

BOOK REVIEW

Shaun Star (Ed), *Australia and India: A Comparative Overview of the Law and Legal Practice*

Universal Law Publishing, New Delhi, India, 2016, 428 Pages + XX Forewords, Introduction In Table Of Contents

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RRP: Rs. 695

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This is a useful and practical book that provides essential information to lawyers who have a need for an up-to-date introduction to the legal systems of India and Australia. It is written with a view to explaining the broad outlines of many important areas of the law, in terms that are easy to absorb and understand.

There are many basic similarities between the Indian and Australian legal systems. This fact is referred to in the forewords to this work written by Chief Justice Robert French (of the High Court of Australia) and the then Chief Justice H.L. Dattu (of the Supreme Court of India). The historical experience of British colonial and imperial rule brought with them the English language, the common law system of law and basically similar legal classifications and professional traditions.

In colonial times, there was even some overlap between the judicial personnel of India and Australia. Sir William Burton, a judge of the Supreme Court of New South Wales, was later appointed to the Madras High Court: viewed as a distinct step up the ladder at the time. Occasionally, advocates in colonial times made the transition from the Australian colonies to India. One of these was John Lang who built a

successful career as a barrister in India. Recently, Prime Minister Modi presented Australia's then Prime Minister Tony Abbott with a copy of John Lang's original petition of 1854 on behalf of Jhansi ki Rani against the East India Company. The independent and uncorrupted judiciary introduced by the British was a major and valued legacy of their empire. It survives today both in India and Australia. The common features of the governmental system are dealt with the first part of this book. Those features include parliamentary democracy; the rule of law; civilian government; a federal system adapted to parliamentary forms; the common law tradition of precedents; judicial development of the law; comparative law borrowings and very similar professional traditions and ethics. When to these features is added a keen shared interest in sports (especially cricket) and increasing trade and educational links, the surprise is not so much that this book has been written but that it was not written much earlier.

For all the similarities (the Indians even copied the substance of Section 92 of the *Australian Constitution* guaranteeing free trade amongst the states of the Federation) there are important differences which the book acknowledges. Chief Justice French refers to the huge disparity between the populations of the two countries: India being 1.3 billion people and Australia a mere 23 million. As well, Chief Justice French points to the significant ethnic, religious and cultural differences. Although in recent decades Australia has embraced the principle of multiculturalism, in India it is an imperative feature of the law, if it is to serve the hugely different communities that make up the Indian nation.

In a comment on the overlap between the two legal systems, Justice Krishna Iyer, of the Supreme Court of India, pointed to the shared

features of the legal systems with their “colonial flavour” that represent substantially a copy of English law. However, he observed that, in interpretation, “we may seek light Australasially” by using Australian cases and English dictionaries. However, he went on: “India is India and its individuality, in law and society, is attested by its national charter, so that statutory constructions must be home-spun even if hospitable to alien thinking”: *Bangalore Water Supply and Sewerage Board v A. Rajappa* (1978) 2 SCC 213 at 225.

In his useful introduction to the book, the editor outlines the challenge that he undertook in collecting and then shepherding the 41 authors in writing their respective chapters. The objective was to address the neglect by Indian and Australian lawyers of each other’s systems: a phenomenon seen as “tragic as it is puzzling”. A degree of urgency for bridging the divide has been afforded by the growing attractions of Australian educational institutions for Indian students and their families; and the increasing numbers of visitor exchanges between legal practitioners in both countries. Such visits have been designed to promote easy access by lawyers in each country to permit them to practise in the other jurisdictions.

However, legal practice remains a difficult obstacle. It is hoped that the present book will contribute to, and stimulate, moves on the part of regulators to open up recognition of legal qualifications under proper conditions in each country as a substantial foundation for admission to practise in the other. Also to face up to the consequence of increasing trade in goods and services as likely to produce occasional conflicts that will need to be resolved in accordance with the applicable law. The subjects selected by Shaun Star (who is the Chair and Co-founder of the

Australia-India Youth Dialogue and an Australian qualified lawyer) are designed to highlight areas of the law where a broad knowledge of the legal system in both countries will be of benefit to lawyers, business, litigants, people and interested citizens.

The content of the book is substantially devoted to areas of the law that respond to the interests of business people and their advisers. The overall design is to incorporate (with only one exception) writings by Australian lawyers alongside contributions from Indian lawyers on the selected subcategories of the law.

Sensibly, the book begins with “a big picture perspective”. The first section opens with a review of the different ways in which federalism has evolved in India and Australia. The Australian perspective is offered by Professor Nicholas Aroney (University of Queensland) and the Indian by Professor Khagesh Gautan, a law teacher in Haryana in India. These authors have together written a single chapter. It describes the way federal (Commonwealth and Union) legislatures have come to predominate both in Australia and India. By reference to case law, the chapter describes the emergence of the “basic structure theory” of the Indian Constitution, whereby it is not open to use the relatively easy parliamentary route to changing the Indian text, where to do so would “destroy or emasculate the basic features or the fundamental features of the Constitution”. Of course, disputes can arise over what such “basic features” are.

