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The “Doctrine of Precedent” in Australian Legal History

By

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INTRODUCTION : THE ORIGINAL, CORE PAPER

- 1 The topic for present consideration, “The Doctrine of Precedent in Australian Legal History”, is the subtitle of a paper, entitled “Building a Nation”, contributed by me to the series of essays, edited by James Watson, entitled *Historical Foundations of Australian Law* (Federation Press, Sydney, 2013). The paper appears as chapter 11, in volume 1 (of two volumes), at pages 267-296 of that book.
- 2 Because of the shared history of England and Australia, each a part of the British Empire as it emerged following the American War of Independence (1775-1783), a study of “the Doctrine of Precedent” in Australia requires consideration of the intersection between English and Australian concepts, and practice, of precedential judicial reasoning as an incident of “the Common Law Tradition”.
- 3 The heyday of “the Doctrine of Precedent”, in both England and Australia, was the century between 1865 and 1966 or thereabouts. Throughout that time, together with an associated “doctrine of *stare decisis*” (justification for the proposition that a court is bound by its own previous decisions or ought not to depart from them), it was conceptualised by lawyers as a conventional means of ensuring that like cases might be decided alike. It required judges (and lawyers generally) to find authoritative guidance in earlier judicial pronouncements, particularly statements of law by courts higher in an appellate hierarchy.

- 4 That “heyday” period may be taken (as a rough guide, recognising the importance of law-reporting to a study of judicial reasoning in the common law tradition) as having commenced with the first publication, in 1865, of the authorised *Law Reports* in England. This was at approximately the same time as 50 years of law reform were about to culminate in the wholesale reorganisation of the English court system *via* the UK *Judicature Acts* of 1873 and 1875.
- 5 The period may be taken (again as a rough guide, in recognition of its perceived importance at the time) as having drawn to a close with publication by the House of Lords (displaced in 2009 by the UK Supreme Court) in their famous “Practice Statement” of 1966: [1966] 1 WLR 1234; [1966] 3 All ER 77.
- 6 Towards the end of the “heyday” period Australia found itself (with British acquiescence) moving towards a formal deconstruction of its colonial court system and the establishment of an independent, national court system, effected by the Australian and Imperial *Australia Acts* of 1986. That did not simply happen on 3 March 1986 (in truth, from a legal perspective, Australia’s Independence Day). It can be seen as having occupied much of the period commencing in or about 1963, with the judgment of the High Court of Australia in *Parker v the Queen* (1963) 111 CLR 610 at 611, culminating in the *Australia Acts*.
- 7 At about the same time, in the wake of World War II (1939-1945), one can discern an influence on Australian jurisprudence of the teaching and writing of Professor Julius Stone (1907-1985). He was sceptical about the existence of any “doctrine” of precedent, save as an artificial 19th century construct. He spoke, at most, of “the common law *theory* of precedent”. The concept of a “doctrine” of precedent did not sit well with his jurisprudential interest in the “leeways of choice” open to judges, their techniques for exploring those choices and the social influences on them. His preoccupation with these ideas deeply influenced generations of law students (including some later prominent as Australian judges) who were taught by him at the University of Sydney (1942-1972) or the University of New South Wales (1972-1985). He was an academic warrior against the declaratory theory of judicial function and the analytical jurisprudence associated with it.
- 8 Once it is accepted that judges “make” law and do not merely “declare” it, a departure from precedent is more readily justified by characterisation of the process as one involving a mere “practice” as distinct from “doctrine”. In the immediate afterglow of enactment of the *Australia Acts* in 1986 it suited the times for the High Court – no longer bound by English courts – to discard the declaratory theory of law celebrated in an earlier era. It might be said that it was time for the High Court to re-make Australian law for Australia, but that would be overstating the case. As the nation’s ultimate court of appeal the Court came under a fresh obligation to take stock of Australian law, no longer constrained by the prospect of contradiction by the Privy Council.

