

The Source and Emergence of an Independent Australian Legal System

by Verity Carney

What is the doctrine of terra nullius? What impact did this doctrine have on the development of the Australian legal system?

The European settlers to Australia classified the country as terra nullius meaning that the land belonged to no one and was uninhabited specifically it was “desert and uncultivated” land and thus failed to acknowledge the rights and customary laws of the indigenous Aboriginal people - instead it was maintained that the laws of England applied from the time of proclamation of the colony.

The Australian legal system therefore was created out of the existing legal framework and laws of England and indigenous law was disregarded and superseded until the decision of the high court in *Mabo v Queensland (No 2)* (1992) 175 CLR 1. The Mabo decision overturned the doctrine of *terra nullius* and found that Native Title still existed where traditional ownership and connections with the land by Aboriginal communities had not been extinguished. As a result of the Mabo decision there began a belated retrieval of Indigenous Law and its incorporation into the contemporary Australian legal system.

What were the main circumstances that encouraged the growth of a legal system based on precedents by the Kings judges in England?

The circumstances were that the king needed assistance in solving disputes and conflicts between his subjects. He appointed judges to go out to areas within the country to resolve these disputes. They often used local laws and customs to resolve these disputes. On returning to England the judges met and compared their cases. Gradually they began selecting the most suitable laws and customs to develop a common standard or set of laws. Over the some few hundred years there became a situation of ‘information overload’ because there were so many previous cases that may be considered persuasive as a way of resolving a dispute or conflict. As a result by the 19th Century the law was systematised by classifying the courts into a hierarchy within a particular jurisdiction. The idea was that judges lower in the hierarchy should be bound to follow the precedents (*stare decisis*) established in similar cases by courts above them. A precedent was formed out of the material facts of a case and the legal reasons given by a judge for his decision. Precedents were to be applied by judges in future cases where similar principles characterised the case being decided. Using precedents gave the law more certainty and ensured impartiality.

Which precedents are binding and which are persuasive? What role does the hierarchy of courts play in this regard?

Ratio decidendi which is the technical term used to refer to the reasons for a judges decision. These reasons form binding **precedents (*stare decisis*)**, which result in future cases or disputes, that are based on the same principles, being decided in the same way

Obiter dicta is the term used to refer to statements made by judges that are not strictly relevant for the decision. It is Latin for sayings by the way. These statements although not binding, may be found persuasive by judges in a later case and may form

the basis of a new precedent. It gives the doctrine of precedent more flexibility to adapt to changing conditions.

The hierarchy of courts means that a judge lower down the hierarchy should feel compelled to follow a precedent set previously by the decision in a similar case by a judge higher up in the hierarchy. If an *obiter dicta* or a senior judge is very persuasive it may be used by a court higher up in the hierarchy to help change the law by setting a new precedent.

What are the strengths and weaknesses of a legal system based on law being declared by judges in particular cases that come before them?

Strengths

- The doctrine of precedent followed by judge's means that decisions are consistent and impartial and that there is greater certainty in the system.
- The power of analogies between cases, decisions and precedents means that judges can use decisions that bare some but not exact resemblance to current disputes or conflicts
- Ability of senior judges in court at the apex of the hierarchy to change the law ensures the flexibility of the system to accommodate for changes in social values and customary circumstances of a society
- The independence of judges from the forces of politics means that decisions are not based on the appeal to popularism.

Weaknesses

- The elected representatives of the people do not decide the rule of law.
- There are limited institutional checks and balances on the power of the courts.
- There is no guarantee that the law will be implemented and administered as intended.
- A judge may not have a generally accepted sense of equity or fairness.

What is meant by the following terms and what is the legal significance of them?

A) The supremacy of parliament

Laws made by parliament are supreme over any other laws. The legal significance is that it relegates laws made by judges to a cameo role.

b) Parliamentary sovereignty

Parliament could enact practically whatever laws it pleased, including enactments that changed previous laws – that is it had the right to make new laws and to repeal and amend old ones. The legal significance is that parliament can act independently of the judiciary to change the law as long as the majority of both houses agree.

c) The separation of powers

The legislature, executive and judiciary have separate but reciprocal roles in the legal and governmental systems. The legal significance is that this doctrine ensures that

there are checks and balances between these three powers and thus none exceed their respective power and that no person or body shall exercise more than one power.

d) A bi-cameral legislature

Refers to two houses of parliament legislature. The lower house is the house of Representatives (representative of an equal number of people in each electorate) and the upper house is the Senate (equal number of representatives from each state). The legal significance is that proposed changes to the law must pass by a majority vote in both houses of parliament thus ensuring the will of the people is the supreme source of our laws.

e) The rule of Law

It is the principle that every person and organisation, including the government, is subject to the same laws. The legal significance is that this principle ensures fairness and consistency and equality before the law.

