Comparisons between the French and Australian Systems of Justice

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Supreme Court of Queensland

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Introduction

Justice Rares has told you generally about the structure of the Federal and State courts in Australia. Let me tell you something more about the State courts like the Supreme Court of Queensland of which I am a member and then proceed to make some comparisons between the French and Australian systems of justice, dealing in some greater length with the rules governing examination and cross-examination of witnesses.

I shall draw to some extent from the experience I have had with one of your recent graduates, M. Charles Tellier, who was my "associate" or "adjoint" in 2009 and is now back in Normandy working as a judge attached to the Court of Appeal at Caen. I have been there for the past two weeks observing some of your courts in action. He produced a very useful "compte-rendu" of his year in Australia which I hope has been distributed to you. It provides a summary of his observations of our system compared to yours, comparing

the weaknesses and strengths of both. I urge you to read it and, if you wish, to ask questions relating to its content.

Some of what I shall say will focus on the benefits to our systems of this sort of comparative analysis but also on the difficulties involved in trying to transplant procedures and ideas from one legal culture to another.

The Supreme Courts of the Australian States

Australia is a federation established in 1901 by an Act of the Imperial Parliament of the United Kingdom after referenda in the six former British colonies that made up our country. Those colonies had been established progressively across the Australian continent from January 1788 when the First Fleet arrived in Sydney Cove. French exploration in the Pacific was common in the 18th century also and names of French explorers such as Jean-Francois de Galaup, comte de La Pérouse, Antoine Raymond Joseph de Brimi D'Entrecasteaux, and Louis-Antoine, comte de Bougainville are reflected in a number of Australian place names. In Bougainville's case it is also reflected in the name of a popular and colourful shrub, the bougainvillea. One of the teasing alternative histories we amuse ourselves with in Australia is what the country would have been like had it been settled by the French.

The oldest Supreme Court in Australia was established in Tasmania in 1824. The Supreme Court of New South Wales was established in that colony also

in 1824. Those courts inherited the jurisdiction and essential structure of the English superior courts of the time. Later the colonies of Victoria and Queensland were carved out of New South Wales and the courts established there inherited similar jurisdiction. In Queensland's case that happened in 1861. Similar events occurred in respect of the establishment of Supreme Courts in the other colonies. Therefore, in terms of both history and significance in the overall administration of the system of justice in Australia it is the State Supreme courts that have been the most important.

They are courts of general jurisdiction like the High Court of England and Wales on which they are based. That jurisdiction includes the main types of civil disputes arising out of contracts and civil wrongs and questions of the ownership of property and inheritance, which are normally governed by State law, as well as much of the civil jurisdiction also exercised by the Federal Court. So to some extent the State Supreme Courts and the Federal Court are in competition with each other in respect of providing access to civil litigants, especially in commercial matters.

The Supreme Courts also exercise jurisdiction over actions of the State administrations by exercising their power to review the legality of administrative decisions and the decisions of a variety of State administrative tribunals that are normally not regarded as courts but as part of the administrative arm of government.

Another Federal Court called the Family Court of Australia deals with matrimonial matters such as divorce, the custody of children and property disputes between married couples and now also between those who have lived together as a couple. Until the Federal Court and the Family Court were established in the 1970s those jurisdictions were exercised by the State Supreme Courts.

Importantly, from your point of view, the Supreme Courts' jurisdiction also includes broad jurisdiction in respect of both federal and state criminal law. The Federal Court has only a limited criminal jurisdiction although there are plans to increase it in certain areas associated with commercial law such as cases of abuse of market power.

The Supreme Court of Queensland has general jurisdiction over criminal matters but, in practice, deals only with the most serious crimes such as murder, manslaughter and drug trafficking. The other State Supreme Courts also deal with the most serious crimes. The lower courts in the States such as the District Court and the Magistrates Court deal with less serious crimes and less important civil disputes. Juries are used in contested criminal trials in both the Supreme Court and the District Court but many defendants plead guilty to the charges against them. That avoids the necessity for a trial with a jury of the question of their guilt.

The Supreme Courts also include Courts of Appeal to hear appeals from the decisions of individual judges of those courts in civil cases, from decisions made by juries or appeals against the penalty imposed by the judge in criminal cases, as well as appeals from the lower courts and administrative tribunals in the State hierarchy.

