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50 HUMAN RIGHTS CASES THAT CHANGED AUSTRALIA

BY LUCY GEDDES AND HAMISH McLACHLAN

FOREWORD

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The human mind thirsts for concrete, rather than abstract, analysis of issues. This is especially true of lawyers, and particularly those trained in the common law tradition. Judicial precedent rests upon thousands of cases decided by published judicial reasons. This is so even today, when, increasingly, common law countries look to constitutional texts and Parliamentary statutes to express the law. Lawyers seek to find and understand the law by the use of particular instances where judges explain the correct way of finding the law by reference to its application in specific fact situations. Individual cases still remain the way we teach, learn and apply the law.

Many authors today are using the technique of scrutinising illustrative cases to identify grand themes. The recent book by Sir Lawrence Freedman, *Command*[1], identifies vivid common themes by analysing instances of conflict in times of war between political leaders and their generals: Adolf

[*] Justice of the High Court of Australia (1996-2009); President of the New South Wales Court of Appeal (1984-96); President of the International Commission of Jurists (1995-8); and Honorary Life Member of the International Bar Association (2022).

[1] L. Freedman, *Command*, OUP, Oxford, 2022.

Hitler and the 21 Field Marshals he sacked; Harry Truman and General Douglas MacArthur; Moshe Dayan and Ariel Sharon; Saddam Hussain and the 300 army leaders he reportedly executed. Individual cases, multiplied by many repetitions, can help to teach big lessons. So it is in this book.

The book tells the story of 50 cases that help to explain how Australia, bereft from the start of a comprehensive Bill of Rights like that expressed in the United States Constitution and many others, has, by individual judicial decisions, built a generally law abiding and rights respecting society. The object of the authors is not to suggest that the resulting design is perfect, or even preferable. On the contrary. In the introductory chapter, the authors acknowledge that "human rights are [not] adequately protected in this country." As they point out, nowhere has this been more vividly illustrated than during Australia's modern experience since European settlement, in the treatment of First Nations peoples' human rights, "particularly their right to self-determination". As the authors admit, "Courts have vindicated peoples' human rights in the cases we have selected [but] in many other instances courts have failed to fulfil this role". In the footnote that sustains this acknowledgement, the authors include reference to the divided decision of the High Australia in *Al-Kateb v Godwin.*[2]

Whilst the provision of instances where Australian courts (especially the High Court of Australia) have helped to change Australia by reasoning in cases involving individual human rights may be reassuring, the cases reveal persistent weaknesses in Australia's human rights protections:

[2] [2004] HCA 37; 219 CLR 562; a case on the lawfulness of indefinite [potentially permanent] detention of a refugee applicant.

* Many cases exist in Australia where applications for human rights protection were refused by Australian courts, often over powerful dissenting minorities. These decisions have narrowed or frustrated human rights reflecting outcomes, in some instances repeatedly. This has often occurred because of the lack of tools to argue for human rights solutions. Such cases are necessarily excluded from this book;

* There are many instances that are never taken to the courts because of the absence of enabling constitutional or legislative provisions that would permit courts more readily to offer human rights-based solutions;

* Although there are truly great decisions of the Australian courts (including most notably *The Australian Communist Party case*[3]*; Mabo v Queensland [No.2]*[4]*; Wik Peoples v Queensland*[5]*),* when searching for instances worthy for celebrating, it is often necessary to look to decisions of tribunals other than the High Court of Australia. The book reveals how Australia had to search for a human rights respecting solution to LGBTIQ inequality in a non-Australian, non-judicial tribunal.[6] No local case came to the rescue;

* Some of the instances that find their way into this book may rest on uncertain foundations: as where a challenge to authority was brought

[3] [1951] HCA 5; (1951) 83 CLR 1 (case no. 43).
[4] [1992] HCA 23; (1992) 175 CLR 1 (case no. 1)
[5] [1996] HCA 40; (1996) 87 CLR 1 (case no. 2)
[6] *Toonen v Australia* (UNHRC Communication Number 488/1992. (case no. 12 (dealing with LGBTIQ rights and criminal sanctions.)

to the correctness of the decision, the challenge was sometimes abandoned following the election of a different government, which decided to withdraw that process begun by its predecessor: *Love v The Commonwealth*[7]*;*

* Many cases involving human rights in the world today involve the principle of intersectionality, whereby a mode of interpretation is necessary to reflect the overlap between departures from respect for different rights. In such matters, Australia's necessity to grasp at straws and invent solutions not originally conceiving of results in unpredicted outcomes, constantly criticised by sceptics.[8]

Some may think that the approach adopted by the authors has been insufficiently critical of the failure of the Australian political system to provide a coherent, conceptual solution to the lack of constitutional and other instruments for the furtherance of individual human rights in Australia. To speak of 50 cases that "changed Australia" might lull the unwary into undue satisfaction with our current human rights tools.

On the other hand, powerful advocacy; the manifest needs of justice; and concurrent international developments terms of in human rights treaties that Australia has ratified will sometimes yield outcomes that cut the Gordian knot. Occasionally, our legal system does accept and apply universal human rights reasoning that "helps to change Australia".[9] When they were

[7] [2020] HCA 3; (2020) 270 CLR 152 (case no. 6).
[8] *Vella v TCN Channel Nine Pty Ltd* (1986) 161 CLR 556; *Australian Capital Television v The Commonwealth* (1992) 177 CLR 106; and *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.
[9] *Mabo v Queensland [No.2]* [1992] HCA 23; (1992) 175 CLR 1 at 42 (case no. 1).

most needed, judges and others, in Australia and beyond, have discovered approaches that uphold the forward-looking use of human rights provisions; and reject the backwards looking approach.

That may be the greatest value of this book. It illustrates the potential of our legal system to safeguard and advance individual human rights, invoking often very limited tools and rejecting over-narrow legal outcomes.

In law, great judges have said, context is everything. The contemporary context of our world is a struggle between universal human rights and the rule of law (on the one hand) and autocracy, violence and oppression (on the other). It may be hoped, and expected, that future generations of Australian lawyers will be more knowledgeable about the benefits of universal human rights for our legal system; aware of its potential to sometimes surprise its practitioners in what is feasible; and determined to build a more conceptual framework for the just resolution of cases. When eventually it is possible to invoke universal human rights to guide legislatures, courts and citizens to *many more than* 50 human rights cases, we will be able to say that we have truly changed Australia for the better.

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