What is meant by equity? Does equity introduce flexibility into the common law legal system at the price of certainty?

Equity is a right or principle recognised by a court based on ethical concept such as fairness, evenness and justice. Equity introduces the flexibility to rule special remedies such as an injunction, a specific performance, orders for restitution of property obtained by trickery and orders to set aside or rescind agreements obtained by trickery or unconscionable conduct or undue influence. In these ways a decision based on the remedy of damages is no longer a certain outcome, rather the decision is more practically aimed at ensuring certain conduct, behaviour and agreements based on more context specific judgements about fairness and evenness.

Do judges make or just apply the law?

Since the development of a Legislative Parliament the role of judges has moved to the realm of interpreting and applying the law to resolve particular disputes. There are some areas of the law where judges are almost solely responsible for making the law such as the area of business law, especially the law of contract. At the apex of the hierarchy of courts such as the High Court of Australia judges can deliberately decide that social values or other good reasons mean that precedent needs to be changed to make the law relevant to changed circumstances. The Mabo decision was an example of judges making and/or overturning law.

Does the amount of delegated legislation governing our lives give too much power to unelected authorities?

Delegated legislation is made by an administrator in the exercise of power conferred by a statute. Rules, regulations, by-laws, ordinances and orders-in-council are delegated legislation and have the force of empowering statute. This form of law must not exceed or conflict with the authorising statute and must be appropriately promulgated (published) and subject to disallowance (repeal or rejection) by the legislature in order to ensure that too much power is not in the power of unelected representatives. It remains as a controversial issue.

In cases of doubt about the meaning of a statute should judges prefer the purposive approach to a narrowly literal approach in interpreting the intention of Parliament?

Sometimes the language can be ambiguous and Interpretative acts are not sufficient to give clear and context specific meaning to particular terms. If the literal rule that gives words their literal or dictionary meaning or technical words their normal technical meaning works well it can be used in most cases. However there might be reason to adopt the golden rule to allow judges to avoid absurd or unintended outcomes caused by the poor or careless wording of statutes. However, in cases of doubt about the meaning of a statute, it may be meaningful for a judge to use the purposive (or mischief) rule - when the intention of parliament is in doubt or ambiguous. This rule favours an interpretation that will best achieve the purposes for which the particular act was passed. Judges can do this by using extrinsic aids such as reports from Royal Commissions or Law Reform Reports, or reports of committees of parliament and the key speech of the Minister who introduced the Bill into Parliament.

What is meant by the following terms and of what significance are they to the operation of the Australian legal system?

a) *Ratio decidendi* and *obiter dicta*

Ratio decidendi is Latin for reasons for deciding. It refers to any indispensable factor in the process of reasoning leading to a judicial decision. *Ratio decidendi* or higher courts are legally binding on lower courts by virtue of the common law doctrine of precedent.

Obiter dicta are other legal arguments or statements of principle found in judgements which do not form part of the *ratio decidendi* – refers to things otherwise said. These statements are not binding on other courts but they may however be persuasive depending on the status of the judge and the court and be used to form new precedents.

b) Case reports

The practice of noting down the details of a case, the decision reached by the court and the reasons for the decision. Case reports usually consist of an identification of the parties, a summary of the important material facts, a discussion of the relevant law or legal principles and the application of the law to the facts of the case and a statement for the judges reasons for the decision.

c) Maxims and presumptions of statutory interpretation

Maxims are conventions of interpretation. They include:

Ejusdem generis where a group of special words are used in a statute followed by general words – the general words are given a more restricted meaning to conform to the more specific words used before them.

Noscitur a sociis – (words of a feather flock together) interpretation is based on the context of the statute in which they appear.

Unius exclusio alterius means the expression of one excludes the other

Statutory presumptions (starting points) of interpretation – tie-breakers.
Include:

- Statutes are presumed not to act retrospectively
- Words are assumed to have their customary or technical meaning
- Unless expressly stated, a statute is not interpreted as affecting a fundamental change in the common law
- Property can not be taken away without just compensation

d) A binding precedent

A precedent *stare decisis* is a judgement that is authority for a case on similar facts. A case that is authority for the legal principle contained in its decision.

Ratio decidendi of higher courts are decisions that are legally binding on lower courts by virtue of the common law doctrine of precedent. Decisions of judges in relation to a dispute or conflict must be made in accordance with prior decisions in similar cases of higher courts. The significance of binding precedents on the Australian legal system is that it ensures the impartiality of judges and the consistency of decisions.

