LAW & LEGAL THINKING BETWEEN THE DECADES

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BOOK REVIEW

AUSTRALIAN LAW JOURNAL

Book Reviews

Alice E-S Tay (Ed), *Australian Law and Legal Thinking Between the Decades*, A collection of 33 Australian Reports to the XIIIth International Congress of Comparative Law presented in McGill University Montreal on 18-24 August 1990, Faculty of Law, Sydney, 1990. Frontispiece, Table and Contents and Preface, i-viii; Contents 1-469; Personalia 471-2. Soft cover $50.00

A century ago, when modern Australia was young, Henry Lawson (now known to many today only by the bank note) wrote an ironical poem *Australian Engineers*:

"A new generation has arisen under Australian skies,
Boys with the light of genius deep in their dreamy eyes -
Not as of artists or poets with the vain imaginings,
But born to be thinkers and doers, and makers of wonderful things."

In his contribution to this collection of essays, Lauchlan Chipman of the University of Wollongong quotes Lawson to make a point about current educational policy in Australia. But the poet's chastisement hangs like a cloud over this whole book. The elegant cover, by Simon Fieldhouse, shows two bewigged judges, leather books in hand, with thoughts lifted heavenward to a cloud. From the cloud, smiling, hangs a legal scholar - at least I take him to be that for he wears a mortarboard. Significantly, the judicial cloud is empty; although it is etched in grey. The symbolism is sadly appropriate to the picture of Australian law

painted for the comparative law experts in this book.

Thirty years ago J A La Nauze, the constitutional historian described Australia's legal culture and institutions as "notably derivative and dependant". His comment is quoted in her essay by Professor Erh-Soon Tay, editor of the collection. Despite the valiant efforts of some authors to show the originality of at least certain Australian legal developments, the overall impact of reading the 33 chapters of this book is one of discouragement. This is not, of course, the fault of the authors. Painstakingly, they have recorded in sketch outline recent, and not so recent, developments in the area of law chosen as their subjects. It is more a commentary on the origins of the modern Australian state and of its legal system. In fact, the first chapter (by Marion Pascoe of the New South Wales Parliamentary Counsel's Office) bears the shattering news that the system of registered land title which we ascribe to Torrens was actually derived from predecessors in Prussia, Bavaria and other German States. I had always thought that Australian law had come up with at least two good ideas: the Torrens system and Testator's Family Maintenance. I knew that Torrens had taken many of his idea from the *Merchant Shipping Acts* and the system of registered title to British ships. But now, it seems, the detailed idea was probably whispered in his ear by those worthy German settlers establishing their farms in the province of South Australia. So much for the nation of legal thinkers and doers! Only TFM remains. Perhaps even that was borrowed from New Zealand.

The format of this collection of essays is simple. Its origin is fully explained in Professor Tay's preface.

Doubtless keen to get temporarily free from the Australian legal scene, academics and others take the opportunity every four years to attend the International Congress of Comparative Law. A large number of the participants in this volume are academics at the University of Sydney. Indeed, the volume, supported by the Law Foundation of New South Wales, is one of the publications for the Centenary of that School. Some of the academics come from other Law Schools. Some are not attached to Law Faculties at all. But led by Professor Tay, an *academician titulaire* of the Academy, with its base in Paris, 32 of them trekked to the quadrennial conference held at the famous McGill University in Montreal in August 1990. The McGill conference was the first after the 1986 conference held in Australia. The reports of that conference were published as *Law and Australian Legal Thinking in the 1980s* (Sydney, 1986). Professor Tay says that it was the "encouraging reception within and outside Australia" to that publication which prompted the decision to put together the 32 reports written for the Montreal conference. To them was added a specially written essay *Bijuralism in Federal Systems or Systems of Local Autonomy* by Mr Edward Epstein, an Australian now teaching law at the University of Hong Kong.

As is inevitable in such a diverse collection, some essays are outstanding and others of lesser quality. The nature of the task accepted by the writers dictates the basic format of most of the essays. These are, after all, contributions to an international conference on comparative law designed to provide the raw data by which specialists in particular areas will get a brief insight into the legal

rules and institutions of different countries. Professor Tay tells us in her preface that Australians contribute as many papers to such conferences as do Canadians and contributors from the United States of America. She draws attention to "the energy, liveliness and commitment to international communication and exchange" which this level of contribution demonstrates. Those adjectives fit comfortably with some but not all of the essays. And, ultimately, the number of papers is not as important as the ideas within them.

Inevitably, in a collection of this kind, many of the authors felt bound to explain basic features of the Australian legal system which Australian lawyers, or even informed citizens, would take for granted. Thus, I lost count of the number of essays which began with the rudimentary revelation that Australia is a Federation. This basal fact, and the derivation of our legal system from England, are repeatedly presented at the starting point for unravelling the mysteries of Australian law to the doubtless bemused eyes of the comparative lawyers gathered at Montreal.

The collection ranges from essays which provide a *tour d'horizon* to essays with a high degree of particularity and detail.

