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GLOBAL INFLUENCES ON THE AUSTRALIAN JUDICIARY

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In an open society, a nation's legal system, and its judiciary, will always be exposed to international influences. Even when unrecognised, or unacknowledged, they will be reflected in the substantive and adjectival law applied by judges, in the structure and status of the judiciary, and in its relationship with the other branches of government.

The original, and formative, influence on Australia's legal culture came from Great Britain. For more than 150 years Australia was part of the British Empire.

By receiving the common law from England, Australia became part of an international legal community that included the United States, India, Canada, Ireland and New Zealand. The principles and procedures of the common law helped shape the societies in which it was received. And it left its distinctive stamp upon the judiciary and the legal profession in those societies.

Some Australian lawyers who respond eagerly to new forces of globalisation, and others who resist foreign influence, appear to forget that our legal system developed as part of a great international network.

The early barristers in the colony of New South Wales (which originally included the whole of the eastern part of mainland Australia) had been admitted to practise in England or Ireland. Until 1861, all judges in the colony had been members of the English or Irish Bar. New South Wales did not have an Australian born Chief Justice until 1910. Until quite recently, members of the English Bar were automatically entitled to be admitted to the Bar of New South Wales.

Before the enactment of the *Australia Act* 1986 (Cth and UK), the Judicial Committee of the Privy Council was part of Australia's judicial structure. In 1968, and again in 1975, the Commonwealth Parliament legislated to limit appeals to the Privy Council, but it was not until 1986 that they were completely blocked. Writing in 1901, Quick and Garran observed that the power of the Privy Council was "not unfelt by any judge in the Empire"[1]. In 1981, Hutley JA of the New South Wales Court of Appeal referred to the "English leadership" under which the Australian law of torts and contracts developed. He said[2]:

> "In a relatively provincial country (though very litigious) such as Australia, the tendency to lapse into self-satisfaction has been restrained by the continual presence of a major legal system, not as a distant exemplar, but as a continual force for change".

While they continued, appeals to the Privy Council had an effect at a personal, as well as an institutional, level. Justices of the High Court used to sit from time to time with the Law Lords. The last two to do that were Sir Harry Gibbs and Sir Ninian Stephen. And Australian barristers used to argue cases before the most senior English judges, and against leaders of the English Bar.

Using the term "constitution" in its broadest sense, the common law of England provided the basis of our constitutional arrangements. Parliamentary democracy, judicial independence, the open administration of justice, legal professional privilege, the presumption of innocence, freedom from arbitrary arrest or imprisonment, the right to silence, and other principles we regard as fundamental to the way we are governed, came to us as part of our common law inheritance.

More specifically, the Commonwealth Constitution was in many respects, a product of foreign precedent. It took legal effect as an enactment of the United Kingdom Parliament, but it was drafted in the federating colonies by people who looked mainly to the experience of the United States for guidance in framing the terms of their federal agreement. At the end of the 19th century, there were only three precedents for a federal Constitution. The Swiss example provided little assistance, while the Canadian model involved a scheme of distribution of powers between the central and the provincial governments that was not acceptable. Following the United States precedent, our Constitution

contains a more sharply defined separation of legislative, executive and judicial powers than has ever existed in the United Kingdom. The explanation lies in the nature of federalism, and the necessity that the judicial arm of government, which determines the boundaries of power sharing marked out by the federal agreement, should be clearly separated from the federal legislature and executive. The constitutional assumption that a court can declare legislation enacted by the Parliament to be invalid was familiar in the case of colonial legislatures with limited powers. But it had been taken up in the United States as an aspect of federalism. The principle established by *Marbury v Madison*[3] was taken for granted by the time our Constitution was drafted. At the same time, we followed the United Kingdom precedent in certain respects. We were, and remain, a constitutional monarchy. Responsible government, difficult to reconcile with federalism, reflects English, rather than American, precedent. And, to a large extent, the framers of our Constitution, unlike their American counterparts, left it largely to Parliament to protect the rights and freedoms of Australian citizens. By contrast, the American approach was to protect rights and freedoms by giving them constitutional status, and thus placing them beyond legislative reach. This is a subject to which more recent international developments have a particular relevance.

Having decided, at the time of Federation, to follow the British example, and leave it mainly to Parliament to decide how, and to what extent, the rights of citizens should be protected, Australia now finds that the United Kingdom has committed itself to a different course. While still

retaining the doctrine of parliamentary supremacy, the United Kingdom, by enacting the *Human Rights Act* 1998 (UK), has made the European Convention on Human Rights part of its basic law. Lord Steyn, in March 2002, described the Convention as effectively the United Kingdom's constitutional Bill of Rights, and said that the incorporation of the Convention into English law has generally accelerated the constitutionalisation of public law[4].

