IMPACT OF LEGAL CULTURE AND LEGAL TRANSPLANTS ON THE EVOLUTION OF THE AUSTRALIAN LEGAL SYSTEM

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- "The only reason for going back into the past is to come forward to the present, to help us to see more clearly the shape of the law today by seeing how it took shape".
-Victoria vs Commonwealth (1962) 107 CLR 529 at 595 per Windeyer J.
"…the compact between the Australian people, rather than the past authority of the United Kingdom Parliament under the common law, [now offers] a more acceptable contemporary explanation of the authority of the basic law of the Constitution".
- Breavington vs Godlman (1988) 169 CLR 41 at 123 per Deane J.

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I. THE CONCEPT OF "LEGAL TRANSPLANTS"

The expression "legal transplants" comes from Alan Watson,[1] but comparative law study has always placed great emphasis on the concept

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[1] Watson, A., *Legal Transplants: An Approach to Comparative Law*, Athens, Georgia, 1993.

of comparing and contrasting laws in order to borrow from them.[2] This process[3] may be summarized as follows:

1. The law as set out in legislation and judgments has a clear meaning which can be detached and moved from one legal culture to another;

2. Legislation and judgments have been created to solve problems which have a functional purpose, i.e. to address problems which are shared by one legal culture with one or more other legal cultures;

3. It should be possible to create a mega-system of law across societies by focusing on the functional purpose of the law for the benefit of other legal institutions which are functionally comparable.[4]

Governments use comparative law for law reform purposes, generally to promote desirable social or legal changes which have been observed to arise from the implementation of such a law in other countries.[5] The way in which they do this is, however, often an informal process. When, why and how should, and do, legislators, governments and judges borrow from foreign laws and legal institutions?

The purpose of this report is to examine the concept of legal transplants in Australia since its founding as a penal colony by Great Britain in 1788 and to consider the role this has played in the evolution of a uniquely Australian system of laws and justice.

1. *The periods of historical change identified in the questionnaire*

Professor Jorge Sánchez Cordero, in his introduction to the questions which are the subject of this report, points out that "the evolution of civil law is as slow as it is deep" and that its evolution is

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[2] See, for example, Zweigert, K. and Kotz, H., *An Introduction to Comparative Law*, (tr. T. Weir), 3rd ed., New York, 1998, p. 39: "different systems give the same or very similar solutions, even as to detail, to the same problems of life, despite the great differences in their historical development."

[3] See Gardiner, M., "Come Spring: The Australian Fair Pay Commission as Legal Transplant", 20 *Australian Journal of Labour Law*, num. 159, 2007, pp. 160-161.

[4] *Loc. cit.*, p. 39.

[5] Kahn-Freund, O., "On Uses and Misuses of Comparative Law", *Modern Law Review*, num. 37, 1974, p. 2, identified three different purposes, the others being to prepare for international unification of the law and to give adequate legal effect to a social change shared by both countries, but the most common reason for legal transplants is the success of the law or procedure in another jurisdiction.

"dominated by length".[6] If the evolution of "legal culture"[7] and a civil legal system is a lengthy process, how is it possible to measure accurately the growth of civil law in Australia, a nation founded in 1788[8] as a penal colony and governed by English law for the first half of its short life as a common law country?

The significant changes in Australia's history coincide with the dates selected by this questionnaire. The first settlement was founded in 1788, one year before the French Revolution of 1789 which is the cutoff date for the first period of time.

As to the second period, the Federation of Australia occurred in 1900, and with the coming of World War I in 1914, the new nation committed a very large contingent of Australian troops, the "ANZACS" as they were called (as they included New Zealand troops). Australia suffered a significant loss of manpower in this War; 416,809 enlisted, of whom over 60,000 were killed and 156,000 wounded, gassed or taken prisoner.[9] At the time Australia's population was four million, so this represented 38.7% of the male population aged between 18 and 44.[10] Although the fighting was far away, the heavy Australian losses of human life in this war marked a turning point in history for Australia just as much for Europe.

A third significant change occurred in Australia in the 1980s, with the severing of final ties with England by the passing of the *Australia Act* 1986 (Cth) in 1986. The court of final appeal was now the High Court of Australia, not the Privy Council, and Australia's Federal system of

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[6] Questionnaire, page 1, paragraph 2. Watson focused on the adoption of laws derived from Roman law in the civil law tradition, but subsequent academic argument has extended to how laws and legal principles from the civil law tradition have been transferred to the common law or other legal systems.