9 At several points during the “doctrine” of precedent’s heyday period, and since that time, the interconnectedness of the Anglo-Australian experiences of law appears explicitly. For example:

- (a) Sir William Blackstone’s highly influential *Commentaries on the Laws of England* (1st edition, 1765-1769) were published almost contemporaneously with Britain’s loss of its First Empire, following recognition of the independence from Britain of the revolutionary United States of America, and the explorations of James Cook (during 1768-1779) that opened the way for the Second British Empire, including colonisation of Australia in and following 1788. The law reformer Jeremy Bentham campaigned against Blackstone’s love of antiquity, unwritten laws and judicial discretion. He agitated for comprehensive legislation to reform English law and procedure. His agitation directly affected the constitutional development of New South Wales, the subject of his 1803 pamphlet, *A Plea for a Constitution* (*Historical Records of Australia*, Series IV, Volume 1, pages 883-900). The establishment of the Supreme Court of New South Wales in 1824 (pursuant to the *New South Wales Act 1823 (Imp)* and the *Third Charter of Justice (1823)*), and the passage of the *Australian Courts Act 1828 (Imp)*, which codified the date for reception of English law in New South Wales, can be attributed to the combined influence on legal thought of both Blackstone (1723-1780) and Bentham (1748-1832).
- (b) Between 1788 and 1828 the principles governing the reception of English law in NSW were generally identified by reference to Blackstone’s *Commentaries*, volume 1, pages 104-105, which drew a distinction between “uninhabited colonies” settled by English colonists (entitled to the benefit of English law as their “birthright”) and “conquered or ceded countries” (where existing laws generally continued in force until changed by the English). Uncertainty attending the status of NSW (which was settled but not uninhabited), the colony was generally treated as a settled colony: Windeyer, “A Birthright and Inheritance” (1961) 1 *Tasmanian University Law Review* 635.
- (c) However, as occurred in other British colonies, this uncertainty was addressed by legislation of the Imperial Parliament. After experimentation with courts established by royal prerogative, the present Supreme Court of NSW was established (by the *Third Charter of Justice, 1823 (Imp)*, promulgated pursuant to the *New South Wales Act, 1823 (Imp)*) with jurisdiction defined by reference to English courts, including the Courts of Common Law (King’s Bench, Common Pleas and Exchequer) and the Court of the Lord Chancellor. Five years later, section 24 of the *Australian Courts Act, 1828 (Imp)* provided, in effect, that all laws and statutes in force in England as at 25 July 1828 were to

be applied in the administration of justice in the course of new South Wales “so far as the same can be applied within the [colony]”.

- (d) This provision, which was seen as a statutory embodiment of principles otherwise identified by reference to Blackstone, allowed for accommodation of local differences between England and New South Wales in the application of English law to the colony.
- (e) In fact, from the time the colony was established, judicial decisions generally, quietly adapted English law to local conditions: Bruce Kercher and Brent Salter (eds), *The Kercher Reports* (Forbes Society, Sydney, 2009), pages xxv-xxviii. Famously, this was done in the very first civil judgment delivered in NSW. In *Cable v Sinclair* (1788) NSW Sel Cas (Kercher) 15; [1788] NSWKR 7 English law of attain (which prevented a capital felon from suing in civil proceedings) was disregarded in order to allow a convict couple to recover damages from the ship’s master who “lost” their baggage on the First Fleet’s voyage to Botany Bay. Two centuries later a stricter view was taken against a convicted felon in *Dugan v Mirror Newspapers Limited* (1978) 142 CLR 583.
- (f) As Britain’s colonial infrastructure, the Empire and modern systems of communication developed, colonial courts came under closer scrutiny by the “Home Government” and, through the Privy Council, they were increasingly expected to follow the English judicial precedents.
- (g) In *Trimble v Hill* (1879) 5 App Cas 342 at 344-345 the Privy Council held that, where an Australian parliament had passed legislation in the same terms as Imperial legislation, and the Imperial legislation had been authoritatively construed by a court of appeal in England, that construction should be adopted by Australian courts until a contrary determination might be arrived at by the House of Lords.
- (h) In *Cooper v Stuart* (1889) 14 App Cas 286 at 291-292 (in a statement endorsed by the High Court of Australia in *State Government Insurance Commission v Trigwell* (1979) 142 CLR 617 at 625-626 and 634-636) the Privy Council observed that “as the population, wealth and commerce of [a] Colony [increased], many rules and principles of English law, which were unsuitable to it in its infancy, [were] gradually ... attracted to it; and ... the power of remodelling its laws [generally belonged] to the colonial legislature.”

