Common Law

The Future Scope of Australian Common Law

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BASES OF A LEGAL SYSTEM AS COMMON LAW: U.S.A.

In the United States of America the expression "common law" has a broader meaning, as evidenced by professional and popular thought and practice, than it ordinarily has in England, Australia or New Zealand. This has something to do with the existence in the United States of national law schools, which do not purport to qualify a student for practice in a particular jurisdiction, even on the substantive law side. Rather the schools seek to familiarise the student with, and develop skill in, the fundamental ideas and techniques which are associated with the operation of the law generally. In the result it is these ideas and techniques which come to be regarded as the most important aspect of the common law itself.

In a school like Harvard, these fundamental notions are developmental in a special way. The tradition there is to insist on the undesirability of making any sharp distinction between the existing state of the authorities and the desirable directions of development.[1] The common law is regarded as having its own resources for development of the legal materials, into which legal workers can fit themselves for the purpose of making their own contributions to that process.[2] This would apply as much to development of the fundamental ideas and techniques themselves as to development of legislation and to "common law" precedents in a narrower sense of that expression. What appears to be better recognised in the United States than often elsewhere is that the fundamentals are themselves at any given time the subject of relatively acute controversy among legal academics who seek to perform tasks of rationalisation, and among the judiciary. A favourite task among academics is detecting the differences among members of the judiciary about these matters and praising or

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[1] See Lon L. Fuller, *Law in Quest of Itself* (1940) at 2.

[2] Lon L. Fuller, *The Morality of Law* (1964) at 106-107; *The Problems of Jurisprudence* (1949) at 89.

condemning them accordingly.[3] A common feature of American academic writing is a belief in the existence of correct solutions to the fundamental controversies on bases about which, however, one might have strong reservations.

Basic Theory as Non-Justiciable : New Zealand

In contrast to this kind of American approach is the attitude of the former Prime Minister of New Zealand, Mr Lange, as exemplified in his remarks reproduced in the Australian Broadcasting Corporation's program "Four Corners" of 5 March, 1990. Mr Lange was concerned in these comments with a pronouncement in the New Zealand Court of Appeal, treating provisions of the Treaty of Waitangi of 1840 between Maori leaders and the British Crown as part of the law of New Zealand. Mr Lange said that the treaty was not self-executing. Except to the extent that, and so long as, provisions of the treaty were enacted by the New Zealand legislature, they were not law. Any pronouncement by a New Zealand court to the contrary was devoid of effect.

This is evidently based in the first instance on the British "theory" that treaties generally do not come into effect until enacted by the ordinary parliamentary processes.[4] It further involves the proposition that this "theory" is not itself capable of amendment, or perhaps even what might be described as interpretation, by the judiciary. It stands above and beyond the verdict of the ordinary legal umpire, even the highest referee in the umpiring system, the verdict of which would be conclusive on legal matters generally. It is not part of anything that could be described as the common law unless we think of the common law as including what *governs* the operation of laws but cannot itself be affected by processes which are part of the operation of laws in the ordinary sense. If, somehow, the processes of settling the validity of the "theory" came to be within the control of the courts and that control came to be accepted, then what would be said by the supporters of this approach would be that a revolution in the government of the country had taken place, even if it was bloodless and only partial because in most respects the new system continued to resemble the old.

In the New Zealand situation, both sides in the struggle seek to lend authority to these claims by appealing to the notion of sovereignty. Like surfaces to which the Kiwi commercial product is applied, this notion is well worn but it has worn well. The fact that it has worn so many different guises at different times, and continues to assume different guises at the same time in different hands, contributes to its continued currency. All the uses nevertheless have a common factor. In one way or another, the basing of a claim on sovereignty seeks to put the claim beyond dispute.

[3] See, for example, exercises in "Jurimetrics".
[4] See J.G. Starke, *An Introduction to International Law* (8th ed. 1977) at 94-96.

Sovereignty as a Political Fact : Nineteenth Century England

When the English nineteenth century version of the theory of sovereignty was developed by writers called positivists, it was put beyond the reach of the courts by the expedient of treating sovereignty as a political fact. Politically organised societies just *did* consist of sovereign persons or bodies exercising control over the community. Their general directives *were* law irrespective of what anybody else held about them, unless what was held could be attributed to the sovereign itself.[5] Neither courts nor anybody else could alter the facts.

The propositions of the nineteenth century British theory of sovereignty itself were presented as generalised facts, which perhaps fails to convey the strength they were expected to have. They were conceived as universal truths. They might be described as laws of nature, but this only made them laws metaphorically, possessing only a few of the characteristics of laws strictly and properly so called—those which the propositions of the theory enabled one to identify as laws of a country. The laws which were subject to supreme official control were at the other end of a kind of spectrum from laws of nature, a spectrum running from laws metaphorically so called, through laws improperly so called, and laws strictly and properly so called.[6]

While this jurisprudential theory of sovereignty was invulnerable in the eyes of its adherents to interference by those involved in the making of what were strictly laws, it was vulnerable, even in these theorists' own eyes, to *factual* criticism of the theory. Professing as they did a scientific faith,[7] they were bound to acknowledge the propriety of criticism on the ground that the theory did not express the truth of the political situation. In fact, however, a number of these who were and still are regarded as progressive political theorists, such as John Stuart Mill, were prepared to develop their views against a background of the theory of sovereignty we have described.[8] It did not incommode them. And, while English common lawyers did criticise on factual grounds the statements about the structure of political society which Mill accepted, the critics' own preoccupations were not calculated to raise questions about the appropriate breadth of the scope of the common law. They were preoccupied with historical questions and the closer they got to looking at the history of their own time, the narrower those questions became. The chief enquiry came to be the development of doctrines through judicial precedents coupled with the asking of the question: Did the courts go astray in the development of this or that doctrine? The criterion of "going astray"

[5] Jeremy Bentham, *Of Laws in General* (ed. H.L.A. Hart 1970) at 1-9; John Austin *The Province of Jurisprudence Determined and the Uses of the Study of Jurisprudence* (ed. H.L.A. Hart 1954) at 9-33.

[6] Austin *op.cit.* at 118-183.

[7] See, e.g., James Fitzjames Stephen, "English Jurisprudence" (1861) 114 *Edinburgh Review* 456.

[8] J.S. Mill, "Austin on Jurisprudence" (1863) 118 *Edinburgh Review* 439.

was the application of a rough common sense[9] and the same criterion was applied to determine where the law was to go from where it stood at any particular time. This sort of question was what the common law was supposed to be about, and hence a view was inculcated that a common lawyer's concerns were confined to the narrowest sense in which the expression common law can be used: the doctrines built up by precedents—the validity of which is always subject to opposing valid legislation anyhow.

Sovereignty as a Legal Conception : A.V. Dicey

On the other hand, the leading constitutional lawyer, whose work straddled the end of the nineteenth century and the first quarter of the twentieth century, began to open a breach in the invulnerability of official legal interference with which the theory of sovereignty as developed until then had sought to surround itself. A.V. Dicey acknowledged that the theory of British Parliamentary sovereignty which he expounded in his *Law of the Constitution* sounded like a mere application to the British constitution of Austin's theory of sovereignty—John Austin being the expositor in most detail of the theory we have been discussing. But Dicey maintained that it was a matter of law rather than political fact that Parliament was sovereign under the English system of his time. It was a question of what authority the courts recognised as supreme over them.[10] Dicey did not go so far as to say that this matter of law was common law. Under the English usage of the time this would have conveyed the impression that the rules of sovereignty were subject to alteration by Parliament itself. Dicey did not go so far as to say that Parliament could call upon the courts to act on some altogether different principle than Parliamentary sovereignty.

For students in the law school of the University of Sydney in Dicey's time, and indeed up to the beginning of the war of 1939-1945, Dicey's *Law of the Constitution* was the authoritative work on general constitutional matters. Sir John Peden, the second Challis Professor of Law, regarded it with particular reverence. Sir John was remarkable for the fact that his researches in Dicey once led to him getting an idea for the solution, in the direction which he wished, of an immediate political problem in the State of New South Wales. In the traditions of the law school, this idea was for a time regarded as so important that the faculty administrative officer used to take visitors to the spot in the library where Sir John was said to have got it. Subsequent experience suggests that, however effective it was for its immediate purpose, it was in the long run a bad idea and has caused continuing confusion. In that respect it was a salutary lesson to subsequent Challis professors against getting ideas. But its history

[9] See, e.g. Sir Paul Vinegradoff, *Common Sense in Law* (1913); Sir Frederick Pollock, "Judicial Caution and Valour" (1929) 45 *L.Q.R.* 293; W.R. Anson, *Derry v. Peek in the House of Lords* (1890) 6 *L.Q.R.* 72, esp. at 74.

[10] A.V. Dicey, *Law of the Constitution* (10th ed. 1959) at 70-85.

is an equally salutary lesson in the problems which Dicey left undeveloped of characterising sovereignty as a legal conception.

Sir John's idea related to section 5 of the *Colonial Laws Validity Act* 1865 which was an Imperial Act designed to clarify the powers of colonial legislatures, such as that of New South Wales, in the face of an unfortunate habit, developed by a South Australian judge, of declaring colonial legislation void on the untenable ground that it was contrary to provisions of domestic English legislation. Dicey described the Act as the charter of colonial legislative independence. At the same time, it would be consistent with the account of the functioning of British notions of sovereignty which Dicey himself gives, to regard it as of a declaratory charter rather than an innovative one. If it had not been for the aberrations of the South Australian judge it should never have been necessary to make the declaration at all. The Imperial Parliament had already enacted various pieces of legislation conferring on particular colonial legislative bodies the powers of the kind which the Imperial Parliament itself was treated as possessing under the prevailing unenacted (or "unwritten") constitutional theory of sovereignty, including the power which the Imperial Parliament was regarded as possessing of regulating its own constitution and the frame of government generally. The colonial legislatures were in this sense created "constituent" bodies by the Imperial Parliament by means of these earlier statutes, the statute framed for New South Wales in this respect being the *Constitution Act* 1855. The Imperial Parliament did not, however, by this kind of statute purport to divest itself of the power of legislating for the colonial area. Any attempt to do this would have raised questions about the theory of sovereignty unexplored by Dicey. But in any case the ultimate Imperial authority was regarded as desirably retained for its convenience in permitting joint Imperial action on matters of common concern until well beyond the advent of the twentieth century.

CAPTURING BASES OF THE LEGAL SYSTEM BY LEGISLATION: THE COLONIAL LAWS VALIDITY ACT

On this basis, s.5 of the *Colonial Laws Validity Act* attempted by way of declaration to kill two birds with one stone. It declared the power of colonial legislatures to establish, change, and abolish courts of judicature, and to make laws respecting the Constitution, powers and procedure of the legislature, subject to compliance with the manner and form required by British Acts, letters patent, or Orders in Council, and by the colonial law in force at the time. Some of the matters declared here related to the powers reserved to the Imperial legislature and orders of bodies under its control, others related to what was involved in the constituent powers which had been conferred on the colonial legislatures—but in the latter case certainly not comprehensively. It is an inevitable defect of an attempt to "write", in the sense of enact, a declaration of whatever is understood to be sovereign powers of regulation of a frame of government by a

legislature that it will lack comprehensiveness. If the declaration is then treated as comprehensive it may be interpreted to reduce the power or to prevent its evolution in the way that "unwritten" law, including the common law in its broader or narrower sense, develops from time to time without the necessity of enactments entering into the process.

