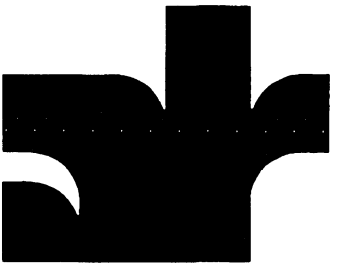

ARTICLES

*Bruce Kercher**

HOMER IN THE AUSTRALIAN ALPS: ATTITUDES TO LAW SINCE 1788

THERE appears to be something wrong with the official story of Australian law. According to the common law, those who established settled colonies took with them the laws of England as their birthright. English law was adopted automatically when it was "applicable" to the needs of the colony. This was reinforced in the eastern colonies by s24 of the *Australian Courts Act* 1828 (UK), which stated that all laws and statutes in force in England at the time of the passage of the Act "shall be applied ... so far as the same can be applied".

On the assumption that they were settled colonies, South Australia and Western Australia remained subject to the common law, with their own dates of acceptance of the bulk of English law.[1] Under this theory, Australian law was derived from that of England, and should have been

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1 Castles, "The Reception and Status of English Law in Australia" (1963) 2 *Adel LR* 1; Castles, *An Australian Legal History* (Law Book Co, Sydney 1982) ch14; Blackstone, *Commentaries on the Laws of England* Vol 1 (Garland Publishing, New York 1978) pp108-109.

constantly subject to comparison with its superior parent. There should have been only minor differences between the two until imperial law gradually relaxed the restrictions on the colonial legislatures.

However, over the past ten years a number of historians have discovered a distinctive quality to Australian law, even when it was supposedly under the complete control of the law of England. A new generation of legal historians have rejected the old certainties of legal positivism under which legal rights were assumed to have begun at the top in England, and then seeped down to the lesser beings in the colonies and dominions. Academic historians have joined lawyers in questioning the role of law in the development of Australian society. Together, they have begun to show that the shape of the law has always been subject to a contest involving legal officials in Britain and the legal officials and ordinary people of Australia. Under the influence of these conflicts, Australian law oscillated between strict adherence to English practices and the recognition of local variations. In place of the certainty derived from common law theory, historians have recognised a rich pluralism within the British empire.[2]

There have been five stages in the seesawing development of Australian legal independence. Each corresponds with constitutional developments, but these structural changes did not all occur at the same time or in the same way in the six Australian colonies. Western Australia, for example, did not gain responsible government until 1890, more than 30 years later than the others. Nor should we assume that the law developed in the same way in each of the colonies, nor even within all of a single colony's courts. Pluralism was as evident between the colonies as within the empire generally.[3]

FRONTIER LAW

The first stage was frontier law, characterised by simple courts, isolated judges, a primitive local legal profession and frontier social conditions. Some of the colonies had amateur judges at this stage, who were required to deal with the complexities of adapting the inherited law of England to sometimes vastly different situations, such as the presence of Aborigines

2 Recent examples include Buck, "*Attorney-General v Brown* and the Development of Property Law in Australia", *Australian Property Law Journal*, forthcoming; Edgeworth, "Tenure, Allodialism and Indigenous Rights at Common Law; English and Australian Land Law Compared after *Mabo v Queensland*" (1994) 23 *Anglo-American Law Review* 397.

3 See, for example, Castles, "The Vandemonian Spirit and the Law" (1991) 38 *Tasmanian Historical Research Association Papers* 105.

and convicts. A few of these courts have been studied in detail, such as the first civil court in New South Wales, which operated from 1788 until 1814. Its judges developed a distinctive jurisprudence to suit local circumstances, such as when they refused to follow English laws governing debt recovery and the rights of convicts, and created their own conflicting local laws instead.[4]

Despite the famous statement by Governor Bligh - "Damn the law; my will is the law, and woe unto the man that dares to disobey it"[5] - most of the governors and the judges of the first British courts in Australia were aware that they were required to follow the law of England. This was especially evident from the beginning of 1810, when an English barrister took judicial office for the first time in New South Wales. Ellis Bent was determined to end the illegalities of his amateur predecessors by following English law strictly, but even he found that he had to follow local legal customs at times.