To a great extent, therefore, the Supreme Courts of the Australian States fulfil a number of roles of the type performed by a combination of the Tribunaux de Grandes Instances, the Cours d'Assises, the Tribunaux de Commerce, the Cours d'Appel, the Cour de Cassation, the Tribunaux Administratifs and the Conseil d'État in the French system. The only court superior to them in the Australian system is the High Court of Australia, which consists of seven judges and, in practice, hears only a very limited number of appeals from the Courts of Appeal of the State Supreme Courts and the appellate court of the Federal Court each year. The High Court of Australia effectively combines the functions of the Cour de Cassation, the Conseil d'État and the Conseil Constitutionnel here.

Comparisons between the legal systems

Common law and codification

Australian law is based on English common law and, unlike French law, is not normally codified although much of it is now statutory. There are

criminal codes in some states and some aspects of our commercial law such as the law relating to sale of goods, bills of exchange and the law of partnership have been codified. Much of our civil law, however, depends for statements of principle on the decisions of the courts over the centuries. That is the body of law known as the common law. Parliament can and does intervene to change the common law if it is no longer consistent with the needs of modern society but the judges retain an important role in its development and restatement and in the interpretation of the statutes passed by Parliament.

Our federal constitution reflects a similar structure to that of the United States of America in dividing the powers of the Federal and State governments but does not include an entrenched constitutional bill of rights, in these days a very significant difference.

As you are aware codified law attempts to lay down precepts deemed to be universally valid irrespective of the time or place in which they apply. In other words the rules precede the solutions. Under the common law approach, however, the general rules are extrapolated from the solutions to individual disputes by an empirical method. If one wanted to be philosophical one could contrast the French approach with the British by contrasting the rationalist approach of Descartes of working from *idées claires* or basic principles with the inductive approach of philosophers such as Locke and Hume who were empiricists rather than rationalists. Empiricists are not

attracted to *a priori* positions regardless of underlying experience – or as the famous American jurist, Oliver Wendell Holmes Jr said of the common law: "The life of the law is not logic; it is experience."

The precepts of your law are laid down in the Civil, Penal and Procedural Codes, which, I have observed, are the essential references for judges. The jurists deputed by Napoleon to undertake that codification just over 200 years ago, it seems to me, did a very effective job of reducing to a coherent, scientific and intelligible structure the essential rules of French law, themselves derived to a large extent from Roman law. Your system has had enormous influence throughout the world since then, both in Europe and South America as well as in many African and Asian societies. Louisiana and Quebec remain heavily influenced by it in countries otherwise dominated by the development of the English common law, while Scotland has always had a Roman law based system possessing many similarities to French law even if it is also now heavily influenced by its larger neighbour. The same applies to South Africa and a number of other "mixed" jurisdictions.

As I understand it, French judges' main concern is to apply the principles expressed in the Codes, developing them if needs be to meet modern social changes, but not departing from the principles stated in them. By contrast, the decisions of our courts in interpreting both the common law and our legislation assume more importance than is normally the case in France. Our

courts are required more strictly to apply decisions of courts superior in the judicial hierarchy. Also, reasons for decisions in Australia tend to be more discursive and argumentative in expressing what the law is and why it should be stated in a particular way than normally occurs in France. For that reason, my understanding is that what French academic lawyers have to say becomes particularly important in the development of your law. By contrast what judges say about the law is most important in our system in determining how it develops.

Differences in the selection of judges and their role in the trial process

Selection of judges

Australian judges and magistrates are, generally speaking, appointed by the Federal and State governments from the members of the private legal profession. They are expected to have developed significant experience in the practice of the law, particularly in litigation in court, and to have shown a high level of skill and integrity during their careers. Most of them have been barristers and Queen's Counsel regarded as leaders of the profession although, more recently, solicitors and academics have been appointed to the superior courts. A typical age on appointment would be between the mid 40s and the mid 50s.

Integrity is a particularly important quality for a judge to possess. Lack of integrity as a lawyer in court in Australia would be very likely to impede that

lawyer's progress in the profession and would be one of the strongest indicators against an appointment as a judge, which is one of the main hallmarks of success in the legal profession. For example a failure to refer to relevant evidence or to legal decisions or statutes that the lawyer knew existed would be a breach of the lawyer's ethical duty not to mislead the Court. It was for that reason that I was surprised to be told by M. Tellier that there was a significant degree of mistrust among French judges for some of the lawyers who appeared before them.