Reading the Indian developments (where access to judicial review has been regarded as part of the basic structure) presents questions to an Australian reader as to whether a similar doctrine might evolve in

Australia to respond to an attempt to introduce, say, a non-secular feature into the Australian constitution or to abolish the many references there to the Crown. Comparative law, closely studied, is often extremely useful to constitutional lawyers.

The other introductory chapter is written by Douglas McDonald, an Australian lawyer, and Arun Thiruvengadam, who teaches law in Bangalore – a centre of Indian technological innovation. This compares the respective roles of the judiciary in India and Australia. It describes the way in which each country has been affected by the jurisprudence of the United States Supreme Court. It contrasts the distinctive approaches to interpretation of the constitutional text that have emerged in each country.

There then follow, in this “big picture” section, useful descriptive chapters of great interest to business. One deals with the regulation of international trade in goods and services in the two countries. The other describes the regulation in foreign direct investment. The latter is written by a well-known Sydney lawyer, Zeke Solomon and by Hargrieve Khaitan. Because each of these topics is substantially governed by the respective statutory laws and administrative practices in Australia and India, the chapters are more sharply divided between the approaches taken in each jurisdiction. Still, there is also included an overview and conclusion that compares and contrasts the ways the topics are dealt with.

The second section of the book contains six chapters describing and analysing areas of domestic and international commercial transactions as they intersect with law in India and Australia. Chapter 5 examines

mergers and acquisitions. Chapter 6, Capital Markets and Securities. Chapter 7, competition law from the standpoint of merger control. Chapter 8 covers competition law from the viewpoint of the enforcement of conduct prohibitions. Chapter 9 is an insightful overview of tax law in the two countries. Chapter 11 deals with intellectual property law. In this last chapter, the commonalities and differences of Indian and Australian law are explained. To some extent these are now brought together, by the common membership of both countries of the World Trade Organisation (WTO), whose member states must implement intellectual property regimes compliant with the TRIPS Agreement of WTO. That agreement found Australia and India in different camps after 1994. Australia had a well-established intellectual property regime for almost 100 years. India, on the other hand, had established its own regime more recently and so was afforded a little more time to bring itself into compliance. This is an excellent examination written by professors of law respectively in Australia (Natalie Stoianoff) and India (T.V. Kumari). Appended to the chapter is an excellent table that compares and contrasts the approaches taken in the two countries to IP law in its several compartments.

There is then an extremely helpful section (Section 3, Dispute Resolution) that should be compulsory reading for any Australian lawyer who ventures into any form of dispute resolution in India – whether before the courts or through the flourishing processes of ADR, especially international commercial arbitration. These chapters are written by authors who are at the top of their field. The chapter dealing with “Litigation and civil procedure” is written by Mr Gopal Subramanian, a past Solicitor-General of India and Mr Stuart Clark, a partner in the Australian legal firm, Clayton Utz and an adjunct professor of law at

Macquarie University. The chapter examines many subtopics. It provides a list of relevant legislation and critical court decisions, particularly where these indicate somewhat different approaches to procedural questions in the two countries. The highly restricted requirement of the *Advocates Act* in India for an entitlement to practise before the courts of that country indicates a powerful protective stance. Essentially, admission to practise depends upon Indian nationality. The approach to procedural questions in India is often more akin to that in Australia 30 years ago before case management and documentary trials took over from trials dominated by advocates and oral persuasion.

The only chapter in the book on commercial arbitration is also the only one without an Indian co-author. It is written by Professor Doug Jones AO, a leading Australian international commercial arbitrator and a consultant at Clayton Utz. As would be expected, it is a brilliant survey of developments both in Australia and India. He points that the *Arbitration and Conciliation Act* 1996 (India) does not prohibit lawyers from foreign jurisdictions from appearing in arbitrations in India or concerned with Indian law. However, the chapter contains comparisons (and some criticisms) of the seemingly greater willingness of Indian courts to intervene in arbitral proceedings, when compared with recent approaches of the courts in Australia and the United Kingdom. As Doug Jones emphasises, this topic is a moving feast with a series of recent decisions that successively emphasise the right and duty of occasional intervention and the need sometimes to exercise restraint.

Any foreign lawyer with ADR proceedings in India would do well to read this chapter. On the other hand, it is possible that the participation of an Indian co-writer for this chapter might have offered explanations for the

more interventionist point of view frequently exhibited by the Indian courts. Perhaps those explanations relate to the perception of the variable skills of arbitrators known to the Indian courts; the great delays that the process of arbitration has often occasioned; and the special importance of constitutional norms and upholding the rule of law in a newly independent nation such as India.