Unfortunately, Sir John Peden latched on to the wording of the part of s.5 of the *Colonial Laws Validity Act* which required that the manner and form of regulation of the constitution of a colonial legislature should be that required by the colonial law in force at the time, rather than the broad theory which lay behind it of the constituent powers of a sovereign body—even where those sovereign powers were subject to some modification as the powers of the colonial legislatures were left in the interests of joint imperial action. This did not, however, make any difference to Peden's own immediate purpose. This was to have the government in power enact legislation which would prevent the opposition, when it came into power, from carrying out its stated intention of abolishing the upper house of the bicameral New South Wales parliament—the Legislative Council of which Sir John was then president. This plan was put into effect by enacting a requirement of a special manner and form in s.7A of the *Constitution Act* 1902 (N.S.W.) for altering the constitution of, or abolishing, the Legislative Council—a manner and form which included resort to a referendum of voters. These tactics were successful, and the courts, ultimately the Judicial Committee of the Privy Council, upheld the validity of the imposition of the requirement of the special manner and form against the attempts of the opposition, by now the government, to enact legislation abolishing the Legislative Council which ignored the requirement of adhering to that special manner and form.[11]

The suspicion that the power of the New South Wales parliament to "entrench" provisions relating to the constitution of an arm of government, by providing a special manner and form for its alteration, did *not* depend on the existence of words in s.5 of the *Colonial Laws Validity Act*, began to appear at a later stage. This was when the validity of s.5B of the *Constitution Act* (N.S.W.) was litigated before the High Court of Australia[12] : a section which required a special manner and form for resolution of deadlocks between houses of the New South Wales parliament including resort to a referendum in some circumstances. While the main High Court judgment conceded that the Privy Council had held that the entrenching provision constituted by s.7A of the *Constitution Act* depended for its validity on s.5 of the *Colonial Laws Validity Act*, it did not in the opinion of their Honours follow that the validity of s.5B depended on that provision. It could be put on the general constituent powers of the New South Wales parliament otherwise provided for it. But in fact there appears to be no difference between s.7A and s.5B in this respect.

[11] *A-G for New South Wales v. Trethowan* [1932] A.C. 526.
[12] *Clayton v. Heffron* (1960) 105 C.L.R. 214.

If the Privy Council had not been induced to approach the validity of s.7A on an unduly limited basis it might well be that the High Court would have put the validity of s.7A on the same basis as it was disposed to put the validity of s.5B, and at the time of writing the High Court no longer treats itself as bound by holdings of the Privy Council.

Since these holdings were made, the expedient of entrenching provisions relating to the constitution of the New South Wales parliament has been much exploited, to produce among other things a Legislative Council of a kind very different from the one of which Sir John was president, but always religiously observing the manner and form required by the existing legislation for changes to be made.[13] There has been no disposition to rely on the unwritten theory of what is involved in the existence of a constituent government with sovereign powers—even if qualified sovereign powers—and to dispense with the necessity of enacted words somewhere to validate the entrenching expedient.

Capturing Sovereignty by Legislation : The Australia Act (Cth.)

The *Australia Act* 1986 (Cth.) was entitled an Act to bring constitutional arrangements affecting the Commonwealth and the States into conformity with the status of the Commonwealth of Australia as a sovereign, independent and federal nation. It might be imagined, if this proposition stood by itself, that the Act was designed to clear out of the way any pieces of legislation which stood in the way of the application to Australia of the general constitutional theory of sovereignty as it might be developed by the Australian courts in the way it has been in other major common law countries. But the context indicates that the ambitions of the draftsmen were rather to reduce the theory of sovereignty itself to enacted form, in the draftsmen's understanding and wishes regarding it, and, as usual in such circumstances, to make any alterations in that understanding a good deal more difficult than it might be if the theory were left to be interpreted by the courts.

The Act went on to recite that there had been agreements at conferences of the Prime Minister and State Premiers in 1982 and 1984 to take certain measures to further the objects of the Act and that the Parliaments of all the States had requested the Commonwealth to enact legislation in terms of the Act in pursuance of paragraph 51(xxxviii) of the Constitution. This is the paragraph which conferred on the Parliament of the Commonwealth, subject to the Constitution, power to make laws for the peace, order, and good government of the Commonwealth with respect to:

> The exercise within the Commonwealth, at the request or with the concurrence of the Parliaments of all the States directly concerned, of any power which can at the establishment of this Constitution

[13] *Constitution Act* 1902 (N.S.W.) Pt III Div 2.

be exercised only by the Parliament of the United Kingdom or by the Federal Council of Australasia.

Section 1 of the *Australia Act* purported to terminate thenceforward the power of the Parliament of the United Kingdom to legislate for the Commonwealth, a State or a Territory, as part of their law. Section 2 declared the power of Parliaments of the States to legislate extraterritorially and that their legislative powers included all those for the State which the United Kingdom Parliament might formerly have exercised, but not a capacity which the State itself did not formerly possess to engage in relations with countries outside Australia. The *Colonial Laws Validity Act* was not to apply to any future State legislation (s.3(1)), no law of a State made thenceforward was to be void on the ground of repugnancy to United Kingdom original or delegated legislation, and existing such legislation could be repealed by the State Parliament (s.3(2)). But s.2 and s.3(2) were to be subject to the *Commonwealth of Australia Constitution Act* and the Constitution itself, and were not to enable a State to affect the Australia Act itself, the Commonwealth of Australia Constitution Act or the Constitution, or the *Statute of Westminster* 1931—the last mentioned being the Imperial Act which purported to put the Parliament of the Commonwealth of Australia on a sovereign basis.

Despite the foregoing momentous assumptions of sovereign powers on behalf of the Commonwealth and the States, it was nevertheless thought desirable to re-enact as part of the law of Australia something resembling words of s.5 of the *Colonial Laws Validity Act* which previously had been used to base entrenching provisions of State legislation. So s.6 provided:

> Notwithstanding sections 2 and 3(2) above, a law made after the commencement of the Act by the Parliament of a State respecting the constitution, powers or procedure of the Parliament of a State shall be of no force or effect unless it is made in such manner and form as may from time to time be required by a law made by that Parliament, whether made before or after the commencement of this Act.

The provision *for* entrenching of aspects of the State *constitutional* legislative framework is thus intended to continue itself to be entrenched, except that whereas formerly it was entrenched through the difficulty of obtaining alterations of Imperial legislation by State representations to Westminster to that end, it is now entrenched by the difficulty of securing alterations to the *Australia Act*—as provided for in the *Australia Act* itself.

The provision for repeal or amendment of the *Australia Act* including s.6 above—and for the amendment or repeal of the *Statute of Westminster* to the extent that it is not amended in its application by s.12 of the *Australia Act*—is that it is to be generally only by Act of Parliament of the Commonwealth passed at the request or with the concurrence of the Parliaments of all the States (s.15(1)). An Act of the Parliament of the Commonwealth that is repugnant to the *Australia Act* or the *Statute*

of Westminster is to be deemed an attempt to repeal or amend it (s.15(2)). But the above is not to affect any powers of the Commonwealth which might be conferred on it by an alteration to the Australian Constitution under s.128 thereof (s.15(3)).

In the result, the policy behind the *Australia Act* was plainly to spell out an Australian approach to sovereignty in this country in as much detail as could be put into the words of an enactment of manageable size, leaving as little as possible to the development of theory by the courts. This is at first sight remarkable, for it is a common theme of Australian politics that this is a progressive country, and it is a common theme among Australian lawyers that the judiciary must be involved in making its own contribution to the progress of the government of the country. But, where sovereignty is involved, there is always the countervailing tendency to put some matters beyond ready dispute, coupled with a paradoxical attitude among reformers that, once their own contribution has been made, reform in a particular area should have reached the end of the road. All that is then required of the judiciary is to implement what is then plainly laid down, so that, instead of the judiciary acting constructively to develop "theory" as changes might seem to be called for by the progress of events in society, it is merely called upon to be submissive to those who have had the control over the reins of legislation.

Section 1 of the *Australia Act*, in so far as it is directed to the courts, is on the face of it a bold call for submission. The courts are called upon to deny legislative validity to any Act of the United Kingdom passed after the commencement of the *Australia Act* in its application to the Commonwealth of Australia or a State or Territory. The enactment of such a provision on the basis of powers provided in s.51(xxviii) of the Australian Constitution is dubious. Those powers are only those which could have been exercised exclusively by the Parliament of the United Kingdom or the Federal Council of Australasia at the time of the establishment of the Australian Constitution. On any theory of sovereignty which had currency in England or Australia at the turn of the century, there was no justification for the supposition that the sovereign United Kingdom parliament had power to abdicate its own sovereignty in its entirety over a substantial area of its operation, which would be what would be involved in binding itself not to legislate for the future in relation to Australia and the Australian States and Territories. On the Austinian theory of sovereignty, adherence to which has been attributed to framers of the Australian Constitution such as Sir Samuel Griffith[14], a sovereign could not by legal means dispose irrevocably elsewhere of its own powers for the future.[15] On the theory that sovereignty was a legal conception,

[14] See Dixon, C.J.'s comments on Sir Samuel Griffith in (1964) 110 C.L.R. xi.

[15] Jeremy Bentham first laid down this plank of the theory : *Of Laws in General* (ed. H.L.A. Hart 1970) at 53-71. Austin described limitations by the sovereign and his own power as "positive morality merely" : *op.cit.* at 259.

such as Dicey held, there was no practical difference in the present respect, because Dicey assumed that the courts would interpret the sovereignty which they legally attributed to the United Kingdom parliament along similar lines in practical effect to what the Austinian theory required.

This is not to say that it would not be open to the courts to interpret paragraph (xxxviii) according to some later developed theory of what the sovereignty of the United Kingdom parliament involved. The paragraph might be treated as, in that sense, ambulatory. But such an approach faces the difficulty, in the first place, that the attribution of exclusive powers to the United Kingdom parliament over Australia at the turn of the century only makes sense on some such theory of sovereignty as the above. Adopting a different one would destroy the foundation of the power as expressed. In the second place, more sophisticated theories of sovereignty which have later been developed would not assist the supposition of the requisite powers to bind itself in 1900 of the United Kingdom parliament. This is not to say that such theories might not have assisted the Australian authorities to assert the sovereign powers of this country's federal government and the States on a different basis. Rather what we are suggesting is that the method adopted by the *Australia Act* for this purpose was inept, and damaging to the orderly and intelligible development of Australian law and government.

The theories of sovereignty current at the time of the coming into effect of the Australian Constitution may put less difficulty in the way of supporting the validity of one aspect of s.15(1) of the *Australia Act* than do later theories. This section is the provision which, it will be recalled, *inter alia*, provides for the *Statute of Westminster* 1931, as in force from time to time, to be repealed or amended in its application to the Commonwealth and its States and Territories by the same method as the *Australia Act* was passed and generally only by that method. That is to say, by an Act of the Parliament of the Commonwealth passed at the request or with the concurrence of the Parliament of the States—taking effect under s.51(xxxviii) of the Constitution. The *Australia Act* itself repealed some sections of the *Statute of Westminster* in its application to this country. Firstly, it repealed s.4, which provided that no Act of Parliament of the United Kingdom passed after commencement of the Act was to be deemed to extend to a Dominion as part of the law of that Dominion, unless it was expressly declared in that Act that the Dominion had requested, and consented to, the enactment thereof. Secondly, it repealed s.9(2), to the effect that nothing in the Statute of Westminster was to be deemed to require the concurrence of the Parliament of the Commonwealth of Australia in any law made by the Parliament of the United Kingdom with respect to any matter within the authority of the Parliament or Government of the Commonwealth of Australia, in any case where it would have been in accordance with the constitutional practice existing before the commencement of the Act that the Parliament of the United Kingdom should make that law without such concurrence.

The *Australia Act* also repealed s.9(3) of the *Statute of Westminster*, which was an interpretation provision applying to s.9(2). Finally, the *Australia Act* repealed s.10(2) of the *Statute of Westminster* which empowered a Dominion to revoke its adoption of the *Statute of Westminster*.

One object of these repeals, in their context in the *Australia Act*, was evidently to disavow the use of the request and consent procedure to enable Acts of the United Kingdom parliament to be passed for Australia, the Australian States, or the Australian Territories, once the *Australia Act* came into operation. This was despite the fact that the Commonwealth had found it convenient on more than one occasion since the passage of the *Statute of Westminster Adoption Act* 1942 to use the request and consent procedure to enable transfer of United Kingdom territory to Australia.[16] It even did so again at the time of the passing of the Australia Act. The Commonwealth and the States, by Acts of each one, requested the United Kingdom Parliament to pass an Act in substantially identical terms to the *Australia Act* (Cth.). The United Kingdom Parliament acceded to this request by the *Australia Act* 1986 (U.K.). But this was evidently intended to be the last time the procedure was used.

