



PROGRAM

JUDICIAL INDEPENDENCE IN AUSTRALIA: Contemporary Challenges, Future Directions

10-11 JULY 2015

Room E109, Forgan Smith Building (1)
The University of Queensland, St Lucia



THE UNIVERSITY
OF QUEENSLAND
AUSTRALIA

TC BEIRNE
SCHOOL
OF LAW

9:30-10:00	Registration Room E109, Forgan Smith Building (1) The University of Queensland, St Lucia
10:00-11:00	Keynote Address The Hon Sir Anthony Mason AC KBE CBE
11:00-11:30	Morning Tea
11:30-1:00	Session One: Conceptualising Judicial Independence Chair: The Hon Margaret White AO, retired Judge of the Supreme Court of Queensland HP Lee (Monash): The Advancement of Judicial Independence as a Universal Value: A Comparative Perspective Suri Ratnapala (UQ): The Philosophy of the Separation of Powers: The Perennial Struggle of Hobbesian and Lockean Visions of Government Jonathan Crowe (UQ): Human, All Too Human: Human Fallibility and the Separation of Powers
1:00-2:00	Lunch
2:00-3:30	Session Two: Judicial Reasoning and Rhetoric Chair: The Hon Justice Roslyn Atkinson AO Andrew Lynch (UNSW): Keep Your Distance: Independence, Individualism and Decision-Making on Multi-Member Courts Gabrielle Appleby (UNSW): Judicial Independence and Policy Distortion David Tomkins and Katherine Lindsay (Newcastle): Judicial Independence and Extra-Curial Writing: A Preliminary Analysis of Contemporary and Historical Australian Practices
3:30-4:00	Afternoon Tea
4:00-5:30	Session Three: Institutional Integrity Chair: Dr Jacoba Brasch QC Patrick Emerton (Monash): Judicial Integrity under the Australian Constitution James Stellios (ANU): The Normalisation of Judicial Functions Constance Youngwon Lee (UQ): Constitutional Silences and the Doctrine of Institutional Integrity Melissa Vogt and Rosalind Dixon (UNSW): Comparative Constitutional Law & the Kable Doctrine
6:00	Conference Dinner St Lucy's Caffè e Cucina

Saturday 11 July

9:30-11:00 **Session Four: Judicial Appointments and Tenure**

Chair: The Hon Justice John Logan RFD

James Allan (UQ): Is Talk of the Quality of Judging Sometimes Strained, Feigned or not Sustained?

Heather Douglas and Francesca Bartlett (UQ): Women, Feminism and Judicial Diversity

Brian Opeskin (Macquarie): Judicial Exits: The Tenure of Judges in Three Apex Courts

11:00-11:30 **Morning Tea**

11:30-1:00 **Session Five: Extra-Judicial Activities**

Chair: The Hon Justice Glenn Martin AM

The Hon Justice Martin Daubney: Extra-Judicial Activities and Judicial Independence

Rebecca Ananian-Welsh (UQ) and George Williams (UNSW): State Judges as Lieutenant-Governors

Fiona Wheeler (ANU): Constitutional Limits on Extra-Judicial Activity by State Judges

1:00-2:00 **Lunch**

2:00-3:30 **Session Six: Courts in the Contemporary World**

Chair: The Hon George Fryberg, retired Judge of the Supreme Court of Queensland

John Williams (Adelaide): Of 'Political Judges', 'Fragile Bastions' and 'Robust Debates': Judges and their Critics

Alysia Blackham and George Williams (UNSW): Social Media and the Judiciary: A Challenge to Judicial Independence?

Rebecca Ananian-Welsh (UQ): Judicial Independence in an Age of Terror

3:30-4:00 **Afternoon Tea**

4:00-4:30 **Concluding Discussion**

SESSION ONE: CONCEPTUALISING JUDICIAL INDEPENDENCE

1. ***The Advancement of Judicial Independence as a Universal Value: A Comparative Perspective***

Professor HP Lee (Monash University, Faculty of Law)

In all highly democratic nations, the strength of the democratic traditions bears a direct correlation to the independence of the judiciary. There is a convergence of aspirations of most countries to attain a truly independent and impartial judiciary. That convergence is reflected in the many efforts to draw up international standards pertaining to judicial independence. This paper seeks to provide an overview of these standards which have been crafted to advance the ideal of judicial independence as a universal value.