Amongst the most interesting of the chapters in the former class are the opening contributions by Marion Pascoe on *The Diffusion of Juridical Models* and Edward Epstein on *Bijuralism*. Pascoe outlines the reception of English law as the "invisible baggage" of the Australian colonists. She traces the recent and sometimes bold reforms of administrative law which stand out simply because they take the innovations of others to their natural consequence. She

describes how, in the age of large-scale legislation, we continue to derive so many legal ideas from statutes enacted in other countries. Thus the *Crimes (Computers and Forgery) Amendment Act* 1989 (NSW) is an adoption, a decade later, of the *Forgery and Counterfeiting Act* 1981 (UK). The *De Facto Relationships Act* 1984 (NSW) has at least the merit that it turned to Scandinavia for many of its ideas. A number of examples cited by Pascoe involve the application in Australia of international conventions and agreements. The lesson is clear. Australia repeatedly demonstrates a desire to bolster legal continuity. The most we typically contribute is a minor adaptation. No large, bold ideas Down Under, thank you.

This point is also brought out in Epstein's essay. The bijuralism of which he speaks is not, for example, that of the European legal system and Aboriginal customary law. Instead, the divisions in Australian law are confined to those less threatening and demanding: between the English origins and local adaptations; the powers of Federal and State authorities under the Constitution; and the suggested division between the legislature and the executive, still dressed up in the clothes of the monarch's "reserve powers".

Professor Tay's essay (with her distinguished husband Professor Eugene Kamenka) draws its inspiration from the temporal coincidence of the establishment of the Australian colonies and the Declaration of the Rights of Man and of the Citizen which followed the French Revolution. What a contrast is there. The Australian colonies were the very antitheses of the revolutionary upheavals of France. Never did they know a revolution or civil war. Unquestioningly,

they accepted the inherited authority and law. This was doubtless the result of the self-satisfaction which accompanied the apogee of British imperial power. The institutional arrangements within the law ensured that the mental blinkers lasted much longer even than the political reality. The State courts looked over their shoulders to the High Court and the Privy Council. The High Court deferred to the Privy Council in London and even to the House of Lords which was never in our judicial hierarchy. In this way, we were bonded to the law of England. Not until *Cook v Cook* (1986) 162 CLR 376, 390 were the legal bonds finally, clearly and irrevocably severed by the High Court. Yet even now, as this collection demonstrates, we are still the children of the English legal system.

This reality is expressed in many of the essays and is reflected in all of them.

After the opening essays are passed, the substantive collection begins with a paper by Professor J L R Davis on harmonization of private law rules in civil and common law jurisdictions. This perceptive essay is followed by a number on aspects of civil law including one by Carolyn Sappideen on reform of medical liability law and another by Dr J W Carter on pre-contractual process. Sappideen illustrates the cautious departures in Australia from the *Bolam* test of medical negligence still accepted in England. Carter outlines the somewhat bolder departure of the Australian courts from the English law of promissory estoppel, such that hardly a contract case now comes before the courts without an estoppel pleaded as a remedy to cure possible contractual defects.

There then follow specialised chapters on time-sharing ownership (R T J Stein), international adoption (R L Anderson), class actions (D J Harland) and civil and administrative procedures (M Allars).

Commercial and associated law make up the central sections of the collection. These essays range from a very pertinent piece on joint ventures between entities in different political and economic systems by Professor Malcolm Smith of the Asian Law Centre in the University of Melbourne, through aspects of company and insolvency law (respectively by Professor H A J Ford and Mr R W Harmer) to an examination of new developments in Australian intellectual property law (by Diana Sharpe) labour law (by Andrew Stewart) and air and maritime law (by John Livermore).

The next section of the book deals with aspects of public, constitutional and administrative law in Australia. Professor Ivan Shearer's essay is given the curious title "Internal Sub-divisions of International Law". In fact, it deals with nothing of the kind. Instead, it is a fairly basic examination of the court system of Australia, the doctrine of precedent as it operates in this country and the approach of the Federal Court and State Supreme Courts to the review of their own decisions. Despite the misleading title, the essay is a useful one; although it was written before Dawson, Toohey and McHugh JJ in *Nguyen v Nguyen* (1990) 169 CLR 245, 269 effectively told the State and Federal appellate courts to avoid an overly strict adherence to previous decisions, given that the High Court can now review only a small proportion of their holdings.

Other essays in this section include a provocative

review of constitutionalism in Australia by M J Detmold, G L Certoma's explanation of Australian laws for the protection of freedom of speech (and for its limitation), an essay on constitutional and legal protection against confiscatory taxation by Professor Richard Vann and papers on computer-related crime (R A Brown) the exclusionary rule of evidence (E S Magner). Curiously, the section on adminstrative law does not contain a full exposition of the quite radical developments of administrative law which have occurred in the Federal sphere in particular in Australia and constitute one of the few bright lights in a generally dull landscape. True, a number of the essays do touch on these developments. The two chosen for the collection under administrative law are on the protection of cultural heritage (P J O'Keefe) and on the status of the administrative judge (N Franklin). The latter contains a thoughtful examination on the vulnerability of administrative decision-makers to removal following the precedent set by the removal of Justice Staples on the reconstitution of the Australian Industrial Relations Commission. I wonder what they made in Montreal of that unhappy event?