[7] The term "legal culture" was first introduced in 1975 by Lawrence Friedman, who defined it as understanding the law as a system, a product of social forces and itself a conduit of those same sources. For a review of the social scientific study of law, see Silbey, S. S. "Legal Culture and Legal Consciousness", accessible at *http://web.mit.edu/anthropology/faculty_staff/silbey/pdf/14iebss.pdf.*

[8] The date of 1788 is commonly given as the date for the commencement of white settlement, but the pre-existing Aboriginal culture dates back around 50,000 years. Prior to white settlement there were approximately 500 tribes who spoke more than 200 different languages and dialects. The harshness of the climate meant that many but not all of the tribes were nomadic but others led an agrarian lifestyle. Although according the Australian Year Book the aboriginal population as at 1788 was between 350,000 and 700,000, the population has declined and persons claiming aboriginal descent currently make up only 2.7% of the Australian population.

[9] Australian War Museum statistics.

[10] *Idem.* A full breakdown of the troops for each State is set out at *http://www.awm.gov.au.*

government included courts at both the State and Federal levels with the establishment in the mid-1970s of the Federal Court of Australia, the Administrative Appeals Tribunal, the Family Court of Australia and a system of federal magistrates.

How did the legal system in Australia change during each of these periods of time? In summary, during the first period (to 1789) the legal system for the Australian continent was the tribal law of the Australian aborigines. During the second period, to the end of World War I, the legal system was the traditional Anglo-American legal system of common law, with comparatively few Australian characteristics, which paid no regard at all to the legal system of the native inhabitants. It was only towards the end of the third period (from World War I to 1989) that the very significant changes that mark the Australian legal system today first began to be made. The nature of these changes show the influence of the legal systems brought by a burgeoning feeling of national pride, and an acceptance of the importance of the Aboriginal law (especially concerning the land) and culture which has led to the development of Australian characteristics in our legal system. During the "post-modern" period these Australian characteristics have become pronounced.

Arguably, Australia owes its existence to America's victory in the War of Independence.[11] Australians have a special interest in the Bicentennial Anniversary of the Independence of the Americas by reason of this accident of history, as well as because of our shared history as common law countries founded during the colonialist activities of Great Britain. Curiously, however, while there is extensive literature in Australia about the transportation of convicts, there is considerably less on the subject of the transportation of convicts to America.[12] The impact of convict labour in the history of the law of Australia is central to an understanding of its development as a legal culture.

As Australia's actual "legal" history, as opposed to its history as settled land, is short, the way in which I have dealt with the first period identified in the questionnaire is to analyze the concept of colonialism and

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[11] Shaw, A. L., *The History of Australia*, Sydney, 1954, p. 33; Conway, S., *The British Isles and the War of American Independence*, Oxford, 2000.

[12] In "Perish or Prosper: The Law and Convict Transportation in the British Empire, 1700-1850", *Law and History Review,* Fall 2003, Professor Bruce Kercher at footnote 4 points out that apart from Ekirch, "Bound For America", American books and articles tend to be about forced labour generally, of which transportation was only a part. The same difference in focus can be seen in general histories, such as Friedman's, Lawrence, *A History of American Law*, New York, 1985. Professor Kercher notes calls by academics for the comparative law study of convict labour.

the colonial view of indigenous legal rights. The circumstances in which Great Britain turned from its defeat in the American War of Independence to the founding of a new penal colony on the continent that was then known as Van Dieman's Land explain the "legal transplant" of the common law system in Australia which remains to this day.

2. *The first period (to 1789) and the concept of colonialism*

Although Australia was not the first country to receive convict settlements,[13] the proposal to found a British penal colony on an isolated continent which was largely unexplored was for practical reasons (namely the necessity of clearing England and Wales' overflowing gaols).[14] It was also, as noted above, a compensation for the humiliating loss of the American colonies, but the pragmatic benefits of transporting the convicts, and benefiting from future trade, were the key persuaders. The discussions of how this loss had come about were very much a part of the discussion of Britain's future. For instance, Mr. Temple Luttrell, contemplating in the House of Commons "the debris of this once mighty empire, when America shall no longer be ours" went on to consider the

[13] The first Transportation Act, 4 Geo. 1, c. 11, was passed in the British Parliament in 1718. Although transportation did not begin with this Act, its basic principles were in force for the rest of the eighteenth century in both America and later in New South Wales, and it resulted in thousands of British and Irish convicts being transported. Before the American Revolution, about 50,000 convicts were transported: see the articles collected at footnote 2 of Kercher, *loc. cit.* Virginia and Maryland took the greatest number of convicts, followed by Pennsylvania. They were often assimilated with slaves, according to Professor Kercher, and their work and living conditions were similar.