- (i) Under the urging of Lord Campbell (1779-1861) in the middle of the 19th century (*Beamish v Beamish* (1861) 9 HL Cases 274 at 338-339; 11 ER 735 at 761), the House of Lords determined in *London Street Tramways Co Ltd v London County Council* [1898] AC 375 that its decisions on questions of law were to be treated as conclusive and binding on it in subsequent cases so that an erroneous decision could be set right only by an Act of Parliament.
- (j) Subjection of the High Court of Australia to appeals to the Privy Council was a condition of the Imperial government's agreement to enact the *Commonwealth of Australia Constitution Act* 1900 (Imp), the repository of the *Australian Constitution*. See J Quick and RR Garran, *The Annotated Constitution of the Australian Commonwealth* (1901), page 750.
- (k) The Privy Council never embraced any view that its own previous decisions were binding on it (*Read v Bishop of London* [1892] AC 644 at 654-655), perhaps a legacy of a need to deal with appeals from a diverse range of colonial jurisdictions, but, by insisting upon the gravitational pull of the House of Lords, it embraced a tendency towards the same direction. In *Robins v National Trust Co Ltd* [1927] AC 515 at 519 it manifested that tendency by an observation to the effect that a judgment of a colonial court that differed from a judgment of the House of Lords (or the Privy Council, but not necessarily the English Court of Appeal) might be assumed by the Privy Council to have been wrongly decided.
- (l) After World War II consciousness of a need for a change, or at least its inevitability, emerged in the 1960s in both Australia and England. In *Parker v The Queen* (1963) 11 CLR 610 at 611, the High Court of Australia declined to follow a judgment of the House of Lords that it regarded as fundamentally erroneous. In *Australian Consolidated Press Ltd v Uren* (1967) 117 CLR 221 at 241 the Privy Council acknowledged that the common law might develop differently in different jurisdictions.
- (m) Shortly after the commencement of the *Australia Acts*, in *Cook v Cook* (1986) 162 CLR 376 at 390 and 394 the High Court made an historic declaration:

“The history of [Australia] and the common law makes it inevitable and desirable that the courts of [Australia] will continue to obtain assistance and guidance from the learning and reasoning of the United Kingdom courts, just as Australian courts benefit from the learning and reasoning of other great common law courts. Subject, perhaps, to the special position of decisions of the House of Lords given in the period in which

appeals lay from [Australia] to the Privy Council, the precedents of other legal systems are not binding and are useful only to the degree of the persuasiveness of their reasoning.”

This was a gentle, but emphatic, declaration of judicial independence from English jurisprudence.

