

“A rough note: The Three Most Important Features of Argentina’s Legal System that Others Should Understand (and their relation with legal education)”

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1. A mixed legal model

Argentina, as many other Latin American countries, has adopted a mixed legal system. On the one hand, public institutions have been designed following the American tradition. On the other hand, private law has been devised in a way similar to the European continental countries.

As a result Argentina adopted a presidential system and a codified private law. But it has absorbed these traditions in a unique way. The presidential system is an extreme version. Many have named our system “hyper-presidentialism”, because it functions in a way very different from the US model, a more authoritarian, centralised, imbalanced way. Latin American presidents have much more powers than their American counterparts, and with much less checks and balances. For example, federalism is only a formality because the national state dominates the political and economic life of the nation; members of the presidential cabinet do not require Congress’ confirmation, the judiciary is less independent than in the US.

The private law also functions in a different way than in the European countries. Mainly, there is a formalist approach to law, which erodes the quality of the judicial decisions, which resemble a sort of mechanical jurisprudence, which in reality means that the political character of the decisions are disguised as neutral application of the law. Some scholars have suggested these two different models (the American public law and the European private law) are incompatible and that their combination results in an impoverished judicial discourse.

2. Inequality’s Law

Latin America is the land of inequality. For example, income and wealth inequality is greater here than in any other continent. Inequality impacts the law in different ways. First, it increasingly motivates a sense of illegitimacy among disfavored groups. Second, it permeates different departments of law distorting their internal logic. For example, it is not clear that it is justifiable to apply criminal sanctions to social protesters that block roads. Similarly, judges are confronted with demands related with social and economic rights, which is seen by many as a subversion of the role of democratic organs as final decision makers regarding budgetary allocations.

Perhaps the greater inequality is the one suffered by women. Although information about the scale and details of the disadvantages affecting women is scarce, it is plain that women suffer massively violence, labor discrimination in the form of lower salaries, rampant sexual harassment, “glass ceilings”, etc, etc. In particular, criminalization of abortion, besides a rights violation per se, produces one of the

greater health problems, due to the lack of protection of women who suffer injuries in illegal abortions.

3. Anomie

Argentina suffers the problem of an enormous gap between the formal law and reality. Non-compliance is not marginal but widespread. Approximately 50% of the society practices tax evasion. Traffic rules are massively violated. Even the political system works at the margins of the law: Presidents legislate through decrees in violation of the constitutions, or are forced to resign without specific legal reasons. Corruption is well above international average, and fair political competition is threatened by the increasing influence of black and public money in politics.

4. The Legal Academy

It may be of some interest to analyze the relations between these three features and the functioning of the legal academy. The legal academy is an important part of the legal landscape. Theoretically, it plays an important function as a critical element of the legislation, the judiciary and the legal profession. This role is not well covered by the legal academy in Argentina for several reasons. The main one is the absence (with few noticeable exceptions) of full time law professors, which is due, not only to economic reasons, but to a certain ideology, that conceives of the teaching of law as the transmission of "clear" rules instead of a tool to strengthen the argumentative and critical skills of law graduates. The dominance of law schools by judges and practitioners weakens the space for an independent scrutiny of the legislation and the judicial doctrines.

The Three Most Important Features of My Country's Legal System That Others Should Understand

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1. Australia is a federation

The Commonwealth of Australia is a federation created on January 1, 1901 out of the (then) six Australian colonies of the United Kingdom of Great Britain - New South Wales, Victoria, Queensland, South Australia, Western Australia and Tasmania. A number of territories also presently exist within Australia (including the mainland territories of the Northern Territory and the Australian Capital Territory) which the Commonwealth subsequently acquired and over which (formally, at least) it has exclusive jurisdiction. Some of these territories have been granted significant degrees of autonomy and self-government.

According to the terms of the Australian Constitution – a document negotiated by representatives of the six original colonies over the latter part of the 19th century, approved by referenda within those colonies and ultimately sanctioned by the Imperial British Parliament by passage of the Commonwealth of Australia Constitution Act 1900 (Imp.) - the entirety of then existing colonial legislative and associated governmental power was divided topic-wise between a newly created central and national government (the Commonwealth of Australia) and the pre-existing colonies (renamed States).

A series of legislative topics considered most appropriate for the new national government were assigned to the new Commonwealth (exclusively or concurrently), with the remainder (unspecified residual powers) left in the hands of the States. Important considerations in deciding upon the distribution of these powers at the time included the improvement of the management of external defence, immigration and international trade, the liberalisation of internal trade and commerce, and the development and better management of domestic public infrastructure. Unlike the constitutions of many other nation states, Australia's constitution was not forged in an atmosphere of highly charged political idealism. Though a vein of nationalism informed the move to bestow the new nation state with a limited degree of autonomy from Great Britain, much of the form taken by the federation was motivated by economic and other largely pragmatic concerns, reflecting the primary interests of those who directed the course of the nation-building, constitution-creating process at the time.

