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WHY LEGAL HISTORY MATTERS

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I THE NEW RELEVANCE OF AUSTRALIAN LEGAL HISTORY

It is a truism that Australia today is in a period of flux. The country has just passed the centenary of its federation, but the prevailing public mood in the half-decade leading up to the Centenary was not one of celebration or commemoration of the events leading up to 1 January 1901. Rather, it was one of reassessment – reassessment of the contemporary appropriateness of its constitutional arrangements and of the continuing significance of the colonial fact in light of present-day reality – a reality which is challenging in a profound way many of the hitherto accepted truths about the nature of the Australian state.

Many of these challenges are headline-grabbers: the (failed) move to a republican form of government, the possibility of a formal 'reconciliation' with the Aboriginal peoples, multiculturalism, globalisation and economic rationalism – seldom a day goes by when the lead story in the television news did not involve one or more of these things. Yet the challenges go much further than merely taking pride of place in the news bulletin. Each of them involves the resolution of really very complex questions of law and social policy. And in most cases, the legal issues are further complicated by the present-day version of the democratic fact – by often fiercely populist battles over countervailing partisan viewpoints.

It is this latter point, more than anything, which has led Australia to develop a distinctive body of substantive law. Gone are the days when change to Australian common law could take place merely because the common law of England had changed. Today, Australian law is very much Australia's, no less than the substantive law of, say, the United States is her own. Yet Australia still shares a legal *system* with England and Wales and the rest of the common law empire. This is an important observation. In systemic terms, Australian law continues to share most of its important elements with the rest of the common law world: the notion of separation of powers and of judicial review (by which the state is viewed in sceptical terms by the judiciary); the adversary system (by which the state is viewed in antagonistic terms by the legal profession); and the prerogative writs or their modern statutory counterparts (by which this combination of scepticism and antagonism serve to check executive power). These common systemic features give rise to a certain shared dynamism of the legal process – which one might call the 'common law constitution' – which makes it still important for us to play close attention to what is taking place elsewhere, beyond our shores.

Yet the 'general currents of thought', as Sir Paul Vinogradoff once described them, ^[1] are now quite different in Australia than they are in England. Australia's geographic and demographic positions have given rise to an economic and social momentum which differs from that of what many of

today' s Australian grandparents once knew as the Mother Country. Insofar as law is concerned with the just reconciliation of competing claims upon public resources, the push and pull of Australian politics cannot help but have given rise to differences in approach to substantive legal questions from England.

One of the consequences of this is that the Australian legal system has had to broaden its jurisprudential horizons. A consciousness of this fact most often manifests itself in the citation of cases from other than Australian or English courts. The importance of this is something about which Kirby J, in particular, has spoken on more than one occasion. But this, in itself, can give rise to a different set of concerns. For one thing, some people are wont to forego reference to English authority out of little more than a sense of Australian chauvinism. In this regard, one is put in mind of the story of Lionel Murphy, upon his appointment to the High Court, insisting that the *English Reports* in his chambers be thrown out in favour of a set of the *US Reports*. [2] As amusing as it may seem to us, this sort of anti-British jingoism can only be demonstrative of a close-mindedness which surely must be as objectionable as would be a fawning attitude to the English courts.

A different form of objection to an increased reliance upon non-British common law judgments – in public law cases, at least – is that in each of those jurisdictions, the superior courts are now operating under the aegis of a Bill of Rights. In New Zealand, it is true, the *Bill of Rights Act* is not enshrined, but the Court of Appeal there has clearly indicated that it is to be viewed as enjoying quasi-constitutional status. [3] Even in the United Kingdom, it has now been accepted that the European Convention on Human Rights is tantamount to a constitutional charter. [4]

That Australia does not have a modern-type Bill of Rights is something that many – including at least one former Chief Justice of the High Court of Australia [5] – lament. But the fact that it does not is of tremendous importance when it comes to the matter of judicial legitimacy. As many will know, the Australian High Court has in recent years come under intense criticism for what has been perceived in some quarters to be excessive judicial activism. This being the case, it surely must follow that to base 'activist' judgments on precedents which have been established in jurisdictions with a constitutional Bill of Rights is to risk engendering even more intense criticism, something which is patently undesirable. Leaving aside for the moment the question of how precisely one defines the concept, it must be apparent to all that stridency in criticism of the highest judiciary in a legal system can run the risk of causing irreparable damage to a vision of the rule of law which depends upon voluntary compliance.