That concern was reinforced when I heard a French/Australian lawyer speak at a conference in Brisbane where he contrasted the duty of candour required of Australian lawyers with his experience of proceedings in France where he said it was not uncommon for lawyers to mislead the Court. My understanding is that the ethical rules governing French lawyers include a duty of courtesy to the Court but say nothing about a duty not to mislead it.[1] That may be contrasted with the *Code de Déontologie des Avocats Européens* which provides in Article 21.4.4:

> "**Informations fausses ou susceptibles d'induire en erreur**:
> A aucun moment, l'avocat ne doit sciemment donner au juge une information fausse ou de nature à l'induire en erreur."

From your point of view as future judges it seems to me that it would be desirable for the French judiciary to demand that the French profession adopt

[1] See http://cnb.avocat.fr/Reglement-Interieur-National-de-la-profession-d-avocat-RIN_a281.html#1

such a rule in the French courts also, not just the European courts. It would make an enormous difference to the efficient operation of our system if we could not rely on the information provided to us by the lawyers. Where, as I understand it, there are now more French judges being appointed from the ranks of the practitioners, it is also important to ensure that those appointed from the profession have been held to high ethical standards.

Let me return to the selection of judges in Australia. Experience in private practice is regarded as important in helping to establish an independent attitude of mind, especially important when deciding cases where the government is a party, as in almost all criminal litigation. Some judges have, however, been appointed successfully from the ranks of government lawyers and, in the past, most magistrates were appointed from the ranks of public servants who worked in the Magistrates Courts registries. The latter régime was not so successful!

The independence of the judges of our superior courts is also constitutionally guaranteed by the prevention of their removal from office except by Parliament, and then only for proved misbehaviour or incapacity. It is a provision integral to Montesquieu's concept of the separation of powers and reflected in your Constitution. It is only recently, however, that we have undergone training for the positions we hold, beyond our practical experience, and then the training occurs only after we have been appointed.

The various Australian governments provide very little funding for such training.

I believe that our system is meritorious in recruiting experienced and skilled practitioners to our judiciary but I must also say, from my observation of your process for selection of judges through the "Concours" process, and my discussions with M. Tellier and other judges in Normandy over the last fortnight, that I have come to appreciate the significance of the French reliance on a competitive and open process for the recruitment of talented individuals and the depth of the resources that you devote to train the judiciary and to keep individual judges' skills up to date. As with many comparative analyses it is important to observe the systems in the background of their respective cultures to understand best how they work. What works well in one system may not readily be transplanted to another.

There are some other notable differences in our judicial structures. We have no judicial equivalent to the procureurs, *les magistrats du parquet,* who are loosely comparable to our Directors of Public Prosecutions and their staff but perform a number of other public roles that would not be performed by a prosecutor in Australia. It would not be conceivable in Australia, for example, for the Chief Justice of a State to administer the court in conjunction with the Director of Public Prosecutions as a Premier Président of a Court of Appeal would do with a Procureur-Général here. There may be some

equivalence with the position of the Procurator Fiscal in Scotland but I am not fully familiar with the duties of that office.

In spite of our wish to maintain the separation of powers by clearly marking out the role of our judiciary from the legislature and the executive, there remains some overlapping of functions. The registries of most of the State Courts are answerable to the judges in practical terms but are controlled administratively by the Ministries of Justice. The Federal Court is, to my mind, in a superior situation as its budget is approved directly by Parliament and administered by the Court which is in charge of the registry staff and how the registry operates.

The role of judges in the courtroom

The differing structures of our legal systems place contrasting demands on the investigation of disputes and the conduct of trials in the court-room. From my limited understanding of your system of procedure I believe there is a much greater focus on the compilation and understanding of the pre-trial dossier by police and examining magistrates in criminal cases, especially at the lower level, and by the court and the parties in civil disputes, and less on the technique of interrogation of witnesses by the parties' lawyers in the court room. The law of 15 June 2000 permitting lawyers to cross-examine has, apparently, had limited effect.[2]

[2] For a French book on how to cross-examine see Christophe Ayela, *Vérités croisées : Cross examination, une petite révolution procedural* (2005, Litec).

As you know, your judges have the principal role in calling evidence and examining witnesses and that is reflected in some of the training that you undergo here although much of the interrogation is performed by police officers in the first instance in criminal matters and recorded in the dossier. As much of your system relies on the written record I gather that the oral hearing is designed more to test the accuracy of the dossier than to tell the story to the court deciding the case as occurs in our system.[3]

By contrast ours is a system based historically on the presentation of evidence orally to juries. Although there is a significant use of pre-trial disclosure and investigation, and affidavit evidence, the traditional model of trial procedure focuses on oral questioning by the parties' lawyers rather than by the judge. In civil trials now the judge is frequently more interventionist in questioning lawyers and sometimes witnesses and may give directions about how the evidence is to be presented but the classical procedure is generally observed, especially in criminal trials, at least when the jury is present in the courtroom.