- (n) In *Mabo v Queensland (No. 2)* (1992) 175 CLR 1 the High Court re-interpreted the legal consequences of British colonisation of Australia and qualified the feudal origins of Australian property law by recognition of indigenous title to land. Compare *Attorney-General v Brown* (1847) 1 Legge 312, a seminal judgment of the Supreme Court of NSW in a different era. Reflect for a moment, on how the legal landscape might have appeared in 1847 to a colonial judge in NSW aware of problems associated with government of “unsettled wastelands” (as rural Australia appeared to a European eye) at risk of occupation by unrestrained, and possibly unrestrainable, settlers squatting on land; aware that in 1835 John Batman had purported to purchase the Port Phillip district (Melbourne) from local aboriginals; aware that in 1840 WC Wentworth had purported to purchase the South Island of New Zealand from local Maoris; and possessed of a belief that, in practical reality, large territories could be properly governed by no agency other than the British Crown. Consider how different the legal landscape might have appeared to late 20th century Australian judges aware of constitutional arrangements in a wealthy nation; conscious of changes in community attitudes in favour of reconciliation between Aboriginal and other Australians; and conscious too of development in indigenous land rights jurisprudence in “comparable” places such as the United States of America, Canada and New Zealand. Is “feudalism” (however it might be defined) an adequate description of a system of centralised government, with delegation of powers and responsibilities, operating over time and space?
- (o) Following amendment of the *Judiciary Act* 1903 (Cth) to refer to “the common law of Australia”, the High Court confirmed in *Lange v Australian Broadcasting Commission* (1997) 189 CLR 520 at 562-563 that, under Australia’s federal system of government, there is but one common law in Australia, the content of which is determined by that court as the nation’s final court of appeal.
- (p) In assertion of its own authority within the Australian court system, and in implicit recognition of the influence of the English Law Professor Peter Birks (a devotee of Roman Law and the civil law tradition), the High Court felt bound in *Bofinger v*

Kingsway Group Ltd (2009) 239 CLR 269 at 299[86]-301[95] to remind judges sitting in courts within the Australian hierarchy of courts that they are bound to follow pronouncements of the High Court in preference to academic statements about the law of England. As manifested in *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89 at 151 [134], the High Court's emphatic affirmation of its primacy, had the incidental effect of modifying the precedential value of judgments of the Court within the Australian legal system: Australian courts are now bound to follow considered opinions of the High Court whether or not, according to earlier notions of *ratio decidendi* and *obiter dictum*, those opinions might have been expressed as part of the *ratio* of a case or merely by way of *obiter*.

- 10 These examples draw principally upon judicial pronouncements. Their force and effect is all the greater if one takes notice of the comparatively late development of local, Australian legal texts.
- 11 Systematic, professional law reporting, with volumes accompanied by head note summaries of reported cases, began only in the second half of the nineteenth century and the modern form of legal text book did not emerge until about the same time (as explained by Professor AWB Simpson in his classic paper "The Rise and Fall of the Legal Treatise: Legal Principles and the Forms of Legal Literature" (1981) 48 *University of Chicago Law Review* 632-679, reprinted as chapter 12 in Simpson's *Legal Theory and Legal History* (Hambledon Press, 1987)). It took a long time for action-based practice books to give way to academic texts stating conceptualised "scientific" principles, as they were perceived in the 19th century to be.
- 12 Not until well into the 20th century was Australian legal research freed from the shackles of English texts as the first port of call, followed by a search for local developments. *Halsbury's Laws of England* (1st edition, 1907-1917; 2nd edition, 1931-1942; 3rd edition, 1952-1964; 4th edition, 1973-1987) was a good root of title for much Australian legal research in each of its first four editions, the last of which supported a satellite publication, *Halsbury's Laws of Australia*, the publication of which commenced in the 1990s.
- 13 The modern legal practitioner is, if anything, over-exposed to law reports. The routine publication of most Australian judgments (as well as those of other jurisdictions) on the internet since the mid-1990s has called into question the once familiar concept of an "unreported case", and affected the nature and course of every-day advocacy. A possibility that it will continue to do so occasionally presents itself to older lawyers in the unfamiliarity of recent law graduates with law reports in their physical, bound form.