Given all of this, a rather more justifiable practice might be an increased interest in cases from Australia' s own past. It goes without saying that the Australia of the late eighteenth and early nineteenth centuries was a very different place from the Australia of the twenty-first. But in an odd way, its situation shares a sort of symmetry with the present-day situation. Then, English legal developments could not be relied upon as a crutch. This was because of the tyranny of distance. In a day and age when it took seven or eight months to make the ocean voyage from New South Wales or Van Diemen' s Land to England, the colonists were forced to rely on their own devices to a significant extent – even if they would have preferred it to be otherwise. But as the century progressed, and as the lines of communication became more efficient, the natural inclination of the colonists to wish to emulate practice at 'Home' became quite workable. Now – even if they wanted to – Australians could not rely upon England as a legal crutch as her legal and political situation has changed so much from theirs (chiefly, of course, by reason of the United Kingdom' s accession to the Treaty of Rome and her decision to withdraw from 'east of Suez'). Paradoxically, given the revolution in communications, distance has again become important. The tyranny of economics has given rise to a new perception of a tyranny of distance.

This makes the time ripe for a broad-based revival of interest in Australia' s legal roots. It has been suggested before that, at least in mainstream academic circles, legal history still suffers from the taint of unfashionability in Australia. [6] Happily, the subject never completely died. The Australia and New Zealand Law and History Society began its life in the early 1980s, for example, and a few law schools, continued to offer courses in the area. Yet, the fact remains that it was more due to the unflagging efforts of a few champions than any real sense of institutional

commitment on the part of the academy that Australian legal history (and legal history in Australia) survived the intellectual dark ages, and is now in a flourishing position.

As the papers which follow make plain, there was no champion more stalwart in his efforts to engender an interest in Australia's legal history than Alex Castles of the University of Adelaide. The papers stem from the 2000 Annual Conference of the Australia and New Zealand Law and History Society, which was held at the Australian National University, in Canberra. [7] Some of the papers were expanded from the original presentations, while others have been retained in their presentation format, allowing the reader to experience some of the warmth and character of the plenary panel where many of these papers were first presented. Though they come from scholars in Canada and New Zealand, as well as Australia, each represents a tribute to the scholarly career of Professor Castles. Castles is, in the words of Justice Kirby, the 'doyen of legal history in Australia'. Nothing, then, could be more fitting than this: a collection of essays, written by some of the leading thinkers about the place of legal history in the Commonwealth, in honour of Castles' work, and as a symbol of his accomplishments.

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[1] *Villeinage in England* (1892) 38.

[2] As recounted by the Hon Michael Kirby, 'Lionel Murphy and the Power of Ideas: the dissenter's views begin to prevail' (Lionel Murphy Foundation, 1993) 3.

[3] See, eg, *R v Butcher* [1992] 2 NZLR 257, *Ministry of Transport v Noort* [1992] 3 NZLR 260.

[4] See *R v Transport Secretary; Ex p Factortame Ltd (No 2)* [1991] 1 AC 603. See also generally, G Winterton, 'The British Grundnorm: Parliamentary Supremacy Re-Examined' (1976) 92 *LQR* 591, 604-608.

[5] See, eg, The Hon Sir Anthony Mason, 'A Bill of Rights for Australia?' (1989) 5 *Aust Bar Rev* 79.

[6] D Harris, et al, 'Community Without Propinquity – Teaching Legal History Intercontinentally' (1999) 10 *Legal Ed Rev* 1, 8.

[7] The papers by Alex Castles and the Hon Justice Michael Kirby were first delivered in Adelaide under the auspices of the Law School, Flinders University in 1999.

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