This development was not sudden. Since 1966, citizens of the United Kingdom have had the right to petition the European Court of Human Rights, and the Convention has influenced the development of the common law. But with the introduction of the Human Rights Act, what was previously an influence is now a direct force.

Australia now finds that the common law countries whose jurisprudence has most influenced its common law, i.e. the United Kingdom, the United States, Canada and New Zealand, have all adopted wide ranging constitutional or legislative declarations of human rights and freedoms. Those declarations directly affect the development of the common law in those countries. It is inevitable that they will have an indirect influence on the development of the common law in Australia.

Consider, for example, judicial review of executive action. It is fair to say, that, both in the United Kingdom and in Australia, administrative law has been in a state of continuing development over the last 50 years. The decisions of English courts, although not binding, have

been carefully considered, and often followed, in Australia. But now there has occurred a significant change. The focus of administrative law in the United Kingdom has become, not the responsibilities of officials, but the rights of citizens. It remains to be seen how much of this change will find its way into Australian law. That will work itself out over time. But the human rights jurisprudence of the other major common law jurisdictions will naturally be closely watched by Australian courts.

There is another mechanism by which human rights jurisprudence affects Australian law: through international treaties and conventions.

As in the United Kingdom, Canada and New Zealand, the provisions of an international treaty do not form part of Australian law unless they have been incorporated into municipal law by statute[5]. However, international treaties to which Australia is a party may indirectly affect the development of the law in Australia.

Courts may use international treaties and conventions in resolving uncertainties in the common law. In *Mabo v Queensland [No 2]* Brennan J said[6]:

> "The common law does not necessarily conform with international law, but international law is a legitimate and important influence on the development of the common law, especially when international law declares the existence of human rights".

The decision in *Mabo* provides a notable example of the High Court of Australia developing the common law in response to the forces of globalisation. Brennan J described the previous refusal to recognise the rights and interests in land of the indigenous inhabitants as an unjust and discriminatory doctrine that could no longer be accepted in the light of Australia's accession to the Optional Protocol to the International Covenant on Civil and Political Rights. He said[7]:

> "A common law doctrine founded on unjust discrimination in the enjoyment of civil and political rights demands reconsideration".

There is no event in Australia's recent legal history that more vividly illustrates the effect on Australian law of developments in international human rights jurisprudence than the decision in *Mabo* and the subsequent legislative response to that decision.

In resolving ambiguity in a statute, courts favour a construction which accords with Australia's obligations under a treaty, on the basis that they presume that Parliament intends to legislate in accordance with, rather than contrary to, its international obligations[8].

It is unnecessary for present purposes to go into the more controversial area of the circumstances in which ratification by Australia of an international convention will give rise to a legitimate expectation that an administrative decision-maker will conform to the convention.

In a paper given at a judicial conference at Launceston in April 2002, Perry J, of the Supreme Court of South Australia, commented that Australian counsel rarely refer judges to international legal materials that might have a bearing on a case. If that is so, it is unfortunate, and suggests that our advocates may be less sensitive to the potential importance of such materials than their European counterparts. Part of the explanation may be that, for lawyers in Europe including the United Kingdom, the Treaty of Rome, and the European Convention on Human Rights, are in one sense supra-national, but in another sense, they are the law of a community to which they all belong. Perhaps, to a barrister in London, Strasbourg is no more foreign than Canberra is to a barrister in Perth. It is certainly much closer. But I believe there is a growing awareness, within the Australian profession, of the importance of looking beyond our own statutes and precedents, and our traditional sources, in formulating answers to legal problems. Our law is increasingly aware of, and responsive to, the guidance we can receive from civil law countries. Ultimately, the issues that arise, and the problems that require solution, are in many respects the same throughout large parts of the world. The forces of globalisation tend to standardise the questions to which a legal system must respond. It is only to be expected that there will be an increasing standardisation of the answers.

An example of a civil law principle that has entered the law of England through Europe, and is becoming influential in Australia, is proportionality. The modern principle appears to be of German origin, although in France, Art 8 of the *Declaration of the Rights of Man and the Citizen* of 1789 provides that laws may only create penalties that are

"strictly and evidently necessary". In its narrowest sense, proportionality requires that a measure must not be disproportionate to its aim. It is a familiar aspect of European Community law, operating as a limit both upon Community action and upon state action that applies, or is required to conform to, Community law. In 1998 it was expressed as follows[9]:

> [T]he principle of proportionality, which is one of the general principles of Community law, requires that measures adopted by Community institutions do not exceed the limits of what is appropriate and necessary in order to attain the objectives legitimately pursued by the legislation in question; when there is a choice between several appropriate measures recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued".

