"TRADITIONS OF THE OLD COUNTRY HAMPER A FRESH SPIRIT"

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MR JUSTICE KIRBY contrasts colonists' rugged originality in settling a continent against their deep legal conservatism, and considers the consequences

Traditions from the Old Country hamper a fresh spirit

FROM the very beginning of European settlement, the law was important for Australia. The First Fleet convicts were creatures of the harsh English criminal justice system. By the standards of today, the criminal trial and the punishments inflicted at the time of the colony seem straight out of Dante's Inferno. However, they were neither better nor much worse than what was going on in England. During the first five years of the colony, 15 persons were hanged in ... Considering the nature of the ... in the rustic circumstances of ... and the stresses to which all ... it is amazing things were not more brutal.

The idea of importing English law ... preceded the establishment of ... under Governor Philip. A distinction had been drawn in London between the acquisition of new colonies by "plantation", where the territory was unoccupied, and its seizure by conquest.

In the latter case, it was generally acknowledged that a treaty with the indigenous people would be necessary, ... the British signed the treaty of Waitangi in 1840 with the Maori ... of the North Island of New Zealand. Relying on James Cook's ... of his explorations of the east coast of Australia in the Endeavour, ... Instructions said nothing about ... with the Australian Aborigines. This way, from the start, there was ... down the problem of the relationship with the native people of the continent. It is a basic flaw of our legal system that this original error has not been corrected.

But if this represents failure, there were many notable successes. The ... of the American Revolution were still vividly in mind as the infant ... at Port Jackson was being established. Indeed, but for that revolution, it is doubtful that the British would ever have bothered to acquire New Holland. The flurry of correspondence between Whitehall and the ... governors discloses increasing concern about departures from strict compliance with English law which the ... inhabitants had brought with them, and from the rights which were seen to attach to being a British subject. Some of the themes of those ... disputes included:

- The right to due process and trial before a legally qualified judge.
- The right to trial by jury.
- Limits on taxation without representation.
- A measure of local independence.

It did not take long for these issues to ... into demands by free settlers and emancipists for an end to the transportation of convicts, amelioration of the criminal code and the establishment of a local legislature. That these were achieved in little more than 50 years is itself a remarkable tale. It demonstrates that, even while opening up the Great South Land by exploration, the institutions of law and the idea of reform were deeply embedded in the culture of the new colonies.

Boringly enough, Australia's constitutional history is virtually unbroken.

THIS continuity undoubtedly gives strength of one sort to our legal institutions. Their authority and legitimacy are firmly established. On the other hand, both in Parliament and in the courts, it has tended to crush or overwhelm most of the flashes of originality before they could get very far in the legal system.

Professor Geoffrey Sawer once said that, constitutionally speaking, Australia was a "frozen continent". This was doubtless a reference to the dismal record of amendments to the Australian Constitution achieved at the ballot box.

The consequence is that the Australian Constitution is one of the oldest and least changed basic laws continuously in operation in the world. But many of its ideas necessarily reflect the political theory, economic policy and national philosophy of colonial men of the 1870s. Colonists were so dazzled by the federal arrangements of the United States Constitution that their own creativity was dampened.

The few human rights guarantees included in the Constitution have, so far at least, attracted narrow interpretations. No general bill of rights was included to restrain the elected dictatorship of Parliament.

All of this appears to paint a rather sober and unexciting image of the public law of Australia. Law came with the Fleet. The institutions of courts and justice were there from the beginning. The Supreme Courts soon followed. Continuity and stability was the name of the game played in those courts. The basic law and legal techniques were imported from England so far as they were applicable to the circumstances of the colony and sometimes even where they were not.

Every now and again, an ancient British statute was discovered, to the astonishment of the parties, to apply to a legal problem before the courts. Thus, as late as 1968, a stockbroker sued for commission on share options. His client claimed that the agreements were illegal and unenforceable as being in breach of an English Act of 1734. The Act had since been repealed in England, being one of the statutes passed to check the disasters known as the infamous "South Sea bubble". It was held by the Court of Appeal that the Act was indeed suitable to the needs of NSW on July 25, 1828, when the relevant English statutes were made applicable, and that it applied to the stockbroker here.

There are many other similar cases. Some of them involve the application to the very different social conditions of Australia of rules developed in earlier times and laid down in legal precedents by English courts. The late Justice Lionel Murphy once declared that the unthinking application of legal precedence inherited from England was an approach to a law suitable for a nation mainly populated by sheep. Until recently, Australian courts showed unthinking deference to decisions on similar points in English courts. They did so even where the rulings of the English court did not strictly bind them in law.

