

The Three Most Important Features of Australia's Legal System that Others Should Understand

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Prepared for the 2007 IALS Conference on "Learning from Each Other: Enriching the Law School Curriculum in an Interrelated World", October 17-19, 2007 at the Kenneth Wang School of Law, Soochow University, Suzhou, P.R. China.

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I have taken the liberty of recasting the assigned topic slightly and in this short paper will identify three features of Australia's legal system that may provide distinctive and useful perspectives for enriching the law school curriculum in (some) other jurisdictions.

The three features (and the teaching questions that they evoke) are these:

- Australia's legal system is based on the common law, inherited at the time of British settlement in the late 18th century, but profoundly influenced by the statute law of an active, and occasionally social-democratic, state. What does the Australian experience reveal about the relative capacities (and inclinations) of courts and legislatures to engage in reform of basic legal principles and social structures?
- Australia's constitutional order rests on a written *Constitution*, enacted in 1900 by the British Parliament giving effect to a more-or-less democratically drafted Australian document. The key features of this constitutional order are that it is federal and parliamentary (including the principles of responsible government), with strong judicial review of structural features including the federal division of powers and the separation of powers. And yet the national government is almost completely dominant in all major policy areas and the states are left with residual powers and declining relevance except as providers of nationally mandated and funded services. What does the Australian experience reveal about the capacity of constitutional courts to protect federalism?
- Australia's constitutional order contains no systematic broadly-based protections for human rights. The tradition is one of parliamentary supremacy and ministerial / parliamentary responsibility for individual liberties. Over the last 30 years, Australian legislatures have enacted antidiscrimination statutes that deal with specific grounds of discrimination. And in the last five years, two Australian sub-national legislatures have enacted human rights acts on the British model. Again, what does the Australian experience reveal about the relative capacities (and inclinations) of courts and legislatures to engage in substantive determination of human rights questions?

These features, stated at this level of generality, are fundamental to understanding the structure of the Australian legal system and may provide useful perspectives for the

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curriculum of basic courses in other jurisdictions. In what follows, I identify further aspects of them (drawing on the teaching questions above) that reflect my own interests and scholarship as a comparative constitutional lawyer, and that may provide useful perspectives for more advanced courses.

Common law – settler State, active State

The Australian legal system is strongly shaped by its British antecedents. When the British took possession of Australia, British statute law and common law (so far as they were applicable to the situation of the new colony) automatically formed the basis of the legal system of the new colony. This was the prevailing legal theory in the late 18th century in relation to desert and uncultivated lands. Australia was so regarded, despite the presence of a substantial indigenous population.

The new settler legal system failed to recognize indigenous Australians' rights to their land. That failure lasted two centuries. Limited statutory rights were created in the 1970s. But it was not until 1992 that the High Court held that the common law recognized a form of native title (*Mabo v Queensland (No 2)* (1992) 175 CLR 1). That decision attracted vehement public criticism on account of its supposed "activism", despite its failure to provide redress for native title rights that had already been extinguished and despite the fragility of the rights that were recognized. Much of the criticism appears to stem from the explicitly moral language in the leading judgments, which recorded "a national legacy of unutterable shame" and talked of "adopt[ing] rules that accord with contemporary notions of justice and human rights". Such language was foreign to the pervasive formalism of Australian legal culture. The case provides the starting point for an extremely useful case study of the judges' own conception of their role as they shift between this norm-creating and transformative mode of reasoning and a more formal mode that insists on close analysis of the prior law.¹ It also provides an extremely useful case study of the limits of the courts as instruments for broad-ranging social reform. The immediate sequel to *Mabo* (and later to *Wik* (1996) 187 CLR 1) was substantial legislation, recognising *and limiting* native title rights. Fifteen years later, another substantial package of (immensely controversial) legislation is attempting to address the ongoing "national legacy of unutterable shame", more directly focusing on social issues rather than on land rights which can only indirectly improve the lives of the most disadvantaged indigenous Australians. This focus is something common law adjudication (at least in its Australian forms) could never achieve; an interesting question for comparative investigation is whether constitutionalised social and economic rights (which do not exist in Australia) might be more successful.

