

Review of:

Grant Hammond, “Judicial Recusal: Principles, Process and Problems” (Oxford: Hart Publishing, 2009)

* This review has been published in [2010] Cambridge Law Journal, pp205-206 (DOI: <http://dx.doi.org/10.1017/S0008197310000243>)

Public Law’s stringent requirement that justice must not only be done, but must also be seen to be done imposes on each generation ever more exacting challenges. This is unsurprising, given the interactions between our increasingly litigious culture, the adversarial nature of the common law legal processes, and the potential for every judicial decision to leave at least one party dissatisfied.

The circumstances that may require a judge or other judicial officer to engage in some soul-searching regarding his so-called “duty to sit” and his obligation to “recuse himself” when possibly compromised are so varied that it would take a brave person to attempt to tackle the topic of judicial recusals as a whole. Grant Hammond (former Law Professor, and judge of the New Zealand Court of Appeal) is one such brave person. His recent monograph *Judicial Recusals: Principles, Process and Problems* (2009, Hart) examines this issue from the vantage point of having once enjoyed the academic’s privileged position of “arm-chair referee” in relation to the many difficulties that face the courts, but now immersed in the realities of life as an appellate judge. This uncommon tapestry perhaps accounts for his writing flair and the compelling cogency of his arguments.

Hammond’s declared intention is to articulate as best as he can the central concepts that engage courts around the common law world on the rule against bias. While it may seem rather ambitious to seek to cover an area as large as “the common law world” Hammond ably

demonstrates that there is much common ground on this issue among the common law jurisdictions. He has chosen to focus his discussion around questions that the (old) British Commonwealth, and US Federal law identify as requiring attention, reducing these to the following three critical questions:

1. When should a judge withdraw from a given case to which he or she has been allocated?
2. Who decides when that judge should withdraw?
3. What process or procedures should be utilised by the decision maker?

While recognising that the precise answers to these questions would vary between jurisdictions, he appropriately takes a “broad principle” approach.

The ensuing analysis is as readable as it is erudite and comprehensive, encompassing the substantive, theoretical and practical questions that one would expect to find in a learned treatise on the subject - and more. The book is a notable contribution to the literature on recusals, and should be of considerable interest to public lawyers and judiciary watchers. Topics covered include the distinction between “objectivity” (Hammond’s preference) and “impartiality” in the context of recusal law; disclosure requirements for judges in order to forestall accusations of bias; waivers; necessity; prior viewpoints of judges; appellate review of the decisions of lower courts; and issues of practice, process and procedure. The book has a high number of chapters, some of which are very short (e.g., about two pages in length). The discussion usefully traces the historical development of the law, noting the early intervention of federal statutes in the USA. The substantive discussion is broadly classified (due recognition being given to the dangers of reductionism) into “automatic disqualification” and “bias”.

A brief review of this nature could not sufficiently comment on such excellent scholarship. Nonetheless, at the risk of some reductionism, I will focus on three controversial areas.

First, Hammond explores the proper future for automatic disqualification, concluding that it will depend on the particular circumstances of each jurisdiction. Since the continued utility of automatic disqualification is clearly contentious, he misses an opportunity to come out clearly for or against such a principle.

Secondly, Hammond discusses at length the issue of “process”, and notes the general absence in the Commonwealth of clear formalised procedures for raising recusal issues. He rightly raises “the obvious concern that the judge, required to be impartial, must decide whether he or she is sufficiently impartial to decide the case” and finds the current situation “quite indefensible”. He proposes that at “the trial level, a recusal request should first go to the allocated trial judge. But if she declines to recuse, there must be clear review mechanisms within the court structure”. Arguably, this does not go far enough. A more radical approach would be for all such requests to be heard by another judge.

With regard to “collegiate courts”, he proposes that “the panel appointed to the case should consider whether the objection is well founded”. In a surprising “concession to old practice”, he argues that the impugned judge could have an input or even sit with his colleagues, but that “the outcome should be for the panel as a whole”. But this concession fails to eliminate the difficulties engendered by an impugned judge deciding in the first instance, since the impugned judge’s presence on the deciding panel would itself arguably give the appearance of bias.

With respect to “final courts”, he considers substitution arrangements. Some Commonwealth jurisdictions (e.g., New Zealand) already have the power to substitute. The US Supreme Court lacks that capacity. Hammond believes that the idea of replacing disqualified justices of the US Supreme Court may have not yet been seriously advanced. While this may be so within the Supreme Court itself, it has been strongly advanced elsewhere (see A Olowofoyeku, “Regulating Supreme Court Recusals” ([2006] *Singapore Journal of Legal Studies* 60). Substitution (an eminently sensible response) is his preferred solution for final courts.

Thirdly, Hammond confronts the age-old dilemma of reformers – whether change should come from within, or be imposed from without. He opts for judicial self-regulation rather than legislation, taking the view that the judiciary is not yet beyond self-redemption in this matter. There are sound arguments for formalised self-regulation, but substitution in the US Supreme Court would require legislation.

Hammond has written an excellent book that should engage scholars, judges and policy-makers alike. Recusal law is much the richer for it. He has fortified the reformers’ camp. Hopefully, his urgent calls for change will not go unheeded.

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