AN UPDATE AND REORIENTATION

- 14 Subject to two qualifications, I adhere to the views expressed in my original paper. Both qualifications reflect events subsequent to preparation of the paper, rather than any fundamental reservations about the views expressed in it.
- 15 The first qualification is that, since publication of the paper, the United Kingdom has voted in a referendum (held on 24 June 2016) to leave the European Union; on 29 March 2017 the UK formally notified the EU of its intention to withdraw from the EU; and negotiations about the terms of its withdrawal are presently in train.
- 16 In the paper, I wrote the following:
- “With two catastrophic World Wars (1914-1918 and 1939-1945) accelerating a process of decolonisation that was inherent in the policy of devolution implicit in British colonial policy, the twentieth century required a new imagination in the administration of justice.
- That was particularly so because, in the post-war period, Britain’s security needs drew it closer to both the United States of America (with its promotion of ‘human rights’ jurisprudence) and Europe, with its civil law system(s) based on a Roman law tradition.
- There was no need to abandon any doctrine of precedent in this environment, but the House of Lords’ approach needed to be changed radically as Britain moved towards joining the European community.
- Change has occurred, in part, through the House of Lords’ redefinition of its attitude to precedent in 1966, but also through the enactment of human rights legislation by the UK Parliament and the embracing by English lawyers of civilian tendencies of mind.
- Explicable in terms of Britain’s national interests, these developments have increased the likelihood of differences between English and Australian law as Australia pursues its own national interests. [Pages 279-280]
- In the 1960s, as the British turned their attention to engagement with Europe and Australians turned theirs to institutional independence from Britain, greater flexibility in the notion of precedential authority was as convenient to both legal systems as had been a stricter regime of precedent in the development of the British Empire over the preceding century. [Page 285]”.
- 17 Sometimes hidden from view by more prominent debates about immigration and the economic consequences of “Brexit” is a question, no less significant, about the extent to which the British court system can, and should, disengage from that of the Economic Union. Implicit in that, sometimes muffled debate is a question about whether the United Kingdom will reorient its system for the administration of justice towards the common law tradition (which, to some Australian observers, appeared increasingly to be out of favour over recent

decades) and away from the European civil law tradition (to which it appeared, to the same observers, to have bound itself).

- 18 The second qualification is that allowance might need to be made for the fact that the original paper, published in 2013, was written a year or so before my appointment (in August 2012) to the bench. Since my appointment, I have enjoyed, not only the privileges of judicial life as a member of the Equity Division of the Supreme Court of NSW, but also the responsibilities of the Court's Probate and Protective List judge.
- 19 A change in perspective, from that of a barrister to that of a judge, invites a different view of the topic. For an advocate, briefed to pursue a litigious outcome by persuading a judge (or other decision-maker) to a particular view of the law, judgments can often readily take on the character of a statement of rules, exceptions or principles "applied" to facts objectively established or approved by evidence. For a judge, particularly in an era in which "case management philosophy" pervades ideas about the administration of justice, there is necessarily a shift away from such a paradigm. Responsibility must be taken for statements of law, findings of fact and case management in a world in which bright lines are not always on show, and many advocates are unable or unwilling to define crisp issues for determination.
- 20 Moreover, despite orthodox statements about the role of a judge being limited to deciding particular disputes defined by the presentation of parties' "issues", management of a specialist list of cases by a judge not uncommonly calls for something more. That "something more" is generally engagement with specialist lawyers (solicitors, barristers, academics), institutions involved in routine business associated with the Court's work, and the broader community. Slowly comes an appreciation of the importance of the *administration*, of justice, not limited to *adjudication* of particular cases. Viewed from that perspective, the law more readily takes on the appearance of a conversation, not merely a series of commands, about the identification, and solution, of problems affecting, not only individuals, but also the community served by the Court.

THE HISTORY OF AN IDEA, AND LEGAL HISTORY

- 21 A history of "The Doctrine of Precedent" is a history of about the existence, operation and development of ideas in the context of a particular institutional framework.
- 22 A full appreciation of that requires that something be said about the nature, and fields of operation, of "law", "history" and "legal history".
- 23 When they return to "first principles", lawyers struggle to agree upon a definition of "law"; historians struggle to define "history"; and legal historians are torn between two different traditions, each with different imperatives.