THE EMERGENCE OF AN INDEPENDENT AUSTRALIAN LEGAL SYSTEM

Why were the Australian Courts Act of 1828 and the Colonial Laws Validity Act of 1865 passed and what was their legal significance?

The Australian Courts Act of 1828 was passed by the British Parliament to declare that all relevant English law up to that date would apply in the two existing Australian colonies of New South Wales and Van Diemens Land and to the new colonies once proclaimed. Later English Acts of Parliament did not apply unless they were specifically passed for the Colonies.

The Act strengthened the role of both Supreme Courts as appeals from the court to the Governor were ended (although appeals to the Privy Council could still only come from the Governor). It provided for trial by jury in the Supreme Court in civil cases and empowered the Governor to introduce general trial by jury in criminal matters.

The Colonial Laws Validity Act of 1865 made clear that the Parliaments in the self-governing Colonies had the right to pass their own legislation as long as it didn't contravene any existing British laws that expressly applies to the colonies. However it defined local constitutional limits of the colonial parliaments, making their legislation subordinate to Acts of the British Parliament.

The legal significance of these Acts were that they strengthened the legal and civil standing of the legislative and judicial institutions of the new and emerging colonies. Australian statute law thus had a firm foundation, but was able to evolve according to its own conditions and needs.

With reference to the Federation movement discuss why the Australian Commonwealth government was only given power over specified subjects.

The Australian Commonwealth Government was only given jurisdiction over specified subjects (few exclusive powers and a number of powers shared concurrently) because the separate colonies (States) did not want to give up all of their powers of self-government. Federation was a compromise of power sharing between the States that had already established their own Parliaments and courts – statute and common law. However, the Federal union of the separate colonies was needed for national co-ordination on defence, currency, postal services and other infrastructure. This compromise of Federation, where a commonwealth government had only limited powers, was necessary to ensure that all colonies (States) agreed to Federation by ensuring their independence (Western Australia opted out in the beginning, only to join a few years later).

Why was the Statute of Westminster adopted after some delay but with retrospective effect? Why is it unusual for laws to operate retrospectively?

Britain's Statute of Westminster passed in December 1931 repealed the Colonial Laws Validity Act as it provided that no law could be passed by the British Parliament to apply to Australia. It provided the legal recognition of the evolved independence of Australia as well as other British Dominions. It defined the equal status of the Australian Parliaments with the British Parliament.

However it was adopted after some delay because of the economic problems of the depression. It was adopted with retrospective effect to September 3 1939 to make it clear that Australia had entered the Second World War as an independent, sovereign power and thus was able to independently direct its troops.

In adopting provisions of the Statute, Australia ratified the free and equal status of its government in relation to the government of Britain. One effect was to remove the necessity of reserving certain Bills for the assent of the sovereign. This document was thus another step in a process of constitutional separation.

It is unusual for laws to operate retrospectively because these laws may make unlawful an act which was lawful at the time it was done, or change the effect of an agreement after it was entered into. Justice is sought at the expense of predictability on which the

operation of business and other contracts rely. Retrospective laws remove certainty and can remove fairness from a legal system.

Because many of the powers of the Australian Commonwealth operate concurrently with those of the States, how is a conflict resolved when both the Commonwealth and a State legislates in the same area?

In the event of a conflict between a valid State law and a valid Commonwealth law section 109 of the constitution provided that to the extent of any inconsistency the State law would be invalid. Laws can be inconsistent due to actual inconsistency, latent inconsistency or by 'covering the field'.

Discuss the proposition that 'changes in the Australian Constitution have been achieved more by creative interpretations of the High Court than by the complex procedure provided within the Constitution itself for achieving constitutional change

Because a change in the constitution of Australian requires a double majority rule in a referendum of the people the vast majority of these types of constitutional changes have been unsuccessful. However through specific interpretations of the words in certain sections of the document by judges of the High Court many changes in the understanding of the general language used has allowed flexibility in the interpretation of key parts of the Constitution and thus has effected constitutional change.

Is Great Britain a foreign power as far as Australia is concerned? If so, when and how did this separation come about?

Great Britain is a foreign power to Australia. This was found by the High Court in the landmark case *Sue v. Hill* [1999] – namely that “the United Kingdom was for the purposes of s44 of the Constitution, a foreign power”. The decision was based on the reason that it [UK] exercised no authority over the executive, legislature and judicial power in Australia. The court found it unnecessary to determine precisely from when this was the case but was sure that this legal position had been achieved ‘at some stage’.