Article 5 of the Maastricht Treaty states that "[a]ny action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty".

Some object to this principle as a basis for judicial review of either legislative or administrative action because of the extent to which it may allow courts a capacity to examine policy as distinct from legality. In its practical effect, the principle of proportionality is modified by a complementary principle which allows a "margin of appreciation", or what might in some contexts be called "deference", to the judgment of the relevant legislative or administrative authority.

A number of the articles of the European Convention on Human Rights contain provisions which expressly invoke proportionality. For example, rights to respect for private and family life, to freedom of

thought, conscience and religion, and to freedom of expression, assembly and association, are not absolute, but any interference with them may only be such as is necessary in a democratic society for the protection of public order, health or morals, or the protection of the rights of others[10].

The *Canadian Charter of Rights and Freedoms* guarantees specified rights and freedoms, subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society. In *R v Oakes*[11] Dickson CJC said that it must be shown:

> "[T]hat the means chosen [to attain the objective] are reasonable and demonstrably justified. This involves 'a form of proportionality test' ... Although the nature of the proportionality test will vary depending on the circumstances, in each case courts will be required to balance the interests of society with those of individuals and groups".

Even before the enactment of the *Human Rights Act* 1998, English courts were familiar with proportionality. The concept has much in common with that of reasonableness and, in its practical operation in many cases, it is likely to produce the same result as would come from the application of a test of reasonableness[12]. But, of course, the concept of *Wednesbury* unreasonableness is narrower. In *Council of Civil Service Unions v Minister for the Civil Service*[13], Lord Diplock raised the possibility of importing the European concept of proportionality as a ground of domestic judicial review, but this was rejected by the House of Lords in *R v Secretary of State for the Home Department; Ex parte*

Brind[14]. However, when the English courts apply Community law, and the *Human Rights Act* 1998, questions of proportionality arise.

Australian law, so far to a limited extent, has applied the concept of proportionality; and not just through the related and familiar concept of reasonableness.

In constitutional cases where a purposive head of legislative power is relied upon, proportionality has been invoked as a test of the sufficiency of the connection between the law and the head of power. In *Commonwealth v Tasmania*[15], Deane J asked whether the law was appropriate and adapted to achieving the object that was said to make it a law with respect to external affairs. In this regard, he said, there was a need for "a reasonable proportionality between the designated purpose or object and the means which the law embodies for achieving or procuring it." On the other hand, in *Leask v The Commonwealth*[16] both Dawson and Toohey JJ were critical of the use of proportionality as a test of whether legislation was within constitutional power.

Where a law is said to infringe some express or implied right or guarantee of freedom, then considerations which have much in common with proportionality are familiar. And in testing whether subordinate legislation has been made within statutory power, a question may arise whether a regulation is so lacking in reasonable proportionality as not to be an exercise of the power[17].

However, so far proportionality has not been accepted in Australia as a separate ground for judicial review of administrative action, although the possibility was raised by Deane J in *Australian Broadcasting Tribunal v Bond*[18].

Proportionality is simply a concrete and topical example of the influence on the judiciary of ideas borrowed from the jurisprudence of other countries. Such ideas are not limited to matters of substantive law.

One of the characteristic differences between common law and civil law countries is in the matter of judicial recruitment and formation. Lawyers in civil law countries who enter the judiciary typically do so at a relatively early age and as a lifelong career. In common law countries, judges, especially senior judges, are typically appointed in middle age, usually from the ranks of legal practitioners. But in one respect they are now following a civil law precedent. All the major common law nations, including Australia, now have established, formal, programs of judicial formation and development. In this they are following the example of civil law countries, where formal training is a necessary preparation for undertaking a judicial career. The leading organisations in this area in Australia have been the Judicial Commission of New South Wales and the Australian Institute of Judicial Administration. An Australian Judicial College is in the course of establishment, with the support of the Commonwealth government and the governments of New South Wales and South Australia.

In recent years there has been a pronounced move towards greater interaction among the judiciary internationally. This has not been confined, as in the past, by a division between judges from countries with a civil law tradition, and judges from common law countries. Europe itself embodies some of the leading examples of both traditions.