Assuming that the power conferred on the Australian parliament by s.51(xxxviii) of the Constitution is ambulatory in the sense in which we have used that term, there would be no difficulty, on the basis of Austinian or Dicey theories of sovereignty, in finding repeals of United Kingdom legislation which was passed in 1986 valid, such as the repeals of provisions of the *Statute of Westminster* in the *Australia Act* (Cth.) itself. Nor would there be any difficulty in prescribing a particular manner and form for such repeals or amendments for the future, as the *Australia Act* does. This is no more than the exercise of the constituent powers of a sovereign body to regulate itself. But on the basis of later theories of sovereignty as developed in England, the matter becomes more complex. More complex, because the *Statute of Westminster* is no ordinary Act of the United Kingdom parliament in the view of such theories.

SOVEREIGNTY IN AUSTRALIA UNDER THE HART THEORY

A sophisticated twentieth century theory of sovereignty was developed in England by H.L.A. Hart, who was professor of jurisprudence in Oxford over much of the third quarter of the century, from early in the fifties to the late sixties, after which he remained active in University government, scholarship and writing. His *Concept of Law*[17] came to dominate consideration of the characteristics of a legal system in that country, at least until the appointment of his successor as professor of jurisprudence, Ronald Dworkin. For Hart, a legal system derives its systematic quality

[16] See *Cocos (Keeling) Islands Act* 1953 (U.K.) and *Christmas Island Act* 1958 (U.K.) passed as a result of the *Cocos (Keeling) Islands (Request and Consent) Act 1954* (Cth.) and *Christmas Island (Request and Consent) Act* 1957 (Cth.).

[17] H.L.A. Hart, *The Concept of Law* (1961).

from the interrelationship of primary and secondary rules, the latter kind governing the operation of the former kind in various ways. They consist of rules of adjudication conferring powers of judging and law enforcement, rules of change conferring powers on persons or groups to legislate, or to change the legal positions of themselves and others, and finally a system contains a rule of recognition which settles the validity of rules as part of a particular system by stating what the criteria of validity are to be for those administering the system.[18]

The criteria specified by the recognition rule of a system will be in large part *sources* having authority for those administering the system, and it will be essential for the quality of the system as such that these sources are presented by the recognition rule in a hierarchy.[19] One of the conditions for the recognition of the obligatoriness of the lower order sources for the administrators will be the absence of overriding obligations created by a source higher in the hierarchy. Thus the highest sources in the hierarchy might be described as sovereign: their authority is not limited by subjection to a different source. It is not fatal, however, to the systematic character of the law that there should be a multiplicity of sources ranked highest, provided that what emerges from a given top source is consistent with what emerges from the other top sources. Nor need a person or group be specified as the top source. It may, for example, consist of a fundamental constitutional document or there may be a number of top sources consisting of fundamental constitutional documents.

The process of transition from British colony to independent nation is seen by Hart thus: at first the legal system of the colony is a subordinate part of a wider system in which the supreme element of the recognition rule is that what the Queen in Parliament enacts is law for, *inter alia*, the colony. But, at the end of the process of achieving independence, the basis of authority of constitutional documents in the status of the Westminster parliament is only historical fact, for the constitution no longer owes its authority to that status. The legal system of the colony now has a "local root" in that the rule of recognition no longer refers to the original source of the material, but depends on local official use and popular acceptance.[20]

The process thus described is not seen by Hart as a development *of* the system to which the colony originally belonged. It involves a breaking away from the original system and the formation of a new one. It is thus revolutionary even if the revolution takes place in an amicable fashion on all sides. There are "fascinating moments of transition during which" a new legal system emerges from the womb of an old one.[21] It may seem at first sight curious that this sort of process cannot be regarded

[18] See the convenient resume in Neil MacCormick, *H.L.A. Hart* (1981) at 20-22.
[19] See MacCormick's hypothetical example of a recognition rule under the Hart system in MacCormick, *op.cit.* at 110.
[20] H.L.A. Hart, *The Concept of Law* (1961) 116.
[21] *Ibid.*

as part of the oridnary process of the development of legal systems occurring as systematically as anything else about them. But Hart regards it as being an essential quality of the legal system that the secondary rules of the system have a fixed core of meaning through the life of the system. It is this which combines with the relation of primary and secondary rules to make it systematic in the distinctive manner that a legal system is—as distinct from much woollier and less effective bodies of rules like codes of morals.[22]

An implication of all this is that what takes place at the fascinating moments of transition cannot be regarded as operating *under* either system, the new or the old. Documents giving effect to determinations made then cannot be regarded as operating under the old system, even if they are enacted in the same manner and form as ordinary legislation within the old system. If they were recognised as "valid" in those terms, it would have to be said that it is feasible for a system radically to change its own recognition rule. This is, according to the theory, impossible. Nor can such documents be considered to operate *under* the nascent system. The document will be framed in terms which demand its recognition by the new system, but it is the response by officials administering the new system which creates that validity in terms of the theory—the acquisition of the "local root". It is in those circumstances a creative document, not one which can be assessed by existing criteria. The *Statute of Westminster* would be generally recognised at this stage as having this sort of significance—as the product of a fundamental compact between the United Kingdom and the Dominions to come into effect for a Dominion when that Dominion adopted the Act.[23]

In terms of this theory, the sovereign documents of the Australian legal system at the federal level by 1942 appeared to be the *Commonwealth of Australia Constitution Act*, including the Constitution, which the *Statute of Westminster* purported to place in that position, the *Statute of Westminster* itself performing that function as well as giving the United Kingdom parliament a purely auxiliary role in the Australian system at the federal level, and the *Statute of Westminster Adoption Act* 1942 (Cth.) constituting an acceptance of this arrangement by the Australian parliament as provided in the *Statute of Westminster*. Strictly, the formal processes with the documents did not have this effect of themselves. They required to become accepted in Australian official practice and especially judicial practice. But there was little doubt of this occurring.

The fundamental accommodation reached by the above processes did not purport to establish the independence from the United Kingdom of the Australian States. Instead, the documents reflect, especially in the provision of the *Statute of Westminster*, now purported to be repealed,

[22] See the emphasis on the fixed core of meaning of legal rules particularly in his "Positivism and the Separation of Law and Morals" (1958) 71 *Harvard L.R.* 393.

[23] Contrast the adherence to the Austinian view in *British Coal Corporation v. R.* [1935] A.C. 500 per Viscount Sankey L.C. at 520.

that the request and consent procedure for United Kingdom legislation was not required in areas in effect reserved to the States, and the desire to preserve the United Kingdom association for the States as a possible buttress against the advance of Australian Commonwealth power.

Even at the Commonwealth level, the adoption of the *Statute of Westminster* in this country had to await the fall of the government of R.G. Menzies, sometimes described as the last of the Queen's men. Moreover, when the Curtin government proceeded to adopt the Statute, there was some finding of excuses for doing so during a war in which the British were an ally, with the Battle of Britain relatively fresh in people's minds, and with Australian troops suffering reverses with the British to Australia's north. So it was said that the extraterritorial powers provided by the *Statute of Westminster* for a Dominion which adopted it were essential to the administrative handling of Australian forces abroad. This argument scarcely held water in the light of common law holdings asserting the existence of such power anyhow. Here we have a further probably unnecessary spelling out of matters which could probably have as well or better been left to judicial development of constitutional theory, whether or not we call it an area of the common law.

If Sir Robert Menzies was the last of the Queen's men at the Commonwealth level, Sir Joh Bjelke-Petersen was perhaps the last of the Queen's men on the State level. But the results of his efforts to buttress the position of his government in Queensland by seeking to utilise the British connection were the reverse of encouraging.[24] Once, therefore, the possibilities of such use were consigned to the obsolete, what might have been anticipated to achieve State independence from the United Kingdom was an arrangement with that country paralleling the arrangements which the *Statute of Westminster* had followed in respect of the Commonwealth: a conference of the States—and perhaps the Commonwealth—and United Kingdom government representatives, followed by the adoption of the United Kingdom legislation by the States.

Ambiguous Functions of the Australia Act (U.K.)

As has been seen, this is not what happened. What we have are two Acts, the *Australia Act* 1986 (U.K.) and the *Australia Act* 1986 (Cth.) with substantially identical provisions. The Commonwealth Act does not specifically refer to the United Kingdom Act at all, reciting instead that the procedures have been followed to enable that Act to be passed in pursuance of s.51(xxxviii) of the Constitution. The United Kingdom Act was passed at the request and consent of the Commonwealth government and parliament as required by the *Statute of Westminster* as it then stood, given through the *Australia (Request and Consent) Act* 1986 with the concurrence of the States as given through the *Australia Act Request Acts*

[24] See the *Appeals and Special Reference Act* 1973 (Qld.), the central provisions of which were declared invalid by the High Court in *Commonwealth v. Queensland* (1975) 134 C.L.R. 298.

of 1986. Since the request and consent procedure was designed to deal with situations in which the United Kingdom Parliament was no longer to be regarded as a full partner in disposing of the matter involved, but only a convenience, this procedure scarcely gives the impression that there was any fundamental compact in which the United Kingdom participated by way of withdrawal from the Australian scene.

Further, the Commonwealth Act went much further than was required for the above purposes. We have seen that the Commonwealth is referred to before the States in the title as a party whose position was to be formalised in conformity with the status of the Commonwealth of Australia as a sovereign, independent and federal nation. One wonders why, if all this was achieved by the Commonwealth Act, the United Kingdom Act was necessary at all. Perhaps something done *ex majori cautela*, so that if the courts were to hold that some provision of the Commonwealth Act was invalid by itself, resort could then be had to the United Kingdom Act. But there is no *admission* that the United Kingdom Act was required in any particular respect.

This approach reflects aspects of the political, and in some degree the judicial, history of attitudes towards the British connection in Australia in the more than forty years between the passage of the *Statute of Westminster Adoption Act* (Cth.) and the passage of the *Australia Acts*. The new waves of immigration after the conclusion of the war of 1939-1945 came to be associated with the notion that the surviving elements in the British connection were a source of provocation to the growing elements in the population which were not of Anglo-Celtic origin. This attitude was also taken even, or perhaps especially, where surviving elements in the connection appeared to have only a symbolic character. Following occasional demonstrations in favour of republicanism, steps were taken during the period of the Whitlam government to take some of the heat out of reactions to the Queen by legislating to acclimatise her. The *Royal Style and Titles Act* 1973 (Cth.) gave the assent of the Commonwealth Parliament to the use by her Majesty, in relation to Australia and its territories, of the style: "Elizabeth the Second, by the Grace of God Queen of Australia and Her other Realms and Territories, Head of the Commonwealth." The difference between this style and that formerly used following the *Royal Style and Titles Act* 1953 (Cth.) was that the references to Her Majesty as Queen of the United Kingdom and as Defender of the Faith were dropped.

The *Australia Act* (Cth.) continues in some of its more detailed provisions to attenuate the formal powers of the Queen as the titular sovereign. Thus s.7(2) provides that, subject to later subsections, all powers and functions of Her Majesty in respect of a State are exercisable only by the Governor of the State. The first qualification to this is that it does not apply in relation to the power of Her Majesty to appoint and terminate the appointments of Governors. But this in practice only means that the State government exercises control over the governor to this

extent, and this is reinforced by the provision that the advice to Her Majesty in respect of a State shall be tendered by the Premier. The further provision that Her Majesty may exercise functions from which Her Majesty would be precluded otherwise by s.7(2) means in practice only that ceremonial visits may include such things as formal opening of the State parliament.

The prohibition in s.8 of disallowance or suspension of State enactments by Her Majesty is of interest in that it applies to State but not Commonwealth laws. It could not apply to Commonwealth laws because the Queen's powers in that respect are preserved by s.59 of the Constitution, and while distinguished bodies recommended the abolition of this provision a few years ago, the referenda proposals were not proceeded with and it makes no practical difference that they were not.