In conveyancing law, for example, there were three sets of competing standards. The first was the law of England, a complex mess of arcane learning, much of which should have been applicable in New South Wales according to common law theory. The governors created the second set of rules which required the registration of land transfers. The third was that of the people of New South Wales who ignored both official sets of laws. They operated in their own customary fashion when they simply handed over the crown grant document in return for the purchase price. In the civil court, Bent had to choose from among these standards, and sometimes endorsed popular customs rather than the legal rules he was supposedly bound to follow.[6]

Customary actions were incorporated in less formal ways as well. For example, even convicts had their own views of their rights as assigned servants, which they asserted when they were taken before the magistrates for disciplinary hearings. Master and servant law in penal colonies had a

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4 See Kercher, "Commerce and the Development of Contract Law in Early New South Wales" (1991) 9 *Law and History Review* 269; Kercher, "An Indigenous Jurisprudence? Debt Recovery and Insolvency Law in the New South Wales Court of Civil Jurisdiction, 1788 to 1814" (1990) 6 *Australian Journal of Law and Society* 15.

5 Quoted by Bennett, "Richard Atkins: An Amateur Judge Jeffreys" (1966) 52 *Journal of the Royal Australian Historical Society* 261 at 284.

6 Kercher, *The Development of Law in the NSW Court of Civil Jurisdiction, 1788-1814* (Ph D thesis, Macquarie University 1992) ch5.

distinctive quality, which came about through a combination of locally developed practices, the common law, and convict discipline.[7]

People also frequently pressed their legal ideas through their activities outside the courts. The formal legal status of Aborigines as British subjects was not established until *Murrell* in 1836, but even after then many colonists killed Aborigines on the assumption that it was not murder to do so. At Myall Creek in 1838, about a dozen convict stockmen killed a group of about 28 Aborigines. They were acquitted at the first trial, one of the jurors remarking that he looked on Aborigines as a set of monkeys who should be exterminated as quickly as possible. Seven of the killers were convicted and hanged after a second trial, but this only reinforced the local attitude to killing Aborigines. The outrage which followed the executions had an effect on the administration of the law rather than its formal rules: the law did not change, but few of the killings after 1838 led to criminal prosecutions.[8]

REPUGNANCY

This local flavour in Australian colonial law should have disappeared after the constitutional changes of the 1820s, which began the second stage of Australian law. Imperial statutes made clear that between that time and the granting of responsible government, the newly created legislatures could pass laws only if they were not repugnant to the applicable law of England. That left legal propriety in the hands of the new Supreme Courts. Judicial review of Australian statutes thus began as a means of ensuring their imperial conformity. It was sometimes used as a means of testing legislation by the standards of a higher general law, rather than merely on a technical basis. For example, Francis Forbes, the first Chief Justice of New South Wales, struck down the press laws of Governor Darling's Legislative Council because by "the laws of England, the liberty of the press is regarded as a constitutional privilege".[9]

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7 See Byrne, *Criminal Law and Colonial Subject: New South Wales, 1810-1830* (CUP, Cambridge 1993). On customs in English law, see Thompson, *Customs in Common* (Penguin, London 1993) ch3.

8 *R v Jack Congo Murrell* (1836) 1 Legge 72. For the jury reaction, see Webby, "Reactions to the Myall Creek Massacre" (1980) 8 *The Push from the Bush* p2. On the Myall Creek Massacre and its aftermath, see Milliss, *Waterloo Creek: the Australia Day Massacre of 1838, George Gipps and the British Conquest of New South Wales* (McPhee Gribble, Ringwood 1992).

9 Currey, *Sir Francis Forbes: the First Chief Justice of New South Wales* (Angus & Robertson, Sydney 1968) p216.

Other cases showed a characteristic debate between the judges as to whether a particular English law was applicable, and if so, whether a local law was in conflict with it. For example, in *Macdonald v Levy* the New South Wales Supreme Court decided by a two to one majority that the usury laws of England were not in operation in the colony.[10] The minority judge, William Burton, held that those laws "can" be applied, so they had to be. Local practices were not a custom, he said, because they had not been in force since the "memory of man runneth". Since the colonies were established after then, no local practice could be elevated into formal law. This argument was not the end of customary practices even at this formal level, because the two majority judges allowed them to continue. Forbes CJ held that accepted local usages could remain in force if they were not repugnant to the general laws of the parent country.

Repugnancy to English law became as much a political slogan as a strict legal test. When the New South Wales legislature passed its *Bushranging Acts* in the 1830s, they clearly infringed the higher principles of English legal liberalism. The Acts allowed any person to arrest any other on suspicion of being an escaped convict, after which the arrested person had to prove their innocence.[11] Despite that, the Supreme Court declared by a two to one majority that these Acts were not repugnant. Forbes was caught between two versions of liberalism, one favouring personal liberty and the other local legal autonomy. He and Dowling allowed the Acts to stand, which they may have come to regret when Dowling was arrested under them as a suspected bushranger, and Forbes was closely questioned by a constable.[12]