- 24 Lawyers (particularly those trained in the common law tradition) imagine that their judgments are based on “facts”, but they see “facts” through a prism defined by a process of litigation in which a dispute (driven by desired outcomes rather than free inquiry) is made the subject of adjudication, not in the interests of “truth” *per se* but in the due administration of “justice”.
- 25 Historians are no less driven by their own purposes in their selection of “facts” and in their presentation of themes. Not uncommonly they endeavour to construct a narrative within a pre-conceived paradigm, or parameters defined by available primary materials, however uninhibited their factual investigations may seem to be.
- 26 Historians should be wary, as practising lawyers can be, in acceptance of a judge’s statement of facts as objectively, “historically” correct. Formal findings of fact can rarely rise above evidence adduced by interested, adversarial parties.
- 27 Lawyers should be equally wary in acceptance of an historian’s description of the law. Unless they are exceptional, historians who venture into legal analysis are likely to be waylaid by more familiar influences – sociology, politics or the like – dressed up as “law”.
- 28 Perspective can be important. For some people, “law” is a command. For others, it is a custom or a norm. For some, it is an embodiment of the institutional policy of those (such as parliaments, the courts, police) who administer “law”.
- 29 Lawyers engaged in its administration, may think of law in terms of an ongoing conversation. Some people speak of “law” as it “is”. Others speak of it as it “ought to be”. The idea that there is a single, universal definition is difficult to sustain in every context; even for a single person, let alone for several.
- 30 However it be defined (assuming it can be defined) “law” is a common incident of “community”. Robinson Crusoe had no need of it when living alone, in isolation. If and when our sense of “community” changes, our perception of “law” may also change, as may be our approach to historical narratives about “law”.
- 31 A graphic, recent demonstration of this in an Australian context might be found in how Australians routinely thought of their island continent before the seminal judgment of the High Court of Australia in *Mabo v Queensland [No. 2]* (1992) 175 CLR 1, and how they think about it now.
- 32 It was a lot easier, before *Mabo*, to conceptualise Australia as a country with large “unoccupied” territory. Since *Mabo*, Australians have a greater consciousness of a country fully occupied by their indigenous compatriots as “traditional owners” of the land. A changing sense of community facilitated

the *Mabo* judgment. That judgment, in its turn, has altered our sense of community.

- 33 Though a judgment by a court of *law*, part of the controversy generated by *Mabo* was a reflection of different perspectives of Australian *history*, past, present and prospective.
- 34 That, and similar controversies, have attracted public attention under the guise of “history wars” as “historians” argue about how Australians should tell their story (or stories); what “facts” are worthy of selection, or require notice; what purpose, or purposes, should be served by historical research or story telling; and what perspectives should be accommodated in the telling of such stories.
- 35 How “history” is told is not merely a question of what happened, or may have happened, in the past. Every bit as important is how the “past” is seen in the present. Perceptions change over time.

HISTORIOGRAPHY OF AUSTRALIAN LEGAL HISTORY

- 36 In any discussion of Australian legal history, historiography – the study of the history of history – is not far from the surface.
- 37 Until 1970 or thereabouts, Australian legal history was viewed by Australian lawyers through the prism of English legal history. Witness the form and content of Sir Victor Windeyer’s classic *Lectures on Legal History* (1st edition, 1938; 2nd edition, 1949; 2nd edition revised, 1957). Its 37 chapters begin with England “Before the Norman Conquest” in 1066 and work towards the 19th century. The book ends with a chapter on “The introduction of English law in Australia”.
- 38 Compare the paradigm shift in Professor Alex Castles’ *Introduction to Australia Legal History* (1971) which, in 1982, became the classic publication, *An Australian Legal History*. This book has an intellectual point of commencement at about the same point that Windeyer’s book ended. Castles’ introductory chapters canvass “The Laws of Empire” and “The Australian Settlements”. In order, his concluding chapters canvass “Australian Statute Law-Making”, “Unenacted English Law in Australian Courts” and “The Aborigines and European law”.
- 39 Since the passage of the *Australia Acts* of 1986 by the Australian and “Imperial” parliaments, and following severance of the formal legal ties that that legislation effected – and, more especially, since *Mabo* – a contemporary Australian legal history text might feel constrained to commence its narrative, and its conceptual analysis, not with the Norman conquest of England, laws of empire developed to serve British colonialism, or the early days of British settlement in Australia, but with an exploration of Aboriginal society and its early engagement with Europeans.