Provisions involving the Queen but having less personal direction in the *Australia Act* are those, firstly, terminating any responsibility of the United Kingdom government in respect of State matters (s.10). This, again, is a provision which does not make a practical difference. A second such provision is that terminating appeals from any Australian court to Her Majesty's Privy Council (s.11). This is a rare example of a provision in the Act which does make a practical difference, since appeals from State courts might previously go in matters within State jurisdiction to the Privy Council. Because the High Court under s.74 of the Commonwealth Constitution may grant a certificate on an *inter se* question for appeal from it to the Privy Council, the definition of Australian court does not include the High Court. Otherwise it would follow that, the section was to that extent invalid. An exercise of power under s.51(xxxviii) of the Constitution is made subject to the Constitution by s.51 itself. What might have been the position under the corresponding provision of the *Australia Act* (U.K.) is less clear, but since the High Court would never dream of giving such a certificate the question will no doubt remain an academic matter in the lawyer's sense of the word.

The aspect of the *Australia Act* legislation in which it appears as a political exercise containing much that it is of no practical effect, and at the same time complicating issues concerning the fundamental sovereign bases of Australian law, may further be regarded as in part a product of misrepresentation of the history of the British connection after the style of the hero's activities in George Orwell's *1984*. By the time of the passage of the *Australia Act* legislation a school of thought had arisen, claiming to be forward thinking, which gave an account of the *Colonial Laws Validity Act* 1865 (U.K.) presenting it in an opposite light to that in which it had been presented by Dicey. Instead of being the charter of colonial legislative independence, it became an instrument of imperial oppression of the colonies including those in Australia. Without any regard to the context which explained the origins of the *Colonial Laws Validity Act*, a bare examination of the provisions of the Act was used to represent it as a British declaration of its claim to dominance over its colonies.

Credence was given to this kind of rewriting of the history of the British connection from within the legal system itself by some judicial pronouncements of Justice Murphy from the High Court bench, though they expressed in some respects a view beyond those to which other High Court justices committed themselves at the time.[25] His Honour's view of sovereignty is in one aspect backward looking, since it proceeds on the basis that legal authority follows political power. It has long been a criticism of the nineteenth century Austinian view of the character of sovereignty that it failed to distinguish between political power and legal authority—in this sense between might and right. Justice Murphy could not be accused of confusing the two notions in the way that the Austinians could, but he roundly asserted that the one followed the other.

In the Murphy view, the validity of statutes such as the *Colonial Laws Validity Act* was based on the paramount force of the United Kingdom over the colony, and once the political control ceased the legal authority ceased as well. He applied this view by claiming that the control ceased in 1901 and so did the legal authority. From that time the continuing basis of the authority of the Constitution was its acceptance by the Australian people and the United Kingdom had no authority for the continuing government of Australia in Commonwealth or State aspects. The basis of State authority from that time forward came to be s.106 of the Constitution. This is the section which provides that the Constitution of each State of the Commonwealth is, subject to the Commonwealth Constitution, to continue as at the establishment of the Commonwealth, or as at the establishment of the State in the case of new States, until altered in accordance with the constitution of the State.

A feature of this approach is that, while the application of the general theory expressed might seem to call for careful attention to what was the political situation in Australia in 1901, nothing of the kind is pursued in its elaboration. The sovereignty in Australia at that time is just assumed to have resided in the people. This is despite the fact that the theory poses that legal authority follows the actual political power. It would surely be out of the question to establish that democracy in Australia had progressed at that time to the point where *real* power resided in the populace generally, or even that it does now. Moreover, the elaboration of the theory fails to take account of the fact that examination of popular attitudes themselves in 1901 would disclose a good deal of attachment to the British connection, which has not altogether disappeared among the most conservative since.

The effect of this glossing over of the difficulties of working out the application of the theory on the political side meant that his Honour was able to proceed immediately to the paramountcy of the

[25] See *Bistricic v. Rokov* (1976) 135 C.L.R. 552 esp. at 565, 567; *Robinson v. Western Australian Museum* (1977) 138 C.L.R. 283, esp. 343-344; *Viro v. R.* (1978) 141 C.L.R. 88 esp. 164; *China Ocean Shipping Co v. South Australia* (1979) 27 A.L.R. 1 where other members of the Court declined to follow Murphy, J.'s view.

Commonwealth Constitution as the sovereign political document, with the subsequent constitutional settlements like the *Statute of Westminster* merely formalising what had occurred in substance already. Presumably what his Honour said about the Statute of Westminster would apply with equal force to the *Australia Act* legislation of 1986. There was really substantially no need for its major provisions—and having regard to the way the *Australia Act* (Cth.) is drafted in reliance on a Constitutional provision, namely s.51(xxxviii) and not obviously on anything else, it might be imagined that the draftsmen of the 1986 legislation may not have been poles apart from Justice Murphy. Whether the 1986 legislation taken as a whole is based on a view like that of Justice Murphy, with the United Kingdom legislation mere formalising, is left ambiguous. So are the foundations of legal sovereignty in Australia.

It may well have been hoped by the framers of the 1986 legislation that the questions left ambiguous would never have to be resolved by the High Court anyhow. The Court might be expected to proceed consistently with the assumptions of the Murphy view without feeling called upon explicitly to adopt them. This would occur if the Court accepted the approach that the *Australia Act* (Cth.) merely operates under the Australian Constitution, and the *Statute of Westminster* is subject to alteration at will through legislation under the Constitution as provided by s.51(xxxviii) in the future as in the past it was through the *Australia Act* (Cth.) itself. Then the fundamental problems of broad constitutional theory in Australia disappear. Everything is just a matter of applying the Constitution and legislation under it, especially when the legislation itself, like the *Australia Act*, purports to dispose of broad questions of sovereignty which would otherwise be left to the development of constitutional theory on a "common law", court developed, basis.

Even supposing that these expectations were realised, there would nevertheless be large questions of the proper interpretation of the constitutional provisions and legislation under them. In the United States, these questions are regarded as fundamental ones involving the development of creative techniques by the courts for handling constitutional words. Justice Murphy had something himself to say about giving the words of the Australian Constitution their broadest meaning[26], though whether particular provisions of the Australian Constitution were accorded this treatment in his hands might be open to question. The breadth of application he gave to provisions dealing with general personal rights might be thought to contrast with the treatment he gave to provisions dealing with professional or property rights.[27]

But there is much more to the problems of constitutional interpretation as conceived in the United States than breadth or narrowness of

[26] See, e.g., his judgment in *A-G for Victoria ex rel Black v. The Commonwealth* (1981) 55 A.L.J.R. 155.

[27] See, e.g., his treatment of s.92 of the Constitution in *Buck v. Bavone* (1976) 135 C.L.R. 110 and see *Uebergang v. Australian Wheat Board* (1980) 145 C.L.R. 266.

interpretation, just as there is to interpretation of legislation generally. All that is involved in the notion of creativity of interpretation by the courts is involved as well. It is a question of moulding the operation of the constitutional provisions to community requirements at a given time, calling on the courts to develop notions of upon what considerations it is proper for them to make continuous adjustments in their interpretation.

Certainly, there has been a good deal of attention in Australia in recent years to problems of statutory interpretation generally. This is true of professional interest, extra-judicial pronouncements of judges, and even some legislation. But the drive of this development has been in the reverse direction from that of encouraging a positive role by the judiciary. The overriding objective has been to achieve more extensive judicial examination of materials disclosing the intentions of framers of legislation—at the cost of prompt dispatch of judicial business and possible cost to the significance of parliament. Parliament generally does not have the opportunity to amend the *travaux preparatoires* preceding legislation to which importance is now being attached. But in any case, the success of this kind of development is more likely to inculcate a submissive role in the judiciary to the government in power than to stimulate a creative role of the kind that is envisaged in the United States.

AUSTRALIAN SOVEREIGNTY AND THE PROJECTED ABORIGINAL TREATY

In any case it is unrealistic to suppose that questions which may call for judicial, common law, development of constitutional theory have been finally disposed of by formulated legislation. In view of some developments on the local scene, there is much that is ironic in the reliance in the *Australia Act* (Cth.) on a power in the Constitution in an interpretation of it which requires the supposition that the sovereignty of the United Kingdom over the Australian colonies in 1900 was absolutely unlimited. In other contexts the supposition of such unlimited sovereignty is regarded by some who think of themselves as progressives as a reactionary view and a source of provocation to the indigenous inhabitants of the country. It is envisaged by the government in power that something in the nature of a treaty will be eventually concluded with the aborigines, one feature of which will be the recognition of the traditional rights of the aborigines, at least as a historical matter, though going how much further one does not know. Are we then to have what would be regarded as another legal revolution, with assumptions about the roots of Australian sovereignty in conflict with those which have so recently been brought into prominence by the *Australia Act* (Cth.)? That was in fact only the second time that s.51(xxxviii) of the Constitution was exploited in any major way, the first being the off-shore constitutional settlement as recently as 1980.[28]

[28] See the *Coastal Waters (State Powers) Act* 1980 (Cth.) and associated State legislation.

In the cases of the seventies in which attempts were made to assert aboriginal rights, the legal arguments took their beginning, neither from nineteenth nor the twentieth century theories of sovereignty which we have thus far canvassed, but from propositions purporting to represent the common law, in particular as contained in Sir William Blackstone's *Commentaries on the Laws of England.* It is perhaps significant that Blackstone's work represents in major degree a common root of English and, more importantly, American development of the common law. He was said to have potted the common law for export. The propositions to which appeal was made in these aboriginal rights cases were certainly common law in no narrow sense of the term. They rate as broad propositions of constitutional theory. They are about the foundations of the law in countries adopting the common law system.

Blackstone said that British settlers take with them, as their "birthright", the laws of England both statutory and unenacted, to a colony settled in uninhabited country. An "uninhabited country" was defined to be one which, at the time of its occupation by the British, was uninhabited or inhabited only by people whose laws and customs were considered inapplicable to British settlers. In the early history of New South Wales, doubts were raised whether the colony qualified as a "settled" one in the light of its penal origins, but the *Australian Courts Act* 1828 declared that generally laws and statutes in force in England at the time of the passing of the Act were to be in force in the colony, as far as they could be. In 1889 the Privy Council held that New South Wales was a settled colony in any case.[29]

In *Milirrpum v. Nabalco Pty Ltd*[30] in 1971, Justice Blackburn of the Northern Territory was called on to decide whether the common law imported into this country recognised the existence of aboriginal custom in relation to land. It was argued that, at common law, rights under native law and custom which were identifiable were recognised until validly terminated by the Crown with the consent of the peoples, or by forfeiture after insurrection, or by explicit legislation or act of state. His Honour held, however, that this rule did not apply to a settled colony and therefore the doctrine was no part of the law of Australia. He considered in particular that earlier High Court authority[31] established that the Crown was the source of all title to land in this country.

In *Coe v. Commonwealth*[32] in 1978 declarations concerning aboriginal land rights were sought in the High Court before Justice Mason, some being made on the basis of aboriginal sovereignty and some relying on the Constitution, legislation and common law as supports for aboriginal autonomy rights. His Honour generally found that the former claims were

[29] *Cooper v. Stuart* (1889) 14 A.C. 286 at 292-293.
[30] [1972-73] A.L.R. 65.
[31] *Williams v. Attorney-General for NSW* (1913) 16 C.L.R. 404; *Municipality of Randwick v. Rutledge* (1959) 102 C.L.R. 54.
[32] (1978) 18 A.L.R. 592.

inconsistent with the accepted legal foundations of Australia. The other claims were found to lack definition and his Honour declined to allow them to be amended. An appeal to the Full High Court was dismissed by majority.[33] The circumstances in which Australia became part of the dominions of the Crown was considered, except by Justice Murphy, to involve acts of state which were not justiciable. But for the rest Justices Jacobs and Murphy dissented because they considered that the question was properly raised whether Australia was not settled but conquered territory under the common law, and that this entitled the plaintiffs to pursue their case that the aboriginal people were entitled to a continuation of proprietary and possessory rights.