Engagement between Australian judges and their overseas counterparts, whether of a civil law or common law background, is essential. There are numerous forums at which exchanges of information and opinions take place. For example, under the auspices of LAWASIA, the Chief Justices of Asia and the Pacific meet every two years. Those meeting are attended by, amongst others, the Chief Justices of Japan, the People's Republic of China, India, Pakistan, Singapore, Malaysia, Russia, Hong Kong, Australia and New Zealand. At a meeting in Beijing in 1995, the Chief Justices of the region adopted a Statement of Principles of the Independence of the Judiciary which is of major importance. The very name of the Beijing Statement on Judicial Independence reflects the significance of international co-operation among judges. The Worldwide Common Law Judiciary Conference is a biennial event. The next such conference will be held in Sydney in April 2003. It will be attended by judges from the United Kingdom, the United States, Canada, India, Pakistan, Australia and New Zealand and other common law jurisdictions.

The Australian judiciary is active in judicial formation and development in the Asia Pacific region. For the last three years, the Federal Court has conducted an annual training program for the Indonesian judiciary with the assistance of financial grants from AUSAID's Government Sector Linkages Program. Australian judges have conducted training workshops in Indonesia and groups of Indonesian judges visit Australia regularly on study tours. Training courses for visiting judges have been provided by the Judicial Commission of New South Wales.

Since 1999, the Federal Court has engaged in judicial exchange activities with the Supreme Court of the Philippines. In cooperation with the Centre for Democratic Institutions at the Australian National University, the Federal Court has hosted visit by groups of judges from the Philippines and has sent Australian judges to conduct training workshops in that country.

The Centre for Democratic Institutions, the Centre for Asia and Pacific Law Studies at the University of Sydney, the Judicial Commission of New South Wales and the Federal Court have also provided judicial development activities in conjunction with the Supreme Peoples' Court of Vietnam. A program of judicial exchange has been established, and Australian judges have lectured at judicial schools in Hanoi.

A number of Australian courts have established relations, and judicial exchange, with courts of the People's Republic of China. Judges and court officials from each country have made regular visits since

1998. The Federal Court has been involved in training activities with judges of the Thai Court of Intellectual Property in Trade and has received visits from members of that court.

The Judicial Commission of New South Wales, in conjunction with the AIJA, for the past seven years has conducted a National Judicial Orientation Courts for judges from around Australia. Judges from Papua New Guinea, Fiji, the Solomon Islands and Indonesia have participated in that course.

Australian courts participate in schemes to provide library and legal resource assistance to a number of courts in the South Pacific.

These activities receive little public notice. But they represent an important form of engagement between the Australian judiciary and the judiciary of other nations, especially in the Asia Pacific region. Engagement of that kind enhances the level of performance of Australian judges. It also fosters, internationally, values of judicial independence, competence, and integrity. The importance of those values is now widely accepted. A number of countries in our region have active programs of judicial reform; and Australia accepts an obligation to contribute to these. We also accept that there are valuable lessons for us to learn from others.

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[1] Quick and Garran, *The Annotated Constitution of the Australian Commonwealth* (1901) at 736.

[2] (1981) 55 ALJ 63 at 69.

[3] (1803) 1 Cranch 137; 5 US 137.

[4] Steyn, "The Case for a Supreme Court", Neill Lecture, All Souls College, 1 March 2002 at 6-7.

[5] *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 287; *Attorney-General of Canada v Attorney-General of Ontario* [1937] 1 DLR 673 at 678-679; *Ashby v Minister for Immigration* [1981] 1 NZLR 222.

[6] (1992) 175 CLR 1 at 42.

[7] (1992) 175 CLR 1 at 42.

[8] *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273.

[9] Case C-157/96, *R v Ministry of Agriculture, Fisheries and Food; Ex parte National Farmers Union & Ors* [1998] ECR I-2211 at I-2258.

[10] As to the application of these qualifications, see Craig and de Burca, *European Union Law,* (1998) 2nd ed., at 349-352.

[11] (1986) 26 DLR (4th) 200 at 227.

[12] cf *R v Chief Constable of Sussex; Ex parte International Trader's Ferry Ltd* [1998] QB 477 at 495.

[13] [1985] AC 374 at 410.

[14] [1991] 1 AC 696. See also *R v International Stock Exchange; Ex parte Else* [1993] QB 534; *R v Secretary of State for the Home Department; Ex parte Hargreaves* [1997] 1 WLR 906.

[15] (1983) 158 CLR 1 at 260. See also *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 at 29-32 per Mason CJ.

[16] (1996) 187 CLR 579 at 599-605 and 615-616.

[17] *South Australia v Tanner* (1989) 166 CLR 161.

[18] (1990) 170 CLR 321 at 367.