2. ***The Philosophy of the Separation of Powers: The Perennial Struggle of Hobbesian and Lockean Visions of Government***

Professor Suri Ratnapala (University of Queensland, TC Beirne School of Law)

The history of representative democracy has seen the continuing struggle between two visions of constitutional order. The vision of Thomas Hobbes is grounded in the idea of a sovereign with unlimited power. John Locke argues for government by general laws, enforced through an independent judicature. The author examines these visions to understand the persistence of the debate and to support the Lockean emphasis on impartial courts.

3. ***Human, All Too Human: Human Fallibility and the Separation of Powers***

Associate Professor Jonathan Crowe (University of Queensland, TC Beirne School of Law)

Humans are fallible—and this fallibility is the hardest thing for us to grasp. It is for this reason that the separation of powers—the importance of which ultimately rests on the flawed character of human reason—is continually under threat. This paper examines the various facets of human fallibility that underpin the separation of powers. It explores how the modern tripartite separation of powers restrains human fallibility, and concludes with a reflection on the vulnerability of the separation of powers today.

SESSION TWO: JUDICIAL REASONING AND RHETORIC

4. ***Keep Your Distance: Independence, Individualism and Decision-making on Multi-member Courts***

Professor Andrew Lynch (University of New South Wales, Faculty of Law)

The last two years has seen a period of sustained reflection from High Court judges about how judgments should be written and delivered in appellate courts. Specifically, how do individual members of such courts balance the institutional benefits of joint opinions against the attraction of speaking separately? This paper examines this debate, asking whether the threats to judicial independence are real or imagined, and whether it is possible to develop general principles around the delivery of judgments.

5. ***Judicial Independence and Policy Distortion***

Associate Professor Gabrielle Appleby (University of New South Wales, Faculty of Law)

This paper considers contemporary challenges that the High Court's attempts to protect judicial independence pose to policy development. The author draws on the work of Mark Tushnet on the propensity for 'policy distortion' to be caused by legislators believing that the permissible range of policy options is smaller than it actually is. Through case studies, the author argues for greater guidance from the High Court on the scope of protections for judicial independence and impartiality.

6. ***Judicial Independence and Extra-Curial Writing: A Preliminary Analysis of Contemporary and Historical Australian Practices***

Dr David Tomkins and Katherine Lindsay (University of Newcastle, School of Law)

This paper explores patterns of extra-curial writing by Australian High Court judges. Having reviewed some historical and contemporary patterns of extra-curial writing by High Court judges, the paper then investigates the potential impact of such activities on the maintenance of judicial independence.

SESSION THREE:

INSTITUTIONAL INTEGRITY AND THE CONSTITUTION

7. ***Judicial Integrity under the Australian Constitution***

Dr Patrick Emerton (Monash University, Faculty of Law)

Well-known decisions of the High Court have derived a doctrine of judicial integrity from the Australian Constitution. The basis for this doctrine, however, remains contentious. This paper adopts an analytical approach that combines approaches of semantic realism with the sociology of institutions (including legal institutions), in order to articulate the textual basis and content of the doctrine. It argues that the judgments of Gummow J, provide the best judicial account of the notion of judicial integrity implicit in the Constitution.

8. ***The Normalisation of Judicial Functions***

Associate Professor James Stellios (Australian National University, Faculty of Law)

This paper explores how historical analogy and double function provisions have been used by courts to 'normalise' functions as judicial and hence expand the judicial role into new territory. It assesses the extent to which independence and impartiality are undermined or sidelined by these methods.

9. ***Constitutional Silences and the Doctrine of Institutional Integrity***

Constance Youngwon Lee (University of Queensland, TC Beirne School of Law)

A constitution, like any document, leaves certain things unsaid. In Australia, the duty to interpret constitutional silences falls to the courts. This paper engages with constitutional theory in order to explain what ought to—and does in fact—dwell in the constitutional silences. This idea is applied to explore the constitutional provisions (or lack thereof) for judicial independence at the state level.

10. ***Comparative Constitutional Law & the Kable Doctrine***

Melissa Vogt and Professor Rosalind Dixon (University of New South Wales, Faculty of Law)

This paper suggests that Australian courts could benefit from looking more directly to comparative constitutional experience in making judgments relating to the Kable doctrine. Most importantly, in applying the doctrine courts could usefully consider whether an equivalent power had been conferred on courts in other constitutional democracies. This principle of "transnational anchoring" has been developed in other context. It also finds implicit support in the High Court's willingness to consider legislative practices in across state jurisdictions within Australia. Expanding this approach could thus offer a useful additional source of objective guidance in determining questions of incompatibility under the Kable doctrine.