The case was not regarded as determining this last issue, which was expected to be resolved by *Mabo v. Queensland and the Commonwealth*[34], the proceedings in which were commenced early in 1982. The plaintiffs in these proceedings, the Murray islanders among inhabitants of Torres Strait islands, acknowledged that their islands had been annexed to Queensland and came under the sovereignty of the Queen, but at the same time maintained that this did not disturb their rights, which were referred to custom, traditional native title and use and enjoyment claimed to be recognised by Anglo-Australian law. The claimants did not initially contest the sovereign powers to alter the rights in question of the Commonwealth, the laws of which were said to protect them in any case, but it was disputed that the rights could be affected by the State of Queensland which was claimed to be threatening to abolish them.

The course of the litigation became protracted. In 1986 Chief Justice Gibbs remitted the issues of fact raised by the pleadings, and questions of determining particulars to be supplied, to the Supreme Court of Queensland[35], preferring that court for this purpose to the Federal Court of Australia. But he reserved liberty to the parties to apply to the High Court. Subsequently proceedings were taken before the Full High Court[36] demurring to the defences by the State of Queensland which relied on the *Queensland Coast Island Declaratory Act* 1985 (Qd.). The defence claimed that the rights of the plaintiffs, if they existed, had been retrospectively abolished by that legislation.

The High Court held by a 4 to 3 majority that the legislation was invalid, being in conflict with valid provisions of the *Racial Discrimination Act* 1975 (Cth.). If the rights existed and the inhabitants of the islands were people who peculiarly held those rights as aboriginals, the Queensland legislation singled them out for discriminatory treatment not applied to other inhabitants of Queensland contrary to s.10(1) of the Commonwealth Act.

[33] (1979) 24 A.L.R. 118.
[34] (1986) 64 A.L.R. 1; (1988) 83 A.L.R. 14.
[35] (1986) 64 A.L.R. 1.
[36] (1988) 83 A.L.R. 14.

At the same time it was acknowledged that this did not determine the fundamental issues which would be required to be resolved if the case was ultimately tried—whether or not the rights in question did in fact exist and on what legal basis. The parties did not wish the Court to resolve these issues at this stage, apparently because neither side considered itself ready to argue the momentous matters involved. Justice Wilson, in the minority, described these questions as questions of law and fact of fundamental interest to all Australians.[37] Justices Brennan, Toohey, and Gaudron, in the majority, said that there was a preliminary question whether the rights existed which was of the greatest importance. It involved the consideration of the legal effect upon native title of both annexation and subsequent alienation of rights in and over land.[38] But their Honours had been asked to suspend judgment on these matters and they did.

International Law and Australian Sovereignty

The High Court judgments on the proceedings in demurrer were delivered as recently as December, 1988. In the meantime, in 1987, Justice Neaves, in the Federal Court of Australia, had dealt with a relevant aspect in *Re Phillips.*[39] In that case the applicant aborigine claimed that he was not bound by the federal bankruptcy legislation, basing his claim on the denial of sovereignty of the Commonwealth over him which he sought to support by pronouncements of the International Court of Justice. His Honour decided that the position under international law was not relevant to a claim in a municipal court in Australia and dismissed the claim of lack of sovereignty of the Commonwealth on the ground that this matter was settled by High Court decisions. He further held that the issue whether the British annexation of Australia was by settlement or by conquest was not here relevant, since it could only affect the application of the common law to aborigines—not statute law.

The sharp distinction drawn between international law and municipal law—the latter meaning, for this purpose, the law of a particular nation-State—is historically a concomitant of English nineteenth and early twentieth century positivistic theory concerning the unlimited sovereignty of the nation-State. In Austinian theory there was not one sovereign in fact governing the world community, but a multiplicity of sovereigns governing particular areas, whose commands were law for those they governed. Nothing else was law. In the theory of Dicey the practical result was no different, for the loyalty of their judges in the British law area at any rate was to the body in that area they accepted as sovereign and that loyalty did not go beyond that. To a similar effect are words of Justice Windeyer in *R v. Foster.*[40] His Honour said that whatever

[37] 83 A.L.R. at 19.
[38] 83 A.L.R. at 28.
[39] (1987) 72 A.L.R. 508.
[40] (1959) 104 C.L.R. 256.

limitations international comity may impose are the consequences of political propriety and of the limitations of political power, not of legal capacity.[41] The view of a modern positivist like Hart is at first sight not much different from the earlier views taken in England, for he does not regard international law as possessing the characteristics of a union of primary and secondary rules which belong to a developed system of law.[42]

It is nevertheless consistent with a view like Hart's that a municipal system of law may choose to incorporate some or all of what prevails as international law into the system. But what Justice Neaves is saying is that Australia does not. Up to the present the practice has been to treat international custom—one of the two bases of international law—as law in Australia only if it is consistent with a local statute which is law for the courts and consistent with any common law rule applicable. The practice concerning treaties—the other basis of international law—has been to treat them as coming into full effect generally only through local legislation. Unless so enacted there are so many qualifications to the recognition of the treaty as such as law, that this part of the recognition rule of the system might appear to have little scope for operation.[43]

For the time being, the question of whether the courts are to treat the attitudes of the older jurisprudence as continuing to determine the position in Australia so that it adopts the parochial British approach among the jurisprudential possibilities disclosed by modern theories, may appear to be one of those fundamental questions which is capable of being shelved. A buffer against having to decide some hard questions is the existence of the Commonwealth external affairs power. The High Court interprets this power to extend even to internal matters like the position of aborigines, which have become of international concern during the period when international fora for discussion of human rights in various countries have developed.[44] A Commonwealth government sensitive to its international reputation, more especially when it wishes to exercise influence internationally in matters affecting the local Australian community, may be anxious to enter into international treaties and implement them promptly by legislation which will then override any contrary provisions in the legislation of the States.

Yet the current direction of developments in the international arena has not been dominantly towards the making of treaties between nations of the international community which would require signatories to recognise special claims of indigenous peoples within their territories. For example, Nettheim and Simpson point out that the claims involved here are different from the human rights law which has developed

[41] At 307.
[42] H.L.A. Hart, *The Concept of Law* (1961) at 222-231, 269.
[43] See R.D. Lumb, *The Constitution of the Commonwealth of Australia Annotated* (4th ed. 1986), at 159.
[44] See, e.g. *Koowarta v. Bjelke-Petersen* (1952) 39 A.L.R. 417 esp. per Stephen J. at 453.

internationally through custom and treaty.[45] Human rights law is useful as a basis for challenging impediments in international law and practice which deny to indigenous people the rights enjoyed by the dominant population. But Nettheim and Simpson add that this scarcely addresses the central claims of indigenous peoples to self-determination and land rights.

In their description of the developments in the international dimension, they do point to recent studies within the UN system working towards a Universal Declaration of Indigenous Rights. They point out that work is being done within the UN towards a study of treaties between nations and their own indigenous peoples, and that the attention of the working group in this area has been drawn to the existence of proposals for an Australian treaty. They conclude that the international community will certainly have an interest in failure to achieve such a treaty or any attempt to abrogate it once it is concluded. This last is a reference to a statement of John Howard when he was leader of the federal opposition, opposing such a treaty and foreshadowing that it would be "torn up" if the opposition found itself in government.

This and other material canvassed by Nettheim and Simpson suggest that the favoured course among supporters of recognition of aboriginal rights would be the conclusion of a local treaty with aborigines implemented by Commonwealth legislation relying on the Commonwealth power under s.51(xxvi) of the Constitution. Whereas this power originally referred to the people of any race for whom it is deemed necessary to make special laws, other than the aboriginal race in any State, the exception was removed in 1967. So long as such legislation existed following the terms of the treaty, the rights sought to be recognised would in general be effectively guaranteed, subject to problems of interpretation of the treaty as implemented by the legislation. But perhaps not altogether. Since all the paragraphs of s.51 give powers subject to the Constitution, we might have bizarre arguments to the effect that particular powers accorded were inconsistent with, for example, the provisions of s.92 of the Constitution.

Possible Future Problems of Australian Constitutional Theory

The problems for the courts would proceed to a much more fundamental level if with a change of government any attempt was made to repeal the legislation implementing such a treaty, or even if the government passed subsequent legislation which was alleged to be inconsistent in some respect with the earlier legislation. In that case the High Court might be faced with the question, from the angle of the Hart jurisprudence, whether the treaty, or the treaty and legislation in combination, had effected a revolution in Australian constitutional theory. The argument that it had

[45] 65 *Current Affairs Bulletin* (No.12) at 18.

might be advanced on some such basis as that the Treaty, or the treaty and legislation together, had come to be a fundamental documentary foundation of Australian law, in the manner of the federal Constitution, and in the manner of the *Statute of Westminster* as it was supposed to be at least before the passage of the *Australia Act* legislation. As such, it might be considered irreversible except by a further revolution in the legal system such as some new fundamental compact creating some new fundamental constitutional document or documents. A still more fundamental approach leading to a similar result might be to accord the treaty the status of an international treaty on the ground that it was made with the aboriginal nation, especially if the treaty itself so asserted, and that the old British rule making treaties subject to local legislation from time to time required revision in Australia's current circumstances.

These particular problems of constitutional theory would not arise for the courts if a treaty with the aborigines were to be implemented in terms by amendment to the Australian Constitution. Then the fundamental "sovereign" document for Australian law would continue to be that Constitution and no possibly revolutionary step would need to be taken. The problems of interpretation of the provisions would remain, including possibly intractable questions of fact relating to the involvement of particular aboriginal groups in traditional customs, unless any matters of this kind were disposed of by "deeming" provisions. Yet any attempt at constitutional amendment for the purpose of settling aboriginal claims might appear to be unlikely in present circumstances. Very elaborate procedures recently undertaken to involve community leaders in the task of constitutional reform did not produce encouraging results, to say the least. It has virtually become an axiom that serious political divisions destroying bipartisan support for measures of constitutional reform will be fatal to the outcome of referenda. This even appears to apply when claims are made by supporters of reform that opponents should feel guilt and shame about their attitudes. The government could not justifiably be accused of proceeding undemocratically if it refrained from submitting legislation concerning an aboriginal treaty to a referendum aimed at constitutional revision. The requirements for such a referendum to be successful are more complex than approval by a simple majority of voters.

Moreover, the supposition made in terms of Hart's theory of law that the different procedures we have canvassed would be of a momentous, revolutionary nature from the jurisprudential point of view is not one that is currently generally accepted by legal theorists. Even those closest to Hart have questioned his view that the law consists largely of rules with a central core of meaning, either generally or in the field of constitutional theory in particular.[46] We have noticed that there are always sharp differences of opinion about what the fundamental propositons of the constitutional theory of a system are at any given time. Hence they

[46] See, e.g. Neil MacCormick, *H.L.A. Hart* Ch.10.

become subject to change, and this is the "common law" approach to them of the kind that is found in the United States. The law in all its areas is expected to progress in response to need, explicitly as far as possible, though it may be argued that changes do in fact take place over a period whether this is explicitly recognised by those administering the law or not. The history, for example, of the royal prerogative in England would be discovered over a substantial period to have moved down the hierarchy of sources of law to a greater extent than could be accounted for by reference to explicit legislation, parliamentary or judicial. Such matters are fundamental ones for a legal system, but evidently subject to gradual processes of change.

Moral Authoritarianism versus the Common Law

At the same time, procedures which leave room for the operation of common law develoment in the future of Australian constitutional theory may not satisfy the current demands of the more enthusiastic of supporters of recognition of aboriginal rights. We have seen as a common thread in theoretical arguments about sovereignty the attempt to put some matters beyond argument and so, inferentially, as far as practicable beyond processes of change. What is true of sovereignty is equally true of attempts to secure the rights seen as belonging to particular groups or individuals by means of legal guarantees. Those concerned with the *Australia Act* legislation evidently considered that they had come to the end of the road in the matter of recognition of comprehensive Australian sovereignty. Similarly the demands for a treaty recognising aboriginal rights would undoubtedly be associated with an aspiration to achieve finality in the formulation of aboriginal rights—to recognise once and for all aspirations which are considered to be undeniably legitimate. Further change and development, except by way of supplementation consistent with the original documents, would not then be expected. Yet revision is what is typical of common law development. Nor is this revision typically unidirectional in any sense: there is an ebb and flow of recognition of particular kinds of claims as circumstances change and judicial attitudes change.