According to James Stephen, the Colonial Office's legal man, the repugnancy doctrine only ruled out what was very foolish or tyrannical. Otherwise, it was only necessary to retain a family resemblance between local and English law for the test to be passed.[13] Even colonial Acts which were in very clear conflict with English legal principles were sometimes allowed past the apparently stern barriers of imperial propriety. Imprisonment for debt was abolished in the Australian colonies decades before England, and the mining laws which were passed in the wake of the Eureka fight were vastly different from English law since they allowed an

10 (1833) 1 Legge 39.
11 11 Geo IV No 10 (1830) s2; 4 Will IV No 14 (1834); 5 Will IV No 9 (1834) s2.
12 Currey, *Sir Francis Forbes: the First Chief Justice of New South Wales* ch39.
13 Therry, *Reminiscences of Thirty Years' Residence in New South Wales and Victoria* (Sydney University Press, Sydney, 2nd ed 1974) p318.

elected judiciary. In each case, local political forces supported change, and the question of repugnancy was not even raised.

RESPONSIBLE GOVERNMENT

The third stage of Australian law began with responsible government which was granted to five of the six colonies in the 1850s. After then, it was clear to all but Benjamin Boothby and a few of his supporters that the new colonial parliaments should have been able to amend or repeal the general laws of England. Boothby's extreme Anglophilia led to his dismissal from the South Australian Supreme Court and to the passage of the *Colonial Laws Validity Act* 1865 (UK). The Act was seen as a charter of colonial independence because it declared that only paramount force Acts of the imperial parliament bound the colonies. This freed the colonial parliaments to change the bulk of their inherited law. From that time, the main restriction on local legislation was that it had to receive royal assent, which is to say, the approval of the British government.

In this third stage many colonial Acts simply copied the law reforms of England, but others were local legal creations such as the laws concerning squatters and selectors, and South Australia's gift to the bourgeois ideal of land-holding, the Torrens system. However, some Australian colonial statutes were denied royal assent in London even as late as the 1890s. The imperial government wanted to control divorce law throughout the empire, for example. It did not give way to the colonial demand for divorce on the ground of desertion until 1890.[14] In 1896 it also refused assent to legislation which would have extended explicitly racist immigration laws to all non-whites. This would have offended the official presentation of the empire as a non-racial one and jeopardised Britain's relationship with Japan. Instead, the Colonial Secretary, Joseph Chamberlain, suggested that the Australian legislatures should adopt the dictation test of Natal. The colonies and the new federal government followed this suggestion, and this notorious test remained in force until 1958 when the first federal immigration law was at last repealed.[15] In laws about race, above all

14 Golder, *Divorce in 19th Century New South Wales* (UNSW Press, Kensington 1985); Campbell, "Desertion and Divorce: the Colony of Victoria, Australia, 1860" in Ives & Manchester (eds), *Law, Litigants and the Legal Profession* (Royal Historical Society, London 1983).

15 Quick & Garran, *The Annotated Constitution of the Australian Commonwealth* (Legal Books, Sydney 1976) pp624-627; Aust, Parl, *Debates* (1901-1902) Vol 3 at 3497ff; *Immigration Restriction Act* 1901 (Cth); *Migration Act* 1958 (Cth).

others, we are warned against celebratory nationalism, the belief that white Australian legal ideas are necessarily superior to those of England.

During the second half of the nineteenth century, the parliaments and the judiciary moved in opposite directions. The legislatures spasmodically moved away from the laws of England while the judges moved closer towards it. In 1879, the Privy Council declared that it was "of the utmost importance that in all parts of the Empire where English law prevails, the interpretation of that law by the Courts should be as nearly as possible the same".[16] This formal statement of legal imperialism was combined with the beginnings of pseudo-scientific positivism, the belief that the law had only to be discovered by the judges, rather like Charles Darwin on his voyages on the *Beagle*.

The first Supreme Court judges in the 1820s and 1830s engaged in considerable adaptation of English practices, but after a decade or so, they came to ape English rules even when they were entirely unsuitable. The legal profession was divided, law and equity were separately administered, complex English civil procedures were followed, and the judges began to wear wigs in the heat of Australian summers. English case law was followed closely. Not all of this was due to the external presence of the imperial Privy Council. The judges carried an internal empire in their heads, a desire to be English as well as British. This continued into the fourth and fifth stages of Australian law, as is still so noticeable in the dress of the legal profession.

FEDERATION

The fourth stage began with federation in 1901. The Australian conventions which drafted the federal constitution agreed that the Privy Council should have only a limited role in the new century. One of the founding fathers, Isaac Isaacs, claimed that the members of the Privy Council were "as unable to interpret the meaning of our statutes as if they were living in the planet Mars".[17] The British government had other ideas, and insisted on the retention of appeals to London, partly through lack of trust that Australian courts would deal adequately with British capital invested in Australia.[18]

16 *Trimble v Hill* (1879) 5 App Cas 342 at 345.