SESSION FOUR: JUDICIAL APPOINTMENTS AND TENURE

11. ***Is Talk of the Quality of Judging Sometimes Strained, Feigned or not Sustained?***

Professor James Allan (University of Queensland, TC Beirne School of Law)

This paper considers judicial selection, contrasting a Dworkinian to a Hartian view on this issue. It explores the idea that one's preferred judge for a single opening on the court may be distinct from what one would want in a court as a whole; in other words, an ideal court may not be peopled by seven or nine 'clones' of one's ideal judge.

12. ***Women, Feminism and Judicial Diversity***

Professor Heather Douglas and Dr Francesca Bartlett (University of Queensland, TC Beirne School of Law)

For many years academics have debated whether diversity of judicial appointment makes a difference to legal outcomes and reasoning approaches, and whether it is indeed possible to be a 'feminist judge'. This paper discusses interviews conducted with 41 women decision-makers throughout Australia who identify as feminist. It considers how these judges reconcile their commitment to feminism and their lived experiences with the judicial oath, and the authors argue for a stronger commitment to judicial diversity.

13. ***Judicial Exits: The Tenure of Judges in Three Apex Courts***

Professor Brian Opeskin (Macquarie University, School of Law)

Tenure is an important facet of judicial independence and a key principle underpinning the rule of law, yet its protection varies markedly from country to country. This article examines the development and experience of the Supreme Court of the United States, the High Court of Australia and the Constitutional Court of South Africa as examples of prevalent models of tenure, namely, life tenure, age limits and term limits.

SESSION FIVE: EXTRA-JUDICIAL ACTIVITIES

14. ***Extra-Judicial Activities and Judicial Independence***

The Hon Justice Martin Daubney

The author, a current judge of the Supreme Court of Queensland, will reflect upon the wide range of extra-judicial functions performed by judges in Australia and the ways these can impact upon the performance of the judicial role.

15. ***State Judges as Lieutenant-Governors***

Dr Rebecca Ananian-Welsh (University of Queensland, TC Beirne School of Law) and Professor George Williams AO (University of New South Wales, Faculty of Law)

Since colonial times, Australian judges have been appointed to the vice-regal office of Lieutenant-Governor. This practice stands at odds with the basic separation between the judicial and executive branches of government and seems increasingly anomalous in the modern constitutional context. In this paper we explore this apparent anomaly and consider how these traditional appointments might evolve so as to best preserve judicial independence.

16. ***Constitutional Limits on Extra-Judicial Activity by State Judges***

Professor Fiona Wheeler (Australian National University, ANU College of Law)

The Kable principle is transforming Australian constitutional law. This paper examines one of the doctrine's newest strands: the emerging separation of powers limitations that confine the extra-judicial activities of State judges. The author discusses the impact of this finding on extra-judicial activities historically performed by State judges, and the legitimacy of recent developments in this area.

SESSION SIX: COURTS IN THE CONTEMPORARY WORLD

17. ***Of 'Political Judges', 'Fragile Bastions' and 'Robust Debates':
Judges and their Critics***

Professor John Williams (University of Adelaide, Faculty of Law)

The judiciary, like other public institutions, is by necessity the subject of scrutiny and critique. Indeed, by design a well-functioning judicial system places review and open justice at the centre of the process. This paper will examine the Australian experience of public criticism of judicial officers. In particular the role played by members of the Executive and Legislature as they provide commentary on the other arm of the state.

18. ***Social Media and the Judiciary: a Challenge to Judicial Independence?***

Alysia Blackham (University of Cambridge, Faculty of Law) and Professor George Williams AO (University of New South Wales, Faculty of Law)

Judges are expected to act independently of public opinion. The growth of social media, and courts' increasing engagement with social media as a communication tool, may pose new challenges to judges' actual and perceived independence. Drawing on an empirical survey of courts' use of social media in Australia, this paper will explore these challenges, and suggest a number of ways to help courts manage this changing media landscape.

19. ***Judicial Independence in an Age of Terror***

Dr Rebecca Ananian-Welsh (University of Queensland, TC Beirne School of Law)

This paper examines some of the key challenges posed to judicial independence by Australia's anti-terrorism frameworks. It explores a quandary that is clearly visible in the area of national security laws, namely, whether judges ought to be involved in executive schemes to provide crucial independent oversight at the risk of their institutional integrity and independence. Alternatively, should judges be kept apart from controversial schemes, thus preserving their independence but risking executive overreach?



Conference Organisers:
Dr Rebecca Ananian-Welsh
Associate Professor Jonathan Crowe

Register at: law.uq.edu.au/judicial-independence

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