[14] The population of England and Wales tripled from the early 1500s; between 1770 and 1830 it increased from 7 to nearly 14 million, most of the increase being absorbed into the urban population. Prosecutions escalated, as did death sentences. The death sentence was already widely used; between 1530 and 1630 75,000 people are thought to have been executed (P Jenkins, "From gallows to prison? The execution rate in early modern England", *Criminal Justice History* 7 (1986), 52). These rates declined in the second third of the seventeenth century as transportation to America absorbed many of those who would be hanged, but after American independence was obtained the capital punishment rate began to rise sharply, probably due in part to prison overcrowding. Between 1770 and 1830 approximately 35,000 people were condemned to death in England and Wales; about 7,000 were hanged but the remainder were sent to prison hulks or transported: Gattrell, V. A. C. "The Hanging Tree", *Oxford University Press*, 1994, p. 7 and Appendix 2. Gattrell (at p. 20) notes that something had to be done, or the land would be covered in gallows. Gattrell notes the criticisms both in England and Europe which led to the abrupt end of these mass scale hangings following the changes to Parliament effected by the 1832 *Reform Act*; these are an instructive backdrop to the establishment of the penal colony in Australia in 1788.

opportunities for trade in other countries such as Africa where the profits could be "beyond arithmetic calculation".[15]

As Professor Coleman notes in "Romantic Colonization and British Anti-Slavery" at p. 2,[16] Michel Foucault's identification of the colony as a "heterotopia of compensation", whose role is to create "another real space, as perfect, as meticulous, as well arranged as ours is messy, ill constructed and jumbled" fits well with the many volumes of work of conjecture, speculation and curiosity about colonization during the 1770s and 1780s following the loss of the American colonies.

The model for many of these plans was the American colony itself, as exemplified in works such as St John de Crèvecoeur's "Letters from an American Farmer",[17] which contrasted the newly vigorous and rising civilization with a broken-down ageing Empire. Crèvecoeur's "great American asylum", with improved and simpler laws appealed to those interested in creating new colonies because they believed, not without cause, that "only unequal and therefore corrupt societies needed complex government".[18] The romantic attraction of these far-off colonies was the opportunity for convicts or slaves to be reborn as free people. On a more prosaic level, the opportunities for trade would be enormous.

This romantically viewed[19] nexus between colonialism, agricultural trade and labour and the moral reformation of criminals, is what led to the founding of "New Albion"[20] (recalling, but superseding,

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[15] "Proceedings in the Commons on the State of the African Company, and of the Trade to Africa", *Parliamentary History of England from the Earliest Period to the year 1830*; 36 vols., London, 1806 – 20, rpt. New York: AMS Press, 1966. Vol. xix, columns 306 and 308, cited in Coleman, *loc. cit.,* p. 4.

[16] St John de Crèvecoeur, J. Hector, *Letters from an American Farmer and Sketches of Eighteenth-Century America, more letters from an American Farmer*, Albert E. Stone (ed.), New York, 1963.

[17] *Ibidem*, p. 37.

[18] Coleman, *loc. cit.*, p. 3.

[19] Coleman, *ibidem,* p. 3, 134 *et passim.*

[20] The settlement's proposed name of "New Albion", chosen by Governor Phillip, although later abandoned for the more prosaic "Sydney" (after Sir Phillip Sydney), reflected the Romantic period's theme of the rise and fall of empire. "Albion" was an inspiration to poets and artists of the period, notably William Blake, whose portrait of "Albion Rose" or "The Dance of Albion" was followed by allegorical poems about the fall and resurrection of Albion (an ancient poetical name for England). Artists, poets and even potters like Josiah Wedgwood were all inspired by the Utopian dream of a new, purer and simpler colony of men, seen as a kind of modern Garden of Eden. See, for example, Erasmus Darwin's visionary poem "the Voyage of Governor Phillip to Botany Bay" (inspired by the Josiah Wedgwood medallion), Darwin, Erasmus, *The Botanic Garden: A Poem, in Two Parts*, London, J. Johnson, 1791. The popularisation of these ideas to the public can be seen in the utopian descriptions of the cultivation of fields and gardens in

the lost "New England"). These romantic concepts of prisoners expiating their crimes through purposeful physical labour to create fields and gardens in these new worlds (and produce items of value to return to England), while bringing civilization to the admiring local natives, permeate the writings of the explorers, settlers and politicians of this time.[21] What little these settlers knew about the indigenous culture and legal systems was disregarded, as they considered it a primitive system that should be replaced by the superior system of common law.

