of identity in the Australian state and the knowledge of space within Australian history.

The emancipatory potential of liberal democracy can, and has in the past, accommodated communities from within to mobilize support for change:

Democratic principles have provided the framework for diverse popular movements producing many different accounts of democracy. Included are movements seeking decolonisation and self-determination, the liberation of women, freedom from racial discrimination, Indigenous peoples' rights, environmental democracy and emancipation from economic and political repression. These developments reveal the breadth of the emancipatory potential of democracy.¹⁹

A liberal democracy is so much more than a ballot box and this potential is inextricably linked with critique and dissent. The acknowledgement and recognition of the stories of Aboriginal Australia must be accommodated for any potential to be realised. Behrendt, like Hilary Charlesworth for example, highlights the utilitarian nature of Australian democracy. Any critique is often

17 The terminology 'Aboriginal customary law' is problematic for many Aboriginal people. That is to say, using a generic tag to define Aboriginal law rather than say Noongar law or Yolngu law or Koori law for example. Nevertheless there is an argument that there needs to be a common term with which to convey or create an interface between the two systems.

18 Behrendt, above n 10, 81.

19 Dianne Otto, 'Challenging the "New World Order": International Law, Global Democracy and the Possibilities for Women' (1993) 4 *Transnational Law and Contemporary Problems* 371, 374.

'neutralised' and denigrated as a 'minority' demand that is portrayed as purporting to threaten the power and will of the 'majority'. Dissent is primarily denigrated by those whose agendas have the most to lose from a liberal construct that encourages and accommodates diversity of interest.²⁰ Despite the media images and community reaction to George Bush's recent 'non-state', 'thank you' celebrity BBQ visit, dissent and critique is a crucial tenet of liberal democracy. And this is what Behrendt has produced in an enlightening critique – a well researched and carefully constructed framework that puts fire back into a national dialogue we are continually told we shouldn't discuss anymore.²¹

Recently commentator Piers Akerman wrote:

When are we going to bite the bullet and deal with Aboriginal Australians as we do with other members of the wider community? ... There is a crisis, true, but the academic club is largely to blame. We should stop looking to academia for solutions.²²

It is interesting that Akerman believes academia is to blame for the crisis in Indigenous Australia given the well known influence of talk-back radio, columnists and polls on a wide range of government policy areas. It is always fascinating to hear academia disparaged, yet when Mr Akerman requires maintenance on his car, or his lap-top fixed, or legal advice on defamation law, surely he would abstain from employing a third rate tradesman, technician or barrister to do the job. The same applies to the nation – why reject the wealth of intelligence, expertise and years of study and training that informs the talent and creativity of the university sector? Their opinions and ideas are just as legitimate and necessary as Akerman's or the oft-quoted 'ordinary Ostrayan'. Would Akerman reject the validity of the input of an Aboriginal academic and lawyer who also understands the experience of being Aboriginal? Larissa Behrendt doesn't pretend to provide a solution to the centuries' old tension between Indigenous people and the Australian state, but she provides valuable ideas, she clarifies and articulates Indigenous aspirations and she has developed a framework that may guarantee greater reconciliation between the distinct needs of Aboriginal peoples and Australia. Ideas like Behrendt's should not be ignored or rendered invalid simply because she holds four degrees.

Behrendt highlights the recognition of past injustices, autonomy and decision-making, property rights and compensation, protection of cultural practices and customary laws and equal protection of rights as a framework of Indigenous aspirations in relation to sovereignty and self-determination.²³ She skilfully dispels the misconception about the 's' word (sovereignty) in the Australian community. Behrendt takes the refreshing approach in her book of citing interviews with Indigenous people in order to determine what it is that Indigenous people claim or aspire to (something quite unusual given that most opinion pieces on Indigenous people about Indigenous experiences are written by white Australians). Behrendt thoughtfully includes a diagram that illustrates her

20 Ibid 396.

21 Editorial, 'PM Rejects Symbols for Solutions', *The Australian* (Sydney), 25 July 2003.

22 Piers Akerman, 'Separate People Ideology is Flawed', *Daily Telegraph* (Sydney), 18 November 2003, 22.

23 Behrendt, above n 10, 123.

conception of the necessary framework for moving forward on Indigenous issues.²⁴ This framework of institutional change is underpinned by three thematic principles: substantive equality, effective participation and legal pluralism.²⁵ Some of her suggestions or ideas for change include a new preamble, repealing section 25 of the Constitution, a bill of rights, specific constitutional protection or a non-discrimination protection.

It seems strange that even now, eleven years after *Mabo*, we still get no 'traction' in terms of the understanding, appreciation and accommodation of Australia's first peoples as a unique group, with unique aspirations and needs within Australia. In Australia, customary Aboriginal law is as relevant for those Aboriginal people who continue to practice Aboriginal law in rural and remote areas as it is for those Aboriginal people whose custom and tradition is essentially a modern evolving construct, a hybrid of experience, of culture and of mythology that is the inevitable result of displacement, of systemic dispossession by the policies of successive state and federal Australian governments.

Throughout the book Behrendt discusses the complexity of Indigenous identity. Indigenous culture is not monolithic. It is fluid and complex, as is Australian culture. You cannot essentialise Indigenous people since, as Deane and Gaudron stated in *Mabo*, 'traditional law and custom is not frozen at the moment of establishment of a Colony'.²⁶ Customary law, Aboriginal law, Koori law, Murri law, Noonga law, these are ways of defining who we are. Indeed, the common law was once customary law. We can be distinctly Indigenous and Australian at the same time without threatening the mythologies of white Australia. This is what Behrendt's ideas achieve. Despite what Piers Akerman might think, this is one contribution from the academic club that provides constructive dialogue for the way forward.

24 Ibid 124.

25 Ibid 125.

26 *Mabo* (1992) 175 CLR 1, 58.