The collection of essays closes with two on adjunct topics. One (by M McAleese) describes the role of publishing houses in the development of legal research in Australia. The other (by Professor A L Tyree) examines computer assisted judicial decision-making - perhaps pointing the way to the future where it may be hoped, by judges at least, that their work will be assisted by effective computer support. There seems little doubt that laws will be written in the future to reduce decision-making to simple choices, some of which can

be performed automatically. Whilst this may reduce the ameliorating contribution of the human decision-maker, it may afford greater access to justice which is now prohibitively expensive for most citizens who are not rich and do not have the support of legal aid.

The foregoing description of the subject matter of the collected essays shows at once the strength and weakness of this book. There is no common theme, except for the feature which all participants share as lawyers concerned in the development and operation of the legal system of Australia. Within their particular chosen fields, the essays contain many insights of the lively minds that put them together. Most of them are descriptive of current Australian legal developments. Being up to date to 1990, many provide a good thumbnail sketch of current legal controversies in this country. Only a few of them set out to be provocative. It takes Mr Detmold, for example, in his review of constitutionalism, to assert that the High Court does not fully recognise its unifying achievement. He explains this astonishing contention:

> *"... in part this is due to the fact that it is a common law court and therefore adjudicates only the particular case in front of it, the occasion for the broad view of the whole not arising. In part it is due to the personal search of its judges for a significant constitutional role. If they are not to hold a Federal balance, what are they there for?"*

Detmold then goes on to claim that:

> *"All major decisions on constitutional power in Australia have for at least the last thirty years gone in favour of the Commonwealth."*

The only exceptions he could note were in the field of the

Federal marriage and divorce power. But in a postscript he was forced to acknowledge the further big exception which arose when the Court struck down the *Corporations Act* 1989 (Cth). A mere "hiccup" according to Detmold. A somewhat irritating, but always interesting, collection of bold assertions.

The reservations I have about the collection will already be apparent. It does not have the merit of the *Annual Survey of Australian Law*. There is no attempt at a broad overview of major areas of the law in Australia. Nor is there a coherent attempt to cover the subtopics chosen. Each author simply does his or her own thing in an idiosyncratic way. Some essays are too detailed and particular for the taste of the generalist. Others, more clearly written for foreign readers, restate truisms about our Federal polity which Australian readers will find tedious. Given the unintegrated nature of the collection, it is particularly disappointing that there is no index, no table of statutes and cases and no serious attempt to provide a general overview (so far as one would be available).

All of this said, there are gems here which reward persistence in the reader. Some of the chapter writers, with an intensive, detailed knowledge of their chosen speciality, have stood back from their subject and painted with bold sweeps, a canvas displaying the point reached by Australian law in their area of interest. But for the most part, that is what is missing. The great gift of the academic lawyer is to disentangle the mind from the sheer detail which is inescapably inherent in solving a particular case. It is to see the broad movements of the law. It is to perceive and

this or that development of legal principle in the context of the great mosaic of our legal system. In the *milieu* of the comparative law exercise, it is to derive ideas from other jurisdictions and (so far as we can) to offer some ideas back in return.

It could not be expected that such an unruly gathering of individualists could have been tamed into striking a common format or even a like approach to the topics chosen, ranging as they did from the generality of constitutionalism to the high specificity of Professor Warren Musgrave's piece on "The Status of Agricultural Units and Their Relationship between Landholders and Agricultural Workers". But it would be my hope that, if there is a third volume in this series, a qualification for admission will be the writing of an essay on a topic of law likely to be of general interest; the capacity of the writer to distance the examination from the *minutiae* of statutory detail; and a willingness to chart the broad social and legal context in Australia within which the development is occurring.

Perhaps by the next collection there will also be "makers of wonderful things" in our law, which we Australians can offer to the bored foreigners observing us. In such a multicultural society, undergoing profound social and economic changes, our lawyers too should occasionally be guilty of original thought and brave new ideas to hasten our pursuit of justice.

Before the modern developments of anaesthesia, the skill of the surgeon was a capacity to remove a limb in 20 seconds. It took more than a decade, following chloroform, for the medical profession to adapt to its changed

environment. Only then did its members come to realise that skills, other than mere speed, were appropriate. Lawyers in Australia are still locked in the mindset of the system of law enforced, ultimately, by the courts at Westminster. Their minds are still captives to the only comparative law material they know: the decisions of the courts of England. A really important contribution to Australian comparative law would be to introduce Australian lawyers to the useful analogues available from the other great jurisdictions of the common law and (dare I say) the civil law tradition which commands the observance of greater share of humanity . It is now more than 10 years since the end of Privy Council appeals. Perhaps soon the comfortable and dreamy legal anaesthesia will at least wear off?

M D K