The conviction that colonialism and the legal systems which it brought to the new colony would be of benefit to the natives was throughout the common law system, even in the United States. Benjamin Franklin's interest in the setting up of a plan to colonize New Zealand is but one example:

> *Britain is said to have produced originally nothing but Sloes. What vast advantages have been communicated to her by the Fruits, Seeds, Roots, Herbage, Animals, and Arts of other countries! We are by their means become a wealthy and mighty Nation, abounding in all good things. Does not some Duty hence arise from us towards other Countries still remaining in our former State?… A voyage is now proposed, to visit a distant people on the other side of the Globe; not to cheat them, not to rob them, not to seize their lands, or enslave their persons; but merely to do them good, and enable them as far as in our power lies, to live as comfortably as ourselves.*[22]

The collision between these well-meaning beliefs and the brutal reality of what occurred when the natives did not appreciate these

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the *Lady's Magazine* of June 1791, which noted that the natives "by kind treatment had been rendered perfectly docile". For the more intellectually inclined, Coleridge's miscellany "The Watchman", included an essay on colonialization by the Swedenborgian William Gilbert, but the combination of lowliness and elevation of man in a modern utopia found its most persuasive advocate in Wordsworth, when the Solitary, fleeing from the failed French Revolution, and the "unknit Republic" of America, finds his ideal in the American Indian (Wordsworth, William, *The Excursion, being a portion of the Recluse, A Poem*, London, Longman's, 1814, pp. 136-138). This same romantic idea of the black man learning from these reformed white settlers can also be seen in William Blake's "The Little Black Boy" (1789), who has black skin but "O! my soul is white".

[21] As well as literary inspiration, the search of explorers caught the public imagination, and the popularity of the "yellow press" newspaper owed much to its exciting stories of exploration and exotic tales of life in far-off fabled climes: Riffenburgh, B., *The Myth of the Explorer: The Press, Sensationalism and Geographical Discovery*, New York, 1993.

[22] Franklin, Benjamin, *Introduction to a Plan for Benefiting the New Zealanders*, 1772, cited in Coleman, *loc. cit.*, pp 12-13. Franklin's interest was aroused by Captain James Cook's first voyage to Australia in 1770 and to his reports of the land as being rich in raw materials such as flax and timber to an extent that would cause a revolution in the whole system of European commerce.

benefits colours the whole of the first part of Australia's history. The first settlers had no understanding of the complex relationship the Aboriginal tribes had with the land upon which they lived, although they could see evidence of settlements, graves and farming activity.

This view was not, however, universal. Concerns about the morality of the replacement of indigenous cultures were also expressed at this time, principally by the explorers themselves. The French explorer La Pérouse's comments concerning the extent of civilization in Maui are instructive:

> *This European practice is too utterly ridiculous, and philosophers must reflect with some sadness that, because one has muskets and cannons, one looks upon 60,000 inhabitants as worth nothing, ignoring their rights over a land where for centuries their ancestors have been buried, which they have watered with their sweat, and whose fruits they pick to bring them as offerings to the so-called new settlers.*

What did the new settlers have to offer in return? The new settlers who arrived in 1788 brought with them the common law legal system that was in use in England at the time. It is from this date that the "legal" history of Australia, in the conventional sense of the word, begins.

The second period: the introduction of the common law system following settlement in 1788.

As far as English law was concerned, the Australian aborigines had no claim whatsoever either to the land they lived on or to the legal system by which they governed their activities; this view remained consistent throughout Australian history until recent times. The relevant English law concerning the status of the Aboriginal occupants of New South Wales can be found in Blackstone's *Commentaries on the Laws of England*:

> *For it is held, that if an uninhabited country be discovered and planted by English subjects, all the English laws are immediately in force. For as the law is the birthright of every subject, so wherever they go they carry their laws with them.*[23]

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[23] *Commentaries*, vol. 1, pp. 104 and 105. For a discussion of its applicability to Australia see Sir Victor Windeyer, "'A Birthright and Inheritance' – The Establishment of the Rule of Law in Australia", *University of Tasmania Law Review*, 1962, p. 635. Although, Prest, Wilfred, "Law for Historians: William Blackstone on Wives, Colonies and Slaves", *Australian Journal of Legal History*, vol. 11, 2007, p. 110 argues that Blackstone regarded

The prevailing view that until 1788 Australia was uninhabited, or *terra nullius*, remained undisturbed until the landmark High Court decision *Mabo* vs *Queensland (Num 2)* (1992) 175 CLR 1.