17 Cowen, *Isaac Isaacs* (University of Queensland Press, St Lucia 1993) p87.

18 The story of the retention of Privy Council appeals has been told many times. See, for example, deGaris, "The Colonial Office and the Commonwealth

Privy Council appeals were the main practical method of imperial control in the fourth stage of Australian law, but the internal empire also reached its peak in this period. This was partly due to the cultural cringe. Michael Meehan has shown that Australian judges rarely cite Australian literature for example, a point which is well illustrated by the story that Chief Justice Dixon used to ride through the Australian alps reciting Homer in ancient Greek.[19] Mostly though, deference to English precedents was due to the continued adherence to legal positivism, which was so firmly asserted in Dixon's well known statement that there "is no other safe guide to judicial decisions in great conflicts than a strict and complete legalism".[20]

AUTONOMY?

Despite this, Dixon began the fifth phase of Australian legal history, in which the law is currently moving decisively away from the influence of England. In 1963 he declared that the High Court would no longer feel bound to follow the House of Lords.[21] This preceded broad constitutional changes. Privy Council appeals were abolished in stages, from 1968 until 1986, and the *Australia Acts* in 1986 ended all practical controls by the British government over Australian law making. The 1986 reforms also freed the states from having to accede to the paramount force laws of England, a step which they had not taken when the federal government adopted the *Statute of Westminster* in 1942.

This is a familiar story outlining a gradual shift from dependence to independence, but it is not generally realised how contested most of these stages were and still are. The current High Court is the most creative in Australian history. Since Sir Anthony Mason became Chief Justice in 1987, it has reshaped much of the common law, and has eradicated the cancer at the heart of the Australian legal system, the *terra nullius* doctrine. Even now, however, many Supreme Court judges still cling to

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Constitution Bill" in Martin (ed), *Essays in Australian Federation* (Melbourne University Press, Melbourne 1969).

19 Meehan, "The Good, the Bad and the Ugly: Judicial Literacy and Australian Cultural Cringe" (1990) 12 *Adel LR* 431. On Dixon, see Andrew, *The Rt Hon Sir Owen Dixon, OM GCMG, 1886-1972: The Foundation Years of Australia's Most Eminent Jurist* (B A Honours thesis, University of Queensland 1988); Stephen, *Sir Owen Dixon: a Celebration* (Melbourne University Press, Carlton 1986).

20 Dixon, *Jesting Pilate and Other Papers and Addresses* (Law Book Co, Sydney 1965) p247.

21 *Parker v R* (1963) 37 ALJR 3.

what Mason calls the fairy tale of legalism, the belief that there is only one correct, neutral answer to any legal problem.[22] As in every period since 1788, there are Burtons and Forbes' in our courts, adaptors and followers of English law. At no time has either side been entirely dominant.

A vast amount has been written about the role of law in Australian history. The June 1994 *Law and History Newsletter* lists 100 books in which this is the central issue, and there are many times that number of articles on the same theme. These include detailed studies of many distinctively Australian laws, such as the Torrens system, the arbitration of industrial disputes, the development of federal constitutional law, laws concerning Aborigines and convicts, the squatters and selectors, and the social reforms of the late nineteenth century which led to claims that Australasia led the common law world in terms of reform. These studies are becoming more sophisticated, with a shift from institutional to substantive histories and a much closer integration of social context.

There is still a great deal to do. We know very little about the development of case law, especially in the nineteenth century. Most of the published histories concern New South Wales; we do not have much on Tasmanian or Victorian law, for example. Explicitly historical studies have also neglected much of what happened in the twentieth century. The richest new technique concerns popular legal customs, but this has not been used on periods after the middle of the nineteenth century. There have been dramatic changes to our law since 1963, but no one has yet teased out just why. This will require a close historical study of the collapse of the British empire, the loss of faith in positivism, the growth of Australian nationalism and the relationships between the activist judges of the High Court.

We also need to develop a new line of study. We now know that Australian law was often in advance of that of England, particularly on social issues such as family law. Some of these reforms were developed locally, but others reflected changes in other common law jurisdictions within the empire or in the United States. This was a two way process, since Australian laws were also influential outside this country. It is now clear that our laws did not all trickle down from England; we need to build a new model of the circulation of legal ideas, particularly around the Pacific. This will have to incorporate multi-directional influences on official and popular thought, while continuing to recognise that Britishness was the mark of propriety for much of Australia's legal history.

22 *Sydney Morning Herald*, 16 March 1994; *Australian*, 17 March 1994.