WHY STUDY LEGAL HISTORY?

- 40 Part of the function of a study of Australian legal history is to alert us all to a need to construct, and deconstruct, paradigms of thought; to help us to know about, and to understand, differences in perspective; and, importantly, to aid development of a faculty to recognise patterns of thought bearing upon statements of law and the administration of justice in a modern setting.
- 41 A study of legal history provides opportunities to think about (and to analyse) the nature, content, implementation and practical effect of “law” that may not be as conveniently, or as creatively, imagined by abstract jurisprudence.
- 42 It provides an important corrective for lawyers whose natural focus is upon abstract debate about “rules”, “exceptions” and “principles” conceived as having fields of operation independent of their application to particular “facts”.
- 43 It provides, also, an important corrective for lawyers who succumb to a natural tendency to perceive the law as having always been what it is presently perceived to be – a tendency of mind reinforced by a vocation which requires recognition, and accommodation, of vested interests throughout the community in all its dimensions.
- 44 It invites consideration of whether (and, if so, to what extent) “rules”, “exceptions” and “principles” – commonly applied and consequentially assumed to be immutable – might, more correctly, be characterised as current “practice” rather than “law”; rules of convenience, if they be “rules” at all.
- 45 It focuses attention on legal *procedure*, often ignored, overlooked or treated with disdain by academic commentators, and senior practising lawyers, who long ago lifted their vision above mundane, mechanical tasks associated with knowledge of rules of court, court process, the conduct of litigation and the enforcement of judgments.

LEGAL PROCEDURE DRIVES SUBSTANTIVE LAW?

- 46 Sir Henry Maine (1822-1888), author of *Ancient Law* (1861), famously wrote in *Dissertations on Early Law and Custom* (1883) that rules of substantive law are secreted in the interstices of rules of procedure.
- 47 Historically, lawyers have tended to think about “law” in terms of available “remedies” – fitting a case into a “cause of action” – as their initial frame of reference, articulating principles governing the availability of a remedy almost as an afterthought.

- 48 The problem-solving techniques of lawyers engaged in litigation are fundamentally purpose-driven: What needs to be done to achieve a particular outcome? How can be done? In advocacy training, lawyers are taught to prepare a case “backwards” (identifying relief sought and working out the means to obtain it) and to present a case “forward” (so as to convey an image of facts unfolding naturally towards a just outcome). Although current textbooks analyse the law in terms of abstract concepts, rules or principles, lawyers still tend to think in terms of available remedies and how to get them.
- 49 The “doctrine of precedent” is a legal construct, more a practice, living in the world of legal procedure, than it is a part of the substantive law.
- 50 It has changed, is changing and is likely to change in the future with changes in court structures, the roles of judges, the way lawyers communicate, the questions lawyers ask and the ways they reason to conclusions.

PATTERNS OF RECOGNITION

- 51 In reading my original paper, I invite the audience to look for the following markers of how law is defined, how it operates and how it develops:
- (a) Legal procedure may be important as a determinant of substantive law.
 - (b) The decline of trial by jury, and the consequent need for judges to articulate formal reasons for judgment, imposes on courts a need for an “objective” process of decision-making.
 - (c) The nature of legal literature (including formal law reports, academic texts and practice books) determines how lawyers think about problems and solutions.
 - (d) Likewise, the nature of legal education, with increasing emphasis on universities and less emphasis on early “on the job” training.
 - (e) Competing philosophical world views sometimes come into play, between (for example) those who prefer incremental developments in law in the common law tradition (eg, Sir William Blackstone) and those who prefer law to be codified in writing, more in the civil law tradition (eg, Jeremy Bentham).