What is by contrast typical of Australian political life at the present time is the attempt to put some matters beyond argument by disposing of them by moral assertions. When, during the recent election campaign, the Prime Minister thought he detected an attempt to restrict Asian immigration in the opposition by adversaries to proposals for a multi-function polis, he did not seek to argue with them. Once the opposition to such immigration was seen as a factor in the opponents' position, it was roundly and comprehensively condemned as immoral.

Such an approach to grave matters recalls intellectual controversies of the early nineteenth century, as indeed much of the intellectual climate surrounding Australian politics at the present time does. One of the particular targets of the utilitarians, led by Jeremy Bentham, at that time was the rationalist ethic on which the approach of natural lawyers was

seen by Bentham to be based. Bentham claimed that the *reason* with which rationalists supposed humanity to be equipped, operated instead by way of simple *ipse dixit*. What was morally right and what was morally wrong for the rationalists came to have that feature by arbitrary assertion. The Benthamites, such as the lawyer Austin we have several times mentioned, sometimes used the expression "moral sense" as better calculated to describe the supposed source of these moral propositions.[47] This is an expression which was sometimes used by the proponents of rationalistic views themselves, then and up to the present time. For example, "moral sentiments" are discussed by the Harvard moral theorist John Rawls.[48]

Rationalism may sometimes be presented as a moral theory directed to the appraisal of individual conduct. But once it is directed to establishing legal propositions, as in the case when it becomes natural law, or propositions about what is politically required, it enters much more significant arenas for community life generally. It then has capacities as an instrument of political oppression. This is more particularly seen to be so when the expression "moral sense" is used to characterise it as better calling attention to the mode of its operation. For whereas defect of reason in non-compliant individuals or groups may be excusable as mere misfortune, defects of moral sense are things about which the delinquents who suffer from them are expected to feel guilt and shame. They have to understand that they can expect at least to be ostracised, which is a kind of exercise of compulsion directed towards them, whether or not they also become subject to the compulsive sanctions of the law. In extreme circumstances, which are unhappily becoming more commonplace, delinquent attitudes may provoke those with acutely sensitive moral senses into various illegal, but perhaps condoned, acts themselves. These may range from technical infringements of property or personal legal rights to acts of violence, most commonly against property but possibly also against the person.

AUSTRALIAN SACRED TOPICS

The American philosopher John Searle has proposed the term "sacred topic" to describe the subjects relating to which moral sensitivity goes so far as to excite the last mentioned kinds of reaction in the face of opposition of a kind or degree which the moralist will find seriously provoking.[49] In Australia, the topic of aboriginal rights is certainly included among the sacred topics. A special feature of it is that the outrage of the aborigines themselves may go to the length of self-destruction in the face of what is seen as severe provocation, in which case official supporters of the aboriginal cause will proceed to focus blame on those

[47] See John Austin, *Lectures on Jurisprudence* (ed. Campbell 1885) 567-575.
[48] John Rawls, *A Theory of Justice* (1972) at 479-490.
[49] John Searle, *The Campus War* (1972) at 18-20.

who are considered to have contributed to the provocation or failed to avert the consequences.

Less peculiar in kind to the aboriginal situation, but more prominent in degree than in the case of other sacred topics in Australia, are the complex methods of identifying those claiming the rights, and who are allies and opponents, in the course of elaborating the moral situation. The diversity of aboriginal groups at the time of European settlement, the interbreeding of aborigines with other groups since that time, and the effects of the impact of European ways on aboriginal social organisation, all create difficulties in the way of identifying who is to be regarded as an aborigine, what groups are entitled to the benefits of particular customary rights which demand recognition, and of whom and what an aboriginal "nation" could be said to be composed.

Some of these matters may be realistically disposed of as questions of fact. Perhaps it was for this reason that a group of Torres Strait islanders found themselves at the centre of the test case launched in the High Court with the subsequent participation of the Supreme Court of Queensland. Questions of entitlements on a customary basis may be more easily settled in the more remote areas. By contrast, the *Aboriginal Land Rights Act* 1983 (N.S.W.) leaves little to be determined by reference to customary behaviour as an aboriginal. For the purposes of the Act, an aboriginal is defined as one who is a member of the aboriginal race of Australia, who identifies as an aboriginal, and who is accepted by the aboriginal community as an aboriginal. Emphasis is thus placed on a person making common cause with aboriginals and acceptance by an aboriginal community, not itself defined, of a person making common cause with them.[50]

While who *is* an aborigine is presumably a genetic matter (even if not without its complications), the other tests depend upon choices being made which have ethical aspects. The ethical aspects are even more prominent when the situation is elaborated in reference to the question of who are to be regarded as responsible, and perhaps to be held to account, for aboriginal grievances. The original source of the grievances is now centuries old, though continuing wrongs are catalogued by claimants down to the present time, involving the Australian electorate and government in so far as the current wrong is conceived to be failure of redress of wrongs of the past. If the authors of the original wrong are conceived to be the British, this may have been a factor in recent efforts of the Australian government sharply to dissociate itself from the British in ways such as those we have canvassed. But even making the British in round terms responsible means that the British of former times are identified in the claims with their current successors, in some sense, in Australia or elsewhere. This identification is a much more complicated matter than the biblical visiting of the sins of the fathers on the children,

[50] S.4(1).

and may justifiably be regarded as oppressive by those who are comprehended as delinquents under such a vaguely identifying umbrella.

Other sacred topics in Australia may not involve complexities in the same degree. But they all involve in high degree the feature that good causes have become overlaid with aggressiveness and peremptoriness. What is fondly imagined to be characteristic of a democratic society is that decisions will be made by appeal and persuasion in a context of freedom of thought and expression. Freedom of thought and expression may not have been legally abrogated in this country as a formal matter, though some of the aspects of anti-discrimination legislation and standards imposed by the Australian Broadcasting Tribunal are examples of legal fetters upon free speech at the present time. What is more important are the fetters imposed by the moral coerciveness which is evident in any context in which a sacred topic becomes involved.

The central weapon of moral authoritarianism is the categorical imperative: the imperative that takes the form "You must do X—full stop." The central vehicle of free discussion and resolution of problems, on the other hand, is the hypothetical imperative: "You need to do X if objective Y is to be achieved." Then the addressee is in a position to assess whether that is true, and whether in any case objective Y appeals to him. The search for truth, and for common ground about the values involved, proceed at the same time. But the categorical imperative cuts all this short, and that is what it is meant to do. An attempt to introduce competition of objectives into discussion will receive short shrift from one to whom a particular objective is sacred. A recent television commercial presented by forestry interests represented an environmentalist responding to whatever considerations were presented to him on behalf of those interests with a repeated: "I don't care". Tasmanian environmentalist Dr Bob Brown, when presented with arguments on behalf of increased immigration which might be thought to threaten the environment, is reported to have responded with a round: "Stop immigration altogether."

Authoritarianism by Appeal to Evolution

The moral authoritarianism which centres around the sacred topics commonly purports to support itself argumentatively by appeal to the direction of social development. But this is only a justification of more specific forms of authoritarianism by reference to a more comprehensive variety. Evolutionary ethics as a doctrine or set of doctrines sometimes seeks to represent itself as scientific by coupling it with the biological evolutionary theory of Charles Darwin. But in fact Darwin's theory has no ethical connotation at all. It merely asserts that what survives will be what is best fitted to survive. That conveys nothing about the extent of good or evil there may be in what survives. The various forms of evolutionary ethical theory are older, the most significant historically being perhaps the Marxist theory that society continually improves dialectically

through the changing relationships of classes to the means of production in a society at any given time. Marx's theory was itself developed by turning the older eighteenth century Hegelian theory on its head. In Hegelian theory it is the social spirit which evolves in a dialectical manner. But in either theory the direction of social development is expected to be from worse to better. Social progress as it is seen is the universal justification for political measures.

In either form and in various offshoots this kind of theory has dark blots on its record. The history of the Soviet Union from its earliest days was a history of tyrannical procedures and suppression of criticism and opposition by inflicting on opponents the guilt of political offences. Those like Lenin and Stalin who purported to represent the progressive force in society, the workers, arrogated to themselves powers of decision which they merely *attributed* through the Party to the working class. Meanwhile the working class itself suffered, and we now see a terminal stage of this direction of progress, wildly different from what it was represented would occur. Hegelianism, for its own part, has a dismal record of connection with the aggression of Prussia and then greater Germany, conspicuously through Bismarck and Hitler. If we regard the notion of a determined continuous progress of society as a myth, at least the alarming consequence in practice of evolutionary theory are plain enough from its own history.

In Australia, appeals to the directions of the progress of society are as discursive as they are universal. In so far as any attempt to delineate the pattern of progress occurs, it appears to centre around attempts to identify the features of modern Australian culture. Such a project was adumbrated at least as long ago as the Whitlam era of Commonwealth government, and the idea continues to be canvassed, for example, in learned societies. Both the Academy of the Social Sciences and the Academy of the Humanities have held conferences concerned with this area. What has to be foreseen as a result of such attempts is that movements of the culture will be seen to be compounded of movements towards the greater fulfilment of objectives comprehended within the sacred topics. The worthy Australian emerges as an enthusiastic environmentalist, a defender of aboriginal rights, a meticulous respecter of the values of various cultural groups within the Australian environment and whatever may be conceived of as human rights generally, an ardent feminist, a person with fierce pride in being an Australian, and censorious of those who do not measure up to his or her standards.

The connection of all this with the evolutionary variety of authoritarian morality is seen in what kinds of criticisms of government policy are praised and blamed. The especially praiseworthy critic is the person who is *ahead* of the powers that be in a direction in which society is seen to be moving: the position in which environmental organisations such as the Conservation Foundation and the Wilderness Society discover themselves to be at the present time, exerting influence upon the futures

of political parties. On the other hand, a person or group who is thought to be *behind* or opposed to what is conceived as the course of development has to cope with the stigma of being un-Australian, or the moral sanctions of being an enemy of the people. What is seen as legitimate criticism becomes canalised. Questions of the order of "Where did we go wrong and how do we backtrack?" are for eastern Europeans, not for the confident Australians concerned with sacred topics. A particular feature of common law thinking, by contrast, is shown in the very tentative character of propositions of the common law, and the scope for withdrawal, modification and qualification in the face of having gone wrong. There is constant room for experience to teach, and a lack of rigid adherence to doctrine: an absence of sacred quality in what has to be moulded.

Some features of the working of evolutionary moral notions serve to restrict the functioning of common law notions in their traditional areas of operation. We do not mean here to refer only to those fields like transport and industrial accident law where in New South Wales the common law rules themselves have been restricted in operation to greater or lesser degree with changes of government. What is of more general importance are institutional changes over the past several decades. The preservation of the effective operation of common law techniques depends on the existence of a unified legal system. The traditional rubrics within which professional lawyers think, which involves some degree of abstraction from the concrete situations with which the law deals, designed to enable concentration on particular factors before taking others into account, becomes unrealistic and out of touch in the absence of a coherent institutional system. The traditional distinction between substantive law and procedure, for example, is hardly workable if there is a conglomeration of courts, tribunals and procedures which are called upon to deal with cases in different ways to the point where the ordinary rules of substantive law may cease to exist and the traditional methods of procedure may also be specifically abrogated.

Until 1970 the emphasis in law reform in New South Wales was in the direction of unifying the legal system along traditional lines. After that the tide set in the opposite direction, with the establishment of special courts in the federal field with a conglomeration of heads of jurisdiction. There was also a proliferation of bodies in State as well as federal fields having some or all of the functions of an ordinary court, but with dispensation from the application of some or all of the traditional legal rules, including the rules about appeals and the exercise of supervisory jurisdiction. Even specialisation in judicial functions of itself threatens common law thinking, especially when the judges in a particular area are chosen on the basis that they are believed to have acceptable attitudes in the specialised area in question. There was in fact some retreat from specialisation through the recognition of this problem in the history of the Federal Court of Australia.