EVEN the High Court of Australia followed this approach. The termination of Privy Council appeals over the last 20 years has at last released our courts from the apron strings of England. Whereas the link was natural and useful in the early days, it survived too long, distorted the adaptation of the law in a number of respects and doused the flames of originality.

So the courtrooms looked the same as England's, the procedures were virtually the same. The court dress was identical, despite the heat. The bulk of statute law remained for a long time imported from England. And the English court decisions blinkered local creativity. We were British subjects. We were subject to English law — or at least the Australian version of it.

But a few developments do stand out. They include:

- The enactment, against much local, legal and judicial opposition, of the Real Property Act 1858 of South Australia. This introduced the Torrens system of registered title for land which has now spread to all parts of Australia and many parts of the world.
- The passage of industrial arbitration and trade union legislation, probably derived, immediately, from New Zealand statutes. But Governor Macquarie had given magistrates power to fix wages in certain circumstances. His lawful authority to do this was challenged and later doubted in London. There were some English precedents for it. Perhaps our original, and not universally appreciated, system of industrial conciliation and arbitration can be traced back to yet another of Macquarie's bold innovations.
- Th... development of goldmining and th... need to keep pace with Califor... produced laws in the 1860s which ... facilitated mining leases on Crown ... later privately owned land.
- Re... ms of defamation law proposed ... not adopted in England were gladly embraced in the NSW colony. By the Common Law of England, truth alone was a defence to a libel. References to the convict origins of a colonist might be true; but in those sensitive times, the truth could be unfair and hurtful. So the need to prove that what was said was not only true but for the public benefit was adopted in NSW and other parts of Australia. Other jurisdictions clung to the Common Law. To this day, the defences are different in different States.

The tyranny of legal history still holds sway. Attempts of the Law Reform Commission to secure a national standard suitable to the modern technology of communications foundered on the rock of legal diversity.

Sometimes the colony could achieve law reform before the mother country. For example, NSW and South Australia permitted the accused in criminal trials to give evidence on oath 10 years before this was allowed in England, as recently as 1898. Indeed, NSW established its first law reform commission in 1870, although it expired a few years later. Nonetheless, at the turn of the century, and despite much slavish copying of English legislation, there was a commendable effort to codify the law and to get applicable local statutes into accessible consolidations as was not then the case in Britain.

This, then, is the picture of the law in Australia during its first 200 years ... a few notable exceptions, there ... little of the spirit of "Australia Un... ited" about the law, its institutions ... its practitioners. The last saw ... selves, for the most part, as fa... servants of the declaratory theory ... law: find the facts; discover ... pre-existing applicable statute or ... mon law; apply it to the facts. The result follows automatically.

The growth of local parliaments ... development of a body of local law ... the adoption of new rules for ... together contributed to a ... nationalism in Australian law in re... years. The impact of American sch... was also felt — pointing out tha... many situations there is simp... clearly applicable rule. Old rules ... therefore be stretched and adapted.

So, on one hand, there was ... ity and adventure in claiming ... often inhospitable land. There was deep conservatism about constitu... fundamentals — and suspicion ... indifference to law reform. Aust... became a land dedicated to ... civilising mission of British justice ... at the same time, one whose law ... the outset countenanced the dispo... sion of the indigenous people ... deprivation of their land and cu... and unprecedented levels of impr... ment of their people.

These may seem harsh judge... upon the law and its practitio... Perhaps the earlier generation ... lawyers simply reflected the world ... the time they lived in. Certainly, ... helped to transplant institutions ... rules which have many admir... qualities and which we inherit toda... in retrospect, from their unprom... beginning, they can be seen as derivative and insufficiently crea... perhaps they present, in microcosm ... indelible flaws of modern Aus... itself. But at least they contributed ... society where we can be critic... ourselves and others, without loo... over our shoulders in fear.

As Prince Charles said on Jan 26, 1988: "A country free enoug... examine its own conscience is a ... worth living in, a nation to be en... Implicit in this royal judgment i... assumption that from our nat... examination of conscience will co... resolve to do better in the next cen... which has just begun. Let us hope ...

Further reading: A C Castles, *An A... lian Legal History*, Law Book Co., 19... especially Chapter 16.

Mr Justice Michael Kirby is President ... Court of Appeal, Supreme Court, Sydne... is also Chancellor of Macquarie Uni... and was the first Chairman of the Aust... Law Reform Commission. The views ... are personal views.