Despite their longstanding inaction (or worse) in relation to position of indigenous Australians, Australian national and state governments have been actively engaged in

¹ The formal mode has been the dominant mode of common law adjudication. But although formal, it is largely antitheoretical. One judge recently wrote: "To the lawyer whose mind has been moulded by civilian influences, the theory may come first, and the source of the theory may be the writing of jurists not the decisions of judges. However, that is not the way in which a system based on case law develops; over time, general principle is derived from judicial decisions upon particular instances, not the other way around." (*Roxborough v Rothmans of Pall Mall Australia Ltd* (2001) 208 CLR 516).

steering other aspects of the society and economy in social-democratic or social-liberal directions² in at least three ways. They have developed a strong welfare state (though this has been under attack more recently). They have relied heavily on state owned and state controlled enterprises (though again the trend over the last 25 years has been to divestment and privatisation). And they have effected significant statutory modifications of the common law. One example of the last phenomenon will have to suffice for the purposes of this paper. Australian legislatures have extensively modified the unwritten common law of contract (and tort) in the consumer and commercial context. The principal statutory provision, which occurs in national and state legislation, proscribes traders from engaging in misleading or deceptive conduct in the course of their trading activities.³ Coupled with a broad remedial power, the provision has become a mainstay of consumer and commercial litigation. In particular, it can sidestep common law limitations on remedies (particularly limitations on damages) for innocent misrepresentation; it can also result in liability for “mere puffery” and extend the liability for failing to speak. Coupled with prohibitions on unfair contract terms and unconscionable conduct, the statutory prohibition on misleading and deceptive conduct represents a far-reaching statutory intervention into the domain of the common law.

The principal interest of this example, however, is in the dynamics that surround interpretation of these statutory provisions. Some of the case-law exhibits a tension between two views of the provisions: as being either intended to transform radically the analogous common law principles or as intended to reflect the content of those principles. The latter cases thus turn on the *selection* of the *appropriate* analogy from the common law. This is made more complex by the fact that some of the provisions – in particular one of the prohibitions on unconscionable conduct – pick up the common law concepts and gives them statutory force. And at the same time the common law principles (or rather equitable principles: Australia has largely maintained the formal separation of these bodies of unwritten law) regarding unconscionable conduct have expanded and become more flexible, less “rulified” and more discretionary.⁴ So there are two intriguing dynamics that have parallels in other jurisdictions and which could form useful teaching points: the relationship between statute and unwritten law and the relationship between certainty and fairness in the interpretation and application of both statutory and unwritten law.

Federalism and judicial review

The first 20 years after Australian federation in 1901 were marked by doctrines, broadly adopted from United States constitutional jurisprudence, that protected the autonomy of States and national government from each other’s regulation. The practical impact, for the

² See Marian Sawer, *The Ethical State? Social Liberalism in Australia* (2003); Paul Kelly, *The End of Certainty* (1992).

³ See for example R V Miller, *Miller's Annotated Trade Practices Act 2007* (28th ed 2007).

⁴ See, for example, Simon Evans, ‘The High Court’s Equity Jurisprudence’ in Peter Cane (ed), *Centenary Essays for the High Court of Australia* (2004) 390.

most part, was to limit the scope of national regulation. National legislative powers were interpreted against an assumption that states retained substantial legislative authority and autonomy, particularly in relation to the economy and industrial relations. And national legislative powers did not extend to regulation of the activities of state government entities, including trading entities.

In 1920, this period came to an end with the *Engineers' Case* (1920) 28 CLR 129. A new majority on the High Court rejected the former approach, arguing that it rested on inappropriate analogies with the United States constitutional system and on political (rather than legal) conceptions of federalism. The new orthodoxy emphasized the text of the *Constitution*, virtually above all else. The scope of federal powers was to be determined according to the natural reading of the constitutional text and not by externally postulated limitations or implications.