Where it is part of the political philosophy of those in power that advantage should be taken of a cultivated reverence for change, it is

important not only that change should occur but that change should appear to occur. Dissatisfaction with the provision of ordinary services by government may often seem to require nothing more than the improvement of efficiency in administration, but such a unspectacular and perhaps difficult process is unlikely to be sufficiently impressive. What is likely to be more impressive is systematic change, especially if it takes visible form in the passage of legislation. Sometimes legislation directed at the solution of a particular source of concern will be covered by more general legislation applying to the area already. But simply to pile fresh legislation on top of it will give an appearance of progress, especially if no point is made of the presence of the existing legislation. The result may in fact be to complicate administration. Legislating for special bodies to deal with particular matters is another way of giving the appearance of reform, but while there may be advantages if the special body is cheaper than the ordinary courts, this is commonly offset by the abandonment of traditional common law protections for the parties involved. A more satisfactory approach might be the more pedestrian task of improving accessibility of the ordinary courts to the ordinary citizen. The criteria of importance which are applied in setting up special bodies are also likely to mean that access to them is more likely to be available to those whose objectives are connected with the vindication of interests in the sacred topic areas, rather than to those with real needs which do not attract the same favourable publicity.

If intending law students of fifty years ago followed the advice of the then Dean of the Faculty of Law in the University of Sydney, Sir John Peden, they proceeded first to Arts and included philosophy among their courses. In that case they began with a study of Platonic dialogues, including the *Euthyphro*.[51] In it Socrates was involved in cross-examining Euthyphro on Euthyphro's proposition that piety is what is pleasing to the gods. One of Socrates' lines of argument was that different gods were known to make different and conflicting demands, and the pious person became involved in conflicts which piety provided him with no means of resolving. There appears to be no difference in the polytheist's problem from that of the person piously dedicated to the furtherance of the objectives within the sacred topics, except that polytheism makes more sense. When the theist of any kind tells us that he has an authoritative command from on high, at least we know what he is talking about, whether or not we are able to find ourselves making the same commitments on the same grounds. But when a categorical imperative is presented simply as a moral proposition its source of authority is left obscure.

Authoritarianism by Appeal to Utility

Jeremy Bentham, the classical critic of the dogmatic character of moral assertions, believed that he had the answer in the means by which moral

[51] See *Socratic Discourses by Plato and Xenophen* (ed. A.D. Lindsay 1910) at 300-320.

argument could be substituted for moral dogma, and in particular in the means by which conflicts between moral objectives could be argumentatively resolved. They could be balanced in the scale of utility. The proper balance was achieved by investigating what, in what degree, contributed to the greatest happiness of the greatest number.[52]

In our current social and political situation in this country, resort is commonly had to utilitarian considerations in situations of strain between the cherished objectives attributed to Australian society by the authoritarian moralists. Moreover, the manner of appeal is very similar to what occurred among the Benthamites, where the arguments tended to be produced in economic terms. For the Benthamites, the model of a social science—then called a moral science—was the laissez faire economics expounded by David Richardo[53], and epitomised for Benthamites by Bentham's lieutenant James Mill.[54] The argument that the wealth of the greatest number was achieved by free market forces was extrapolated to apply to human values more generally, so that general politics assumed the shape of what was then called political economy. Market language and ideas were applied to society generally despite the theoretical difficulties of treating society generally as a market[55], especially if it claims to be a pluralist society, an idea to which Australians at least pay lip service.

Recent exchanges between the Prime Minister and the Leader of the Opposition are illustrative of this kind of approach at the present time. The major urban environments are threatened by pollution, the principal causes of which are the pressures of expanding urban population and its economic activities. It is particularly in the major cities that increases of population through migration occur. The committed environmentalists harass the bodies with the largest responsibilities for disposing of waste, and do not direct their complaints to what may be thought the root causes. The supporters of ethnic causes on the other hand are likely to have their attention concentrated on the effects on their fellows of restriction of immigration.

In these circumstances Dr Hewson claims that there "is" not really an ethnic problem, but an economic problem. A cost-benefit analysis has to be made of immigration. The Prime Minister is not affronted by the argument put in this form. He mildly responds that the investigation proposed is unnecessary because the existing governmental policies have got the answer to the problem right anyway. If we do not currently have any ideal solutions to this kind of problem operating, at least the economy is "on course" because the correct policies are "in place".

[52] Bentham borrowed this notion from Joseph Priestley, *An Essay on the First Principles of Government* (1771) at 17.

[53] David Ricardo, *The Principles of Political Economy and Taxation* (3rd ed. 1821).

[54] James Mill, *Elements of Political Economy* (1826).

[55] See John Anderson, "Utilitarianism" 10 *Aust. Journal of Psychology and Philosophy* no. 3, at 161-172 reprinted in John Anderson, *Studies in Empirical Philosophy* Ch.20 at 227.

While the inability to take care of itself of the laissez faire economy and society posited by the utilitarians has long been abundantly demonstrated, its ways of thinking continue to provide a myth of a future functioning society in which all values are capable of reconciliation on a mutually satisfactory basis. A leading columnist in the *Sydney Morning Herald* of 9 April 1990, Max Walsh, proves to his own satisfaction that population growth in this post-Malthusian age caries no threat of continuing or increasing pollution, for the right kind of technical progress will result in economic growth being rendered consistent with environmental requirements. The environmentalists thus, ultimately, have no need to quarrel with the ethnic groups, or with business groups looking forward with anticipation to larger markets here and elsewhere. Nevertheless, we may comment that, in the course of a century and a half, continual adjustments have had to be made to theory to preserve the kind of myth to which the political economist now commonly subscribes. Significantly, this subscription is much commoner in the current morally and politically authoritarian society than it was fifty years ago. The theory becomes one that various adjustments have to be made from outside the economic system to keep it properly functioning, or to bring it to a state of proper functioning in the way that the utilitarians supposed that it would if left to itself. The demands made for support of the adjustments have acquired an increasingly moral charge.

The onset of major depressions in the late nineteenth century and during the earlier part of the twentieth century proved the inability of the great free enterprise system to maintain itself in conditions in which resources were fully employed—meaning most acutely, for the ordinary person, human resources. The great depression of the 1930s further called attention to the system's inability to prevent chronic build-ups of foreign debt for numbers of countries—though because the debt situation was then much exacerbated by the existence of war debts, it possibly seemed less of a normal occurrence then than it does now. On the moral side, even in those days the prophetic redemption theme ("You have sinned, so rise up from sloth and high living and follow me") was raising its head. It stemmed in the first instance, particularly in Australia, from the advice sought from Sir Otto Niemeyer of the Bank of England.[56] But the demand addressed to the general community to pull in its belt was far from exciting the degree of conformity then which it appears to do now. There was savage political contention about the kinds of interests in which the demands were being made, whether *general* blame for the state of affairs could be attributed to the community, and whether the "ordinary" person stood to benefit by conformity.[57] The economic demands made on the community now in the interests of contributing to the supposed optimum economic and societal situation make simplistic

[56] See C.B. Schedvin, *Australia and the Great Depression* (1970) at 180-182.
[57] Witness the history of the government led by J.T. Lang in New South Wales.

identifications of responsibility in the same way as do proponents of the sacred topics. The positivistic lawyer knows when he is making fictional identification of, for example, an employee with an employer. But part of the stock in trade of the authoritarian moralist is to exploit obscure identificational fictions as if they were real.

As different devices are deemed necessary to bring "us" on course for the increasingly Utopian destination of a reconciled economy and society for which the analysis presented by the utilitarians has served as a jumping off point, the picture of the future itself undergoes various changes, in the manner of the society depicted in George Orwell's *Animal Farm*. The attempts to preserve from outside the operation of the competition within which free market forces need to operate according to the classical theory, in order to produce optimum conditions for all, were begun in the United States very early. Legislation set up government bodies to restrain monopoly. In Australia no serious efforts were made in the same direction until Attorney General Murphy's legislation setting up the Trade Practices Commission.[58]

But this was late in the days when free competition was considered to be of the essence of the Utopia. Decades before, leading American economist J.K. Galbraith was telling us that yearning for numerous competitive businesses was a kind of social nostalgia.[59] The benefits of civilisation as we know it were in high degree due to the large corporation and the efforts of bodies in the United States to restrict their growth had produced results which were virtually nil. Not wholly dissimilar accounts are given of the efforts of our own Trade Practices Commission. Max Walsh has remarked, in the *Herald* of 5 April 1990, on the failure of the Commission to stop the reduction of competition in the brewery, print media, retailing and airline industries in recent years. But while economists may make this kind of observation, what they do not do is to reconstruct a general theory of how the picture of an optimal economy and society of the future can be established or maintained when one of the major features of that picture as presented in the past has gone with the winds of change.

Although Walsh does not express general views about the development towards monopoly in the economy, what does worry him is the development of monopoly in financial institutions. Among the devices used for the securing of optimal performance of the private sector of the economy in comparatively recent times has been governmental control of the financial sector through public bodies like the Reserve Bank. It was thought that market forces might appropriately control the industrial and commercial sectors, if the government controlled the flow of money, internally and externally.

[58] The *Trade Practices Act* 1974 (Cth.).
[59] J.K. Galbraith, *The Liberal Hour* (1960) at 120-122.

But then the financial sector was partially "freed up". In the matter of the exchange rate, for example, the Reserve Bank no longer enjoyed the comprehensive control which could be exercised by unlimited buying and selling at rates it fixed. It ran in and out of the market like the little mice of which Suckling wrote in describing the feet of the bride beneath her petticoat in the "Ballad of the Wedding". As with the bride's feet, there even appeared to be some fear of the light, since the extent of the Reserve Bank operations and the reasons for them were not always made clear at the time. No general theory is advanced by way of explanation, but we are somehow supposed to believe all will come out right, even in the absence of justification for sporadic interference with forces determining the exchange rate in classical theory.

One reason why we are expected to have confidence in the adjustments made to the economy by bodies charged with these functions is their business representation. Veneration for the entrepreneurial function, and various functions associated with it, is another of those things which have survived despite the loss of confidence in the continuation of the discipline of competition which once purported to justify confidence in those achieving business success. In the large corporation any simplistic correlation between performance of the top persons and the success of the company itself financially may often be difficult to detect, having regard to the pressures towards bureaucratisation within the company, the flows of expert information and advice from without which affect decision-making, and the numerous pure contingencies in external circumstances which may affect success. Personalities make reputations in booms and lose them in recessions. The extent to which outcomes depend on rational decision-making is always exaggerated both in the political and private sectors. Moreover, once the conditions for the supposed discipline of competition working on the profit motives of different entrepreneurs are much diminished, the traditional justification for the supposition that the success of a particular corporation reflects its contribution to an optimum condition of costs and prices in the market disappears. On top of this, it was always a fallacy of the utilitarian economics that there is a correlation between the effective demand in the market to which the operation of competition is supposed to give maximum satisfaction and the actual wants and needs of consumers or members of society in general.

For all this, the current official attitudes towards big business, at least at the official level, contemplate privatisation, total or partial, as a solution to the problems of public bodies—such as, for example, the Commonwealth Bank and Australian Airlines—active in areas in which we have seen particular concern expressed about the growth of monopoly. Official attitudes towards the entrepreneurial and associated functions are also reflected in features of the wages system. The salary earner generally is expected to keep his ambitions for increases within narrow limits laid down by public functionaries charged with the determination of these matters. Any attempt to break these bounds is not just repressed:

moral ignominy is heaped on the miscreants and the resulting losses to the community are made their responsibility, with the usual moralist arbitrariness in attributing cause and effect to particular persons. On the other hand, business executives are accorded much greater freedom to negotiate, and much greater increases in remuneration "packages" are condoned. Persons who are exercising public functions supposed to parallel the top business functions of the private sector are expected to be rewarded with parallel salaries and benefits.