- (f) Precedential reasoning and occasions for it depend in large measure on the structure of courts (eg, compare before and after adoption of a *Judicature Act* system of court administration), appeal procedures and adjustments from time to time made in definition of judicial functions (eg, notice recent “delegations” of decision-making functions to arbitrators and mediators, as practitioners of “alternative dispute resolution” procedures, and to administrative tribunals, “supervised” by judges who may seek to avoid direct engagement in processes of fact finding).
- (g) Changes in legal research methodology (from practice books, to encyclopaedias, texts, the internet) can profoundly affect the nature, and course, of advocacy.
- (h) Tensions between different theories of law and how it is made (including competing views about whether it is the role of judges simply to “declare” what the law is or, more broadly, to “make” law) might seem no longer important, but they remain ever-present.

PRECONDITIONS FOR “DOCTRINE OF PRECEDENT”

52 In the paper I suggest, for analytical purposes, that history reveals five “preconditions” for the existence of a doctrine of precedent in Anglo-Australian law:

- (a) establishment of a system of courts in a constitutional setting, with decision-making procedures that are known, open and orderly.
- (b) a shared commitment to the rule of law in the community served by participants in the process leading to court judgments.
- (c) a practice amongst judges of delivering reasons for their judgments.
- (d) the availability of reports of judgments, if not other classes of legal literature.
- (e) a cohort of lawyers professionally trained to serve as intermediaries between judges who pronounce judgment and the litigants who seek or suffer the judgements.

53 In making good that case, I suggest that an understanding of the doctrine of precedent in Australia requires an understanding of the British Empire and Australia's emergence from that setting. In particular, one needs to appreciate a shift in focus over time from nation-building in England and the British Empire to nation-building in Australia, along with a growing consciousness of an emergent Australian common law distinct from that of England, looking forward from 1788 (the first British settlement in Australia) rather than backwards towards the Norman Conquest in 1066.

LAW AS CONVERSATION

54 One needs also, at least occasionally, to glimpse law as an ongoing conversation and the concept of reasoning by reference to precedents as a means of aiding that conversation.

55 In *Franklins Pty Ltd v Metcash Trading Ltd* (2009) 76 NSWLR 603 at 685 [332] Campbell JA observed that "the operation of the system of precedent provides an invaluable service to the effective operation of the law, by enabling a new start to be made from time to time, on the basis of a principle recently adopted by the High Court, that makes unnecessary what would otherwise be a time-consuming and difficult analysis of case law."

56 As a recent example of the law in conversation I draw to attention the discussion of "undue influence" in *Boyce v Bunce* [2015] NSWSC 1924 at [32]-[60] and [198]-[2007] as a result of *obiter* in *Bridgewater v Leahy* (1998) 194 CLR 457 at 474 [62]- 475 [63] and commentary of a senior silk at a seminar series remarking upon a possible avenue for a principled development of probate law interacting with equitable principles: (2016) 43 *Australian Bar Review* 32-33.

57 The High Court opened a door to new thinking about the law but, without a case appropriately conducted at first instance, there can be no scope for more than academic reflection. Without a pleading raising the issue, a court of first instance is unlikely to be able to decide the point at issue. And so, we have an example of the importance of lawyers, at all levels, engaging in a constructive dialogue about the content, and development, of the law.

58 Not all "precedents" take the form of a command and, judiciously expressed, even *obiter* may play a part.... At least (with *Bofinger v Kingsway Group Ltd* (2009) 239 CLR 269 at 299[86] and *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89 at 151[134] in mind) if it is the High Court that says something by the way.

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GCL