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[3] There are several useful articles comparing and contrasting the French and Australian systems published in Australian journals by Bron McKillop of Sydney University Law School: *What can we learn from the French criminal justice system?* (2002) 76 ALJ 49; *The position of accused persons under the common law system in Australia (more particularly in New South Wales) and the civil law system in France* (2003) 26(2) UNSW Law Journal 515 and *Review of convictions after jury trials: the new French jury court of appeal* (2006) 28 Syd Law Rev 343. See also her articles in (1997) 45 American Journal of Comparative Law 527 and (1998) 46 American Journal of Comparative Law 757. Further references in English include S. Field, *Dialogue and the Inquisitorial Tradition* (2003) 14(3) Criminal law Forum 261; J. Hodgson, *French Criminal Justice* (2005).

In the classical method the evidence is unveiled to the judge or judge and jury by the lawyers and the parties' witnesses in a way that often assumes no prior knowledge by the court of the evidence being presented to it. I understand that in a Cour d'Assises that is how the evidence is revealed to the jury here, although the judges have access to the dossier as well.

The International Criminal Court and International Criminal Tribunals for Yugoslavia, Rwanda, Sierra Leone, Cambodia and Lebanon use more adversarial methods based on the common law systems but ones that have also been influenced by their judges trained in the civil law systems. As the official languages of those bodies are French and English I expect that some of you may be interested in their work and in learning more about common law techniques of examining and cross- examining witnesses. Lawyers appearing there need training in the techniques used in the ICC and the various tribunals. M. Tellier was also impressed by some of the cross-examinations he observed in Queensland so I believe it may be useful for you if I go into some more detail about the oral examination of witnesses in our system.

The rules relating to examination and cross-examination

To assist the common law process of leading the evidence there is a developed body of substantive law dealing with its admissibility and the method of its presentation, whether by the examination of a party's own

witnesses or by the cross-examination of the opposing party's witnesses. Our law of evidence is a major study in its own right so I shall simply say a little about the objects of examining and cross-examining witnesses by the parties' lawyers.

Examination of witnesses

The object of examination of witnesses is to obtain testimony in support of the version of the facts in issue or relevant to the issue for which the party calling the witness contends. The testimony must be based on personal knowledge — on what the witness saw, heard, felt, touched or tasted. It must be testimony as to facts, not inferences. Testimony as to opinions or inferences or beliefs may, exceptionally, be permitted if the rules as to opinion evidence are satisfied, or if a contrary course would be over-pedantic. Generally speaking witnesses may not be asked leading questions, ones which suggest an answer, and, although a witness may refresh memory by referring to documents previously prepared by that witness, a witness cannot usually be asked about former statements of that witness with a view to their becoming evidence in the case or in order to demonstrate the consistency of that witness. A party may call a second witness to contradict a first witness called by that party who has given unfavourable evidence with regard to a fact in issue or relevant to the issue, but a party may only discredit a witness called by that party if the judge considers the witness to be hostile.[4]

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4 See *Cross on Evidence* (Aust. ed.) at [17140].

Cross-examination

Cross examination is a different skill. Recently a leading Australian judge, dealing with a criminal case where the prosecutor had transgressed seriously in his cross- examination of the defendant, described some of the rules governing that process in these terms:3[5]

> "[119] They are rules which necessarily developed over time once it came to be established that oral evidence should be elicited, not by means of witnesses delivering statements, and not through questioning by the court, but by means of answers given to a succession of particular questions put, usually by an advocate, and often in leading form. A cross-examiner is entitled to ask quite confined questions, and to insist, at the peril of matters being taken further in a re-examination which is outside the cross-examiner's control, not only that there be an answer fully responding to each question, but also that there be no more than an answer. By these means a cross-examiner is entitled to seek to cut down the effect of answers given in chief, to elicit additional evidence favourable to the cross-examiner's client, and to attack the credit of the witness, while ensuring that the hand of the party calling the witness is not mended by the witness thrusting on the cross-examiner in non-responsive answers evidence which that witness may have failed to give in chief. To this end a cross-examiner is given considerable power to limit the witness's answers and to control the witness in many other ways."

I understand that a lawyer here has very little ability to limit a witness's answers.