Thus began the extraordinary expansion of federal power, seen most recently in the *Work Choices Case* (2006) 231 ALR 1. That case involved legislation that directly regulated terms and conditions of employment (and much more) based on the national legislature's power to make laws with respect to trading and financial corporations. The legislation was upheld notwithstanding the existence of a parallel, but very much narrower legislative power to make laws that allowed industrial regulation but only by means of laws with respect to "conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State". The High Court sniffily dismissed arguments for an implied limit on the scope of national legislative powers that protected the scope of State powers. For a time after *Engineers* it had been assumed that the textual orthodoxy in constitutional interpretation precluded the drawing of constitutional implications. That position was rejected in the *Melbourne Corporation Case* (1947) 74 CLR 31, a case that is now understood as establishing a federal implication that invalidated national legislation where it threatens the continued existence of states and their capacity to function as governments. But that is very much a principle of ultimate resort and is not a meaningful brake on national regulation.

As well as the formal regulatory dominance of the national parliament, brought about by the emphasis on text in constitutional interpretation, the national parliament and government has achieved dominance through financial means. Vertical fiscal imbalance – a measure of the financial autonomy of national and subnational units in a federation – is notoriously high in Australia. Much of the blame can be laid at the feet of the High Court. It has allowed the national parliament to sequester surplus revenues (that would otherwise have to be paid to the states) in trust funds for future national expenditure. It has interpreted broadly the restrictions on the States' power to impose customs and excise duties (in particular preventing the states from imposing any sales tax on goods). It twice upheld 1940s wartime legislation that imposed a national income tax at rates that left no room for state income taxes to operate and that appropriated part of the revenues to the states on condition that they not impose an income tax of their own. It has recognized virtually no limits on the power of the national parliament to attach conditions to grants-in-aid to the States, which has allowed the national parliament to impose comprehensive regulation in major areas of social policy – in particular health and education – where its own legislative powers are relatively limited.

The Australian example is therefore of a carefully constructed federal state becoming increasingly centralized as a result of national parliamentary ambition and High Court acquiescence. An intriguing contrast with the United States in particular is that national dominance has *not* occurred through the interstate commerce power. But the really intriguing set of questions that is thrown up by the Australian case study centre on why the High Court has acquiesced in this process. Part of the answer comes from the court's interpretive methods. But why has it stuck with these methods when other constitutional courts, in broadly similar federations, engaged in far more substantive review of federal questions? And how distinctive is former Chief Justice Sir Owen Dixon's proposition insistence on "a strict and complete legalism", an insistence that remains central to Australian constitutional methodology?⁵

Substantive judicial review and human rights

It should be noted that there was a brief flowering of more substantive judicial review under Chief Justice Sir Anthony Mason. (This was also the era of *Mabo v Queensland (No 2)*, noted above.) The Mason High Court most famously recognised that the Constitution contained an implied freedom of political communication that limited national (and later State) legislative and executive power so as not to impose disproportionate burdens on communication relevant to the election of federal representatives (*Nationwide News* (1992) 177 CLR 1 and *ACTV* (1992) 177 CLR 106). It expanded a form of proportionality review in a range of constitutional areas, importing a rather attenuated but nonetheless substantive element into constitutional adjudication.⁶ The Brennan court later struck down State legislation that allowed a State Supreme Court to order the preventative detention of a named individual at the end of his sentence, notwithstanding that State constitutions do not contain an entrenched separation of powers (*Kable* (1996) 189 CLR 51).

These doctrinal innovations have proved immensely controversial. *Kable* in particular has proven to be an anomalous result, with the contemporary High Court upholding other preventative detention legislation and mandatory executive detention of asylum seekers.⁷ Notwithstanding the controversy attending them, the early decisions have developed a strong following among overseas constitutional comparativists, particularly those (to simplify dramatically) sympathetic to a substantive rule of recognition or grundnorm that the courts develop in a common law fashion. But given the more recent cases, which significantly qualify the moves towards substantive review of the 1990s, the contemporary focus of comparative enquiry should shift to the pattern of advance and retreat in

⁵ "[C]lose adherence to legal reasoning is the only way to maintain confidence of all parties in federal conflicts. It may be that the Court is thought to be excessively legalistic. I should be sorry to think that it is anything else. There is no safeguard to judicial decisions in great conflicts than a strict and complete legalism" (1952, on the occasion of his swearing in as Chief Justice).