This particular official line carries much less conviction within the general community than most, but when we examine the grounds on which the opposition is rationalised, we find ourselves observing another kind of authoritarian moralism of a utilitarian kind contending with the official application of utilitarianism. The objections are put on the ground of wage and social justice. Justice in the abstract is something of which people are universally found to be in favour, though a Yale professor was once heard whimsically to say that he could reconcile himself to his enemies suffering injustice. This attitude should be enough to relegate the proposition that one supports justice to the realm of tautological propositions. Justice is what one favours. But of course this does not appear on the surface, since the conception incorporates the feature of morally authoritarian propositions by which the demands of the speaker are given a spurious and mysterious objectivity, carrying supposed obligatoriness upon others. Moreover, it is *consuming* demands which are ordinarily represented by demands for justice, demands for a share. But this hardly tackles the problem of what would be an optimum distribution. We are just left to suppose that there is some optimum distribution on some utilitarian calculus which economists and accountants and entrepreneurs could work out.

AUTHORITARIANISM IN LEGAL EDUCATION

The amalgam of evolutionary ethical and utilitarian moral theory which characterises Australian political thinking at the present time has had a powerful impact on legal education in this country since the 1939-1945 war. Before that time legal education, especially in Sydney, was modelled upon the English system. Afterwards it came to be subject to American influences with a much increased interaction of scholars, assisted by the development of the Fulbright system, and a much increased interest in this country by the major American law schools. Of special interest in the present context is the influence of the work of Dean Roscoe Pound of Harvard, who was writing up his multi-volume work on Jurisprudence[60] in the immediate post-war years, at the same time as his former assistant, Julius Stone, was developing his work as Challis Professor of International Law and Jurisprudence in Sydney.

[60] The first volume of R. Pound, *Jurisprudence* appeared in 1959.

Pound was particularly influenced by what he termed civilisation theories of law, which for him meant theories of the role of law in the advance of civilisation, theories such as that of Rudolf Stammler[61], who in turn was influenced by Hegelian notions of the unidirectional development of society and law from worse to better. Pound thus endeavoured to map the typical phases of the development of the legal system from the more primitive to the more civilised. What introduced notions like the utilitarian calculus into his theory was that he posited that the current stage in the advance of civilisation is the complex economically organised society, and that its basic premise is that resources should be made to go round with the least possible friction and waste.[62]

What distinguishes Pound's utilitarianism from Bentham's is in the kind of examination which was supposed to be necessary for the working out of the utilitarian calculus. For Bentham the problem was simplified by his view that after you had seen a comparatively few human beings you had seen them all. That was how he justified his readiness to produce codes of law for countries in areas with which he was unfamiliar. Pound on the other hand was all for making detailed examinations of the environment in which legal decisions had to be made. Hence the term sociological jurisprudence to describe his kind of approach. But what was never demonstrated was that, once the examination had been made, the sums could be done which would produce something which could be described as social justice which reconciled the different interests of different groups. It is a curious feature of Stone's work that the examination of laws in relation to justice precedes his sociological examination of law.[63]

It is against this background of theory that the current issues between professional training in law and broader social training for the purposes of the lawyer are misrepresented. Professional training is supposed, in this thinking, to consist of training in the logical application of what the professional teacher is supposed to think of as fixed rules, to facts. This is supposed to be what a positivistic approach to law calls for and the broader jurist generously concedes the necessity for the qualified person to have learned some legal rules in the course of some such process. But this must be balanced by a general sociological inquiry.

The sociological inquiry has been introduced in the typical legal education of this kind by an elaborate attack on the supposition of the general fixity of legal rules. This exercise is rather un-American. The view in that country has tended to be that the falsity of the fixity supposition is patent, and it scarcely needs to be taken seriously. What some American theorists such as Jerome Frank[64] have placed a lot more emphasis upon

[61] Pound *op.cit.* at 147-148 says that Stammler led us to see that the law goes through epochs.
[62] Pound op.cit. at 432.
[63] See the order of treatment in Julius Stone, *The Province and Function of Law* (1946) and the order of publication of the successor books to that volume : *Legal System and Lawyers' Reasonings* (1964), *Human Law and Human Justice* (1965), *Social Dimensions of Law and Justice* (1966).
[64] Jerome Frank, *Law and the Modern Mind* (English ed. 1949).

is rather the supposition that the law is applied to the facts. In the course of litigation the law is applied to the facts *as found*, and the extent of the gap between the two is the jumping off point for various kinds of American inquiry. The American approach might seem to be the more practical emphasis. But the existence in England of theories like Hart's, claiming that there is at any rate a fixed "core" to legal rules which determines the ordinary course of events in legal matters, is no doubt a justification for the Australian investigations of the strange things that may happen to the legal rules themselves in the course of application to the facts as found, and their subsequent use in the working of precedent.

Having disposed of the myth of general fixity in the legal rules, the sociological jurist proceeds to investigate the real determinants of judicial decisions. He then supposes that these are the intrusions of notions of justice, and in view of the fact that the judicial opinion is proceeding as if legal rules were being mechanically applied, this intrusion tends to be surreptitious or even unconscious. It would be better and more honest, the argument then runs, if the notions of justice being used were brought out into the open, and their sociological bases properly examined. But the sociologist then himself supposes that the answers to the problems of the court are to be found in that sort of inquiry, whereas we would argue that what happens is that subjective demands are inevitably introduced and presented as if they had objective validity. Authoritarian moralism is generated. This unscientific and anti-scientific feature of juristic theories has been recognised in America and attempts have been made to combat it, especially over many years at the Yale law school.[65]

The account given by the sociological jurist of legal professional training, in the course of downgrading it, ignores what is involved in training for the profession of the law *as* a profession. It is characteristic of a profession that it has ideals of its own which it sees as involved in its part in community affairs. What on the other hand is characteristic of the Australian scene at the present time is the extent to which demoralisation of the professions—in an opposite sense to that which we have thus far used the term moral—has proceeded. The processes involved highlight the consistency of aspirations towards multi-culturalism with the absence of a genuine consistent pluralism in a society. What qualifies in this country as a culture is most usually that of a group which represents a nationality elsewhere, or which has aspirations to be recognised as a nation here or elsewhere. But the independence of ideals among the professions has been eroded, whether we are speaking of academia, the teaching profession, the public service, medicine or the law. In all cases demands have been made upon them, with high moralistic charges, to accommodate themselves to the sorts of values associated with the way community progress or utility is politically understood,

[65] In the works particularly of Harold D. Lasswell, Myres S. McDougal and W. Michael Reisman. See W.L. Morison, "Myres S. McDougal and Twentieth Century Jurisprudence" in *Toward World Order and Human Dignity* (ed. Reisman and Burnes Weston (1976) Ch.1.

accompanied by the penetration of the professions themselves by groups devoted to applying pressure to their colleagues in the direction of social conformism.

In the law, the instruments of erosion have been less the destruction of financial independence from those in power than in some other instances, and more the breaking up of the systematic character of legal institutions, the changes in the kinds of legal materials with which lawyers have to operate, and the proliferation of bodies with powers of Royal Commissions built into them on a permanent basis. The induction of judges—or persons given the status of judges—and lawyers, into these bodies is calculated to exploit the primitive mystique of the authority of the law, while at the same time traditionally important features of the operation of the law are discarded, beginning with the ditching of the rules of evidence and of the protections normally accorded to an accused.

Authoritarianism versus Freedom in Common Law Development

What is involved in these last matters calls attention to the fact that the traditional preoccupation at the most general level of the legal profession working with developing common law materials has been the preservation of freedom in an understandable empirical sense. What we have now in the political arena worldwide is the virtual supersession of the empirical notion of freedom by conceptions of human rights, with the potentiality for dogmatic presentation and aggressive coercion that such terms, used in a moral rather than legal sense, have. If the term "right" is used in a strict sense there will be correlative duties, and if human rights legislation was termed human duties legislation it would perhaps direct the attention of those who are promised them to different aspects of what they are being promised. The change in terminology seems to make no difference to the practicalities so long as the concentration is on arbitrary violence to the person, and this is the area in which we find lawyer-inspired bodies like Amnesty International concentrating their attention. But when perorations about human rights move beyond this area they can become more associated with moralistic oppression and we can find civil liberties bodies reversing their traditional role on occasion and setting out to exert pressure for conformity.

I have already referred to material indicating something of the manner in which the constitutional development of this country in the nineteenth century, and since, embodied the growth of local freedom under the influence of British constitutional theory. The theme could be expanded by reference to other areas of more specifically common law development, such as the development of the supervisory jurisdiction of the superior courts, a major area of administrative law. But now when bodies operating quasi-judicially are set up, the supervisory jurisdiction may be restricted or abrogated.

Meanwhile grave doubts may be raised about the extent of protection of the citizen by the law of contempt. This was undoubtedly always a

double-edged weapon, containing threats to liberty as well as protection, but what it is signally failing to do at the present time is to prevent trial of the citizen by the media, latching on to the material provided by the proliferation of administrative inquiries. Even if this does not lead to prejudice at a subsequent trial, it may have damaging effects on the accused's future in other ways, for example in public life. The traditional freedom of the media themselves to show what they choose has been extended in the traditional areas of sexual freedom, but the reverse has occurred, at least in the case of the political freedom of television stations. What is laid down by the law may present a liberal picture, but not what is involved in the power of investigatory and administrative bodies, either newly created or increasingly active.

We have said that justice in the abstract is an empty conception. "Justice according to law" was not, for it incorporated the values of freedom given content by the developing common law. But if justice according to law comes to mean the kinds of moral authoritarianism we have been exploring, because those are the values potential lawyers are trained to embrace, the law loses its independence and becomes opposed to freedom—whatever scope there is or is not for the application of the common law in the future.

One of the works studied by those who took Sir John Peden's advice fifty years ago, and included philosophy in their Arts studies as a preliminary to law, was Plato's *Republic*. In the first book of that work Plato presents an empirical theory of human goodness generally, to which freedom is central. This theory begins with the proposition, if we may put it in terms which have passed into our language because of the misplacing by the ancient Hebrews of the seat of the human emotions, that goodness is primarily a matter of the heart rather than the head. The heart has its reasons, but they are always tentative, and if those reasons threaten to be inconsistent with the dictates of the heart in any application, they are referred back to the feelings of the heart. At its best the common law is like that.

The theory envisages that there are some motivations within the heart which are constructive, and spontaneously cooperative with other motivations of the same kind. Their characteristic mode of spreading themselves is by appeal to motivations of the same kind in others everywhere. The pattern of these motivations in human beings everywhere constitutes the kingdom of heaven within them. But while the relation of good motives in different persons is one of warm cooperation, on the other hand they are always in struggle with their opposites.

Plato stressed that their opposites, motivations which are consuming and coercively aggressive, are different in that they are not only characteristically in conflict with good motives, but what cooperation occurs between those motivated by evil motives is forced. Free cooperation is characteristic only of the relations between good activities. Because good fights evil, and evil fights good as well as other evils, it is inferred

that good motivations freely cooperating have a coherence which is lacking in evil. The notion goes back to the Greek creation myth, one version of which is that the world was formed by Eros in competition with Chaos. An Italian philosopher, developing this theme, thought that human history could only sensibly be written as the history of the fortunes and misfortunes of freedom.

On this general theory our own teachers of philosophy placed a gloss.[66] This was to the effect that good activities in this empirical sense regularly have to seek to cope with a fifth column from within, and the fifth column is authoritarian moralism. This develops through the translation of the objectives of good activities into rigid principles which are presented as having a coercive obligatory force upon others. Aggression and exploitation are generated in the course of this, and hence they become instruments of oppression. It is the destructive and ominous influence of these notions at the present time upon the ways of thinking affecting law and the community which have been the theme of this essay.

[66] See John Anderson, "Determinism and Ethics" (1928) VI *Aust. Journal of Psychology and Philosophy* 241 reprinted in John Anderson, *Studies in Empirical Philosophy* Ch.19 at 214.