Following the initial distribution of powers between the Commonwealth and States at the dawn of the 20th century, the intervening years have seen a dynamic, uneasy and occasionally controversial relationship develop between the Commonwealth and States at both the political and the legal levels. Arguably, Australia's constitutional court – the High Court of Australia – has, over a series of decisions, interpreted the original division of legislative heads of powers in a manner conducive to the extension of Commonwealth power at the expense of the States (in what is commonly thought to be a “zero-sum game”). This has been claimed by federalist advocates of so-called “States rights” to involve an illegitimate conspiracy of Commonwealth appointed and ideologically centrist judges committed to undermining the ongoing viability of the federation in the service of some or other malevolent end and by their opponents to involve a sensible and flexible

fine-tuning of an anachronistic political arrangement in response to the ever-changing challenges of modernity and globalisation.

The debate about the federal division of power continues today in relation to a series of highly contentious and well-publicised legislative moves by the Commonwealth involving industrial relations and inter-state land and water management. The federal compact, born out of a vigorously negotiated inter-colonial agreement in the late 19th century, remains a locus for competing interests today. Whether it will end, as some argue (either despondently or with anticipation) with the ultimate ascendancy of the Commonwealth in a unitary state - de facto or de jure – remains to be seen. In the meantime, it makes for entertaining politics and interesting litigation.

2. Australia's constitution is a mix of UK and US elements and lacks a Bill of Rights

The Commonwealth Constitution was drafted in the 1890's by representatives of the six Australian colonies and embodies an uneasy amalgam of elements of both the UK and US systems of government in what has been termed a "Washminster" system of government. From the UK, the Commonwealth has inherited a tradition of responsible government; a relatively weak separation of powers doctrine, including what might be conceived of as a predisposition or orientation towards Parliamentary sovereignty and a background anxiety about the exercise of a judicial power of legislative review; as well as an associated trust in common law and statutory (as distinct from constitutionally codified and entrenched) mechanisms for protecting basic rights. From the US, the Commonwealth has inherited a written constitution; a federal structure; a bi-cameral Parliament with a legislative and upper Senate chamber representing (formally, at least) State interests; and a supreme court with formal jurisdiction to ensure that the other limbs of government - including the Commonwealth Parliament itself - comply with the terms of the Constitution. The contradictions inherent in such a system – as well as the fascinating synergies – should be apparent to the politically informed observer. Where does one begin to list the modes and occasions of legal and political contradiction, as well as opportunity, generated by such a mongrel (no insult intended!) over its one hundred and six years?

Importantly, implicit in this feature of Australia's legal system is the fact that Australia does not have a national, constitutionally codified and entrenched bill of basic rights. This distinguishes Australia's legal system from that of many - if not, most - of the nations of the world. Notwithstanding their adoption of a range of features of the US constitution, the 19th century drafters of the Australian constitution were not minded to include a Bill of Rights (though they did debate doing so). Rather, they incorporated (expressly, at least) a narrowly restricted number of discrete civil and political rights here and there throughout the text of the document and, in true British style (at least, the Britain of that time), left the protection of the majority of basic rights to the traditions of the common law and the wisdom and benevolence of the people's national and regional Parliaments. Subsequent airings in the public sphere of the idea of introducing a constitutional Bill of Rights by means of a formal constitutional amendment (via a popular, though federally weighted, referendum process) have come to naught, the Australian people arguably content with the existing arrangements as far as their fundamental rights are concerned. The failure of

these projects hasn't deterred a number of High Court majorities and individual judges from time to time implying certain civil and political rights into the Constitution – most notably in recent times, an implied right (or freedom, more correctly) of political communication. The public debate about whether or not to codify a Bill of Rights in the Constitution continues today. Recent legislative responses to terrorism have heightened the intensity of the debate from its usual low simmer. Where things will lead in this respect is not clear.

3. Australia is not a republic

The nation state that is the Commonwealth of Australia was created in 1901 by an Act of the British Parliament. Its constitution remains to this day Section 9 of that British Act. At its birth, Australia was a colony of Great Britain and it remained politically and legally subordinate to Great Britain to some degree or other until 1986, when by a further Act of the British Parliament (supplemented by a mirror Act of the Australian Parliament) the jurisdiction of Britain's Parliament, Executive and Judiciary over Australia was formally ended. Debate continues today as to whether or not (despite their formal terms) the Australia Acts of 1986 conclusively conferred legal and political sovereignty as an independent nation state on Australia or whether some further legal and political gesture is necessary.

One complicating factor here is that the Queen of Australia - who is constitutionally recognised as an element of the Commonwealth and State Parliaments, as well as the formal holder of Commonwealth and State executive power - is constitutionally and statutorily identified as the presiding monarch of Great Britain. The Australian head of state is at law the current head of state of its old colonial overlord. Some have argued that as a result of this, Australia is not quite yet a republic, either in the sense of being a fully sovereign nation subordinate to the legal or political institutions of no other, or in the sense of not being subject to the power (however limited) of an undemocratic, hereditary monarchy. Much here hinges on the actual power the monarch yields in Australia. However, the politically potent symbolic dimension of the situation should not be discounted.

Like the Bill of Rights debate, the republic debate simmers in the Australian public sphere, occasionally flaring up into a full-blown controversy. Its last eruption preceded and followed a 1999 national referendum on whether or not to formally amend the Australian constitution so as to more overtly and conclusively republicanise our governmental structures. What the failure of that most recent movement for constitutional change indicates about the Australian psyche has been a topic of rumination for lawyers, political scientists and sociologists ever since.