⁶ See Adrienne Stone and Simon Evans, "[Balancing and Proportionality: A Distinctive Ethic?](#)" (paper delivered at a workshop on Balancing and proportionality in constitutional review at the VIIth World Congress of the International Association of Constitutional Law, Athens, 11-15 June 2007).

⁷ See Simon Evans, 'Australia: Mandatory administrative detention' (2006) 4 *International Journal of Constitutional Law* 517.

substantive constitutional review. Pierce's book length study (*Inside the Mason Court: The High Court of Australia Transformed*) is a useful contribution by an American political scientist, based largely on interviews with Australian judges. The cases themselves provide another lens for overseas legal scholars and law teachers to consider the impact of legal culture on this process of advance and retreat.

One important influence has been a resurgence of the previously dominant constitutional legalism I sketched in the previous section. Another has been the parliamentary tradition inherited from the UK that has emphasised parliamentary supremacy (within the subject matters of constitutional competence) and judicial abstinence from substantive questions.⁸

Unsurprisingly there have been regular calls for statutory or constitutional protection of human rights. The answer regularly given by courts and politicians is that this is not the Australian tradition; that the parliamentary tradition protects individual rights through regular elections and the responsibility of government ministers to the parliament. The answer rings hollow in the modern era of party government. Moreover, the parliamentary tradition has developed only the weakest mechanisms for parliamentary scrutiny of human rights issues. The Australian parliaments did pioneer scrutiny committees that consider whether legislation trespasses unduly on individual rights and freedoms. However, that scrutiny is narrowly focussed and is ineffective against a determined government.⁹

The political and legal context is now changing, with growing support for statutory protection of human rights. Two pioneering jurisdictions have enacted human rights Acts that follow the model of the UK *Human Rights Act 1998* (albeit with some significant cutbacks).¹⁰ This model is consistent with the Australian parliamentary tradition: requiring Ministers to take responsibility for the human rights impact of their legislative proposals; empowering parliamentary committees to scrutinise legislative proposals against human rights criteria; not affording courts the power to strike down legislation though giving them the power to reinterpret it to comply with human rights where possible and the power to declare that legislation is inconsistent with human rights.

Clearly enough these powers give Australian courts an unfamiliar substantive role, particularly in assessing whether limitations on human rights are demonstrably justified or proportional. They also require the courts and parliament to identify the limits of their own roles and the respect or deference owed to the other branch. Even if the process is conceptualised as a dialogue,¹¹ it is a distinctly Australian variant of inter-branch human

⁸ One illustration is the case that held that the national legislative power with respect to "the people of any race, for whom it is deemed necessary to make special laws" supports laws that discriminate *against* the people of such races (*Kartinyeri* (1998) 195 CLR 337).

⁹ This is the subject of an ongoing research project with my colleague Carolyn Evans funded by the Australian Research Council on parliaments and the protection of human rights. See for example Carolyn Evans and Simon Evans, 'Scrutiny Committees and Parliamentary Conceptions of Human Rights' [2006] *Public Law* 785.

¹⁰ In due course, see Carolyn Evans and Simon Evans, *Australian Bills of Rights* (LexisNexis forthcoming 2008).

¹¹ Which may be unwise, given the difficulties with that metaphor even in Canada, its country of origin.

rights dialogue given the preservation of parliamentary supremacy and the prevailing formalist legal culture. It will likely prove to be a worthy object for comparative study.

Further reading

- Peter Cane (ed), *Centenary Essays for the High Court of Australia* (2004).
- George Winterton and H P Lee, *Australian Constitutional Landmarks* (2004).