The Australian judge went on to describe the rationale for the rules prohibiting offensive questioning, the making of comments rather than the asking of questions, asking compound questions which simultaneously pose

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5 *R v Libke* [2007] HCA 30; (2007) 230 CLR 559 at [119]-[133] per Heydon J.

more than one inquiry and call for more than one answer. Such questions, as his Honour said, present two problems. First, the question may be ambiguous because of its multiple facets and complexity. Secondly, any answer may be confusing because of uncertainty as to which part of the compound question the witness intended to address. Nor may a cross-examiner cut off answers before they are completed or ask questions resting on controversial assumptions; nor should questions provide merely an invitation to argument. What is wanted from the witness is answers to questions of fact. The rule against argumentative questioning as with the other rules touched on rests on the need not to mislead or confuse witnesses.

His Honour concluded as follows:

> "[132] It is not unique in the law of evidence to find that the more closely the rules for admissibility are complied with, the greater the utility of the testimony from the point of view of the party eliciting it. It is certainly the case in this field. The rules permit a steady, methodical destruction of the case advanced by the party calling the witness, and compliance with them prevents undue sympathy for the witness developing. It is perfectly possible to conduct a rigorous, testing, thorough, aggressive and determined cross-examination while preserving the most scrupulous courtesy and calmness."

If lawyers transgress these rules then the trial judge has a responsibility independently of objections to prevent this type of questioning being employed. It is also one role of advocacy training to try to teach advocates how to follow the rules and become effective examiners and cross-examiners.

The problems of harmonization

I have spoken previously to an ENM audience in Paris about some French influences on Australian substantive law, particularly in the area of copyright and, indirectly, in respect of whether there should be an obligation to perform contracts in good faith implied into Australian law. Other examples exist. The French system of administrative justice has been a popular subject of study in the common law world for a long time because of the relatively undeveloped nature of our earlier systems.

The movement for harmonization of many areas of European law has also led to the preparation of transnational principles of contract law such as the Draft Common Frame of Reference prepared for the European Commission, which probably raises hackles here as much as in England because of its attempt to move away from basic principles such as the need for consideration in our system or the need for "cause" in yours in order to establish an enforceable contract.

Putting questions of substantive law to one side in favour of procedural rules, in Queensland we have recently modified our rules about expert witnesses to make them more like the European models, such as under Art 264 of the *Nouveau Code de Procédure Civile*. We now encourage the parties to use one witness, often a court appointed witness, rather than to engage their own witnesses, whose views are normally likely to support the positions taken by the parties. Expert witnesses are supposed to be impartial between the parties

but there is a view in our system that some experts have become "guns for hire".

Where the system is otherwise adversarial, however, and where there are often genuine differences of opinion among experts, I remain sceptical of the efficacy of this attempt to graft this feature of the "inquisitorial" or official inquiry system onto ours. For similar reasons I can understand the difficulties in grafting the procedure of examination and cross-examination onto a system like yours based so much on the importance of the dossier.

I understand, in any case, that your system deals with the cases where there are genuine differences of opinion among experts by permitting the parties readily to call experts whose views are opposed. The techniques discussed by Justice Rares of hearing the evidence of such experts in a conclave should, we hope, be of interest to you also.

Another area that interests me is the role of juries in the Cours d'Assises in helping determine the penalty to be imposed on a guilty defendant. In our system juries have no role at that stage of a trial – it is something done by the judge alone. That is not the case in some American states and, recently, the Chief Justice of our largest State, New South Wales, proposed the idea that there could be a role for juries at that stage of our process also. One objection to the proposal in Australia is that such sentences would be potentially

inconsistent with sentences imposed by judges alone, as, in the vast majority of cases, defendants plead guilty before a judge without a jury and do not require a trial. The suggestion that juries be involved in sentencing has not received general support.

I had hoped to attend a Cours d'Assises on this trip and observe the process of a French jury trial in action but unfortunately that has proved impossible in the time I had available. I hope that next time that can be arranged.

I suspect that some procedural differences in our systems are more entrenched culturally than the differences in substantive law and may be more difficult to harmonize. The development of the ICC, the international criminal tribunals and international arbitration in commercial disputes is already leading to significant change in these areas, however, and to the need for more contact and exchange of ideas between judges and lawyers with practical experience of our differing systems. It is clear to me that there is much that we can do to learn from each other. My experience of having M. Tellier work with me for a year certainly reinforced that conclusion for me.

Thank you for the invitation to speak and I hope that there can be many more fruitful discussions between our colleagues from Australia and you.