The final section of the book identifies four particular areas of the law that are described by Indian and Australian authors. These are Environmental Law (chapter 13); Public Health Law and Ethics (chapter 14); Corporate Governance and Independent Directors (chapter 15) and Regulation of the Energy and Resources (Oil and Gas) Sector (chapter 16). Of course, all of these areas are rich in statutory regulation in both countries. Chapters that average 30 pages each can only give a general perspective. However, each chapter is written by highly respected co-authors. Most of them have included schedules that permit comparison of the applicable legal provisions. Necessarily, they can only give a broad outline. However, even this would be important and valuable to a lawyer venturing for the first time upon the subjects in the other country.

The chapter on Public Health Law and Ethics is co-written by Fiona Lander, an Australian lawyer with medical as well as legal qualifications, and Mr Anand Grover who is a Senior Advocate of the Supreme Court of India. Mr Grover until recently also held the office of Special Rapporteur on the Right to Health for the Human Rights Council of the United Nations. This permits him to view regulation in his own country from the perspective of the broader approach of international regulation. The chapter is entirely up to date, containing recent legal provisions on tobacco regulation, including plain packaging for tobacco products. The

human rights provisions in the Indian Constitution (including the 'right to life' expressed in article 21) have been used to apply to claims for the right to health and healthcare: *Consumer Education and Research Centre v Union of India* (1995) AIR SC 992. It is when lawyers in other countries invoke constitutional norms protective of basic rights that Australian lawyers sometimes find themselves at sea. This is the price of operating under one of the oldest still operative constitutions in the world, generally seen as somewhat old fashioned by modern standards and largely devoid of basic human rights provisions.

Shaun Star's book is surprisingly free of typographicals, given the multitude of topics and authors. The verb to "practise" is misspelt on p.273. However, this can be forgiven because most spell check technology today follows the American tradition which annoyingly reverses the rules observed in Commonwealth countries.

The book is brisk and essentially practical. It does not examine the detail of the remarkable jurisprudence of the Supreme Court of India over the 70 years of independence. Building a nationwide constitutionalism and uniting it under a new Supreme Court created in 1950 constitutes (with secularism, civilian governance, the rule of law and repeated national elections) an astonishing achievement. India represents one of the great models that is on display for developing countries everywhere. Lawyers have played an important role in India's many positive legal and judicial achievements.

The weakness of the book is the lack of an index either for subject matter; persons; or cases. Particularly in a text that includes many chapters that overlap with others, the provision of a thorough index

should have been regarded as indispensable. Mr Star is hoping that a copy of the book will be published in Australia for the Australian legal audience. If it is, this defect must be repaired.

The strength of the book is the inclusion in many (but not all) chapters of comparative tables, contrasting the operative legal provisions on the legal subject matters being analysed. If a fresh edition is written, it would be desirable that it should include the reflections of an experienced Indian lawyer, engaged in international commercial arbitration. With a growth in the Indian economy and concerns about delays in cases before the Indian courts, ADR is sure to expand rapidly on the Subcontinent. A perspective of commercial arbitration law, written from an Indian standpoint would be useful and doubtless welcomed by Doug Jones, who is one of Australia's most accomplished practitioners of ADR.

The cover of the text, with its images of the buildings of the High Court of Australia and the Supreme Court of India is pleasing. Although the arrangement of the title accords with the alphabet and the historical evolution of the respective final courts of the two countries, the fact remains that India is not only an infinitely more populous and economically powerful nation. Its achievement and creativity in the field of law is also deserving of pre-eminence. With comparatively few exceptions, Australia has been somewhat uninventive in the matter of law and often resistant to fresh thinking. It might be appropriate, and a good market ploy, for future editions of the book to be titled "India and Australia". The Indian legal profession has its own publishing market almost completely sewn up. That could be a reason for promoting the

book to Indian lawyers. There are so many more of them. And their future, as this book demonstrates, looks promising.

Also if a new edition is written, the addition of a postlude would be welcome. Especially where a book comprises chapters that deal with highly specific areas of the law, there is a need for those who have absorbed its detail to stand back from the particularities and to reflect upon the emerging broad landscape. Of course, the unfamiliarity of Indian lawyers about Australian law and vice versa may be due to indifference and lack of interest. However, in the future, the law may follow trade and growing personal contacts. Some closing reflections on those who consider this to be a worthwhile and achievable goal could itself contribute to the attainment of such goals.

This said, Shaun Star's book is an important achievement. One has only to imagine the difficulties he would have faced in herding so many authors, on so many topics, in so many different places to bring the work to finality. He, and the authors, deserve our appreciation. But the nature of text will demand a revision and update before too long, if it is to remain as useful as it now is to contemporary lawyers of both countries.

Michael Kirby*

* Justice of the High Court of Australia (1996-2009); National Law School of India Hon. LLD. This review is based upon an address at the launch of the book in the Australian High Commission in New Delhi, India, on 16 December 2015 in the presence of many leaders of the Indian legal profession.