It is not surprising, in these circumstances, that colonial settlers were said to "wear the common law on their backs"[24] and to adopt not only British law but also British procedure. However, what the convicts and later free settlers brought with them were only those parts of the English law as were appropriate to the condition of a small colony. The geographical distance and difference, the small population and the exigencies of daily life in a colony where the majority of persons were convicts or former convicts meant some change was inevitable. Some of these differences were practical, such as the absence of the right to trial by jury for a number of decades; others showed the unique nature of life in a colony, such as the creation in New South Wales 1847 of a defence to slander known as "unlikelihood of harm", which was designed to confer protection for statements made in a joking manner in an informal setting.

Many of the convicts in the new colony laboured under a particular legal hardship, namely felony attaint, which meant that they could not sue in law. This principle was, however, ignored from the earliest days in the new colony. In July 1788, less than six months after the formal commencement of the new colony, two convicts (Henry and Susannah Cable) sued the captain of the ship *Alexander*, Duncan Sinclair. They had been sentenced to death in England, then granted the conditional pardons that led to their transportation; under English law, they had no right of ownership of the goods or the right to bring proceedings for their recovery. Their civil claim, the first in Australia, concerned Sinclair's refusal to hand over their baggage, which had been put on board when they sailed from England, and they were awarded damages of fifteen pounds by the court.

In awarding these damages, the Court of Civil Jurisdiction specifically ignored the law of felony attaint, which should have been a

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absence of agriculture, rather than lack of habitation, as the key, the conduct of the new white inhabitants is wholly to the contrary of Prest's kinder interpretation. An example of the courts relying upon Blackstone to this effect can be seen in the murder trial *R* vs *Murrell and Bummaree* (1836) *www.law.mq.edu.au/scnsw*.

[24] D Weisbrot, "Reform of the civil justice system and economic growth: Australian experience", *Court Reform and Economic Growth*, Fundacion ICO Conference, 19 October 2000, footnote 3. Professor Wesibrot notes Australian Law Reform Commission research shows that Australian lawyers "feel strongly" about their adversarial common law heritage.

bar both to their action and the recovery of damages. After this complete rejection of the law of attaint at the beginning of the colony, attempts were made to restrict civil rights by a series of governor's orders. Kercher comments:

> *This restriction on actions against convicts was not justified by the common law's reception of law rules: those rules allowed some of English law to be left behind, not the creation of new rules such as this, which contradicted English law. This flexible attitude to the adoption and creation of law was characteristic of early New South Wales law.*[25]

This flexibility continued to be evident in the courts during this early period. Convicts retained their rights to earn and to hold property, and could also give evidence in courts. Then, in 1801, Governor King introduced a system of tickets of leave, a forerunner of parole, which allowed convicts to live free of the restrictions of compulsory labour although still serving a sentence of transportation. The practice of refusing to accede to the law of attaint continued when the new civil court commenced operation in 1814. Courts refused to permit questions to be put to witnesses which might reveal their attainted status.[26]

Between 1788 at 1823, five English governors successively presided over the colony. Each of the first five governors of New South Wales ended his period of office amid allegations of failure to govern properly. This failure was largely caused by the inherent uncertainty as to the nature of the laws required for a settlement where free settlers, convicts and emancipated convicts lived and worked together and where the tensions between the democratic approach of the governors (especially Governor Macquarie) was in conflict with the Colonial Office. In 1819 the English courts held that many of the pardons granted by Governors of the new colony were invalid[27] and in 1822–1823 the Bigge Report comprehensively repudiated not only the colony's policy of treating emancipated convicts as rehabilitated, but also the proposed legal reforms of trial by a jury of peers (as opposed to a Judge Advocate and six military officers), on the basis that the jury members were likely to be emancipists. It was a crushing blow, not only to Governor Macquarie, but

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[25] Kercher, *loc. cit.,* p. 47.

[26] This was one of the matters which was dealt with in the Bigge report, discussed in more detail below. Bigge in fact approved of this step, noting with approval the comment of Judge Barron Field of the first Supreme Court that "the sting of the law in this remote colony, where it could sting itself to death, is well and wisely taken away by the law itself; the letter killeth, but the spirit giveth life": see Kercher, *loc. cit.,* p. 51.

[27] *Bullock* vs *Dodds* (1819) 2 B and Ald 358.

to those who sought to change a penal institution into a civil society. The transplanted legal culture was restrained by the Colonial Office.

The problem concerning the law of attaint was that it was suddenly put into effect in 1820 when an Irish attorney, Edward Eager, brought proceedings in the Supreme Court. Eager had been pardoned by Governor Macquarie. Judge Field, who had himself been earlier sued in the local court by Eager, took the view that the court had discretion as to whether or not to hear cases brought by convicts and that this would depend on the merits of the case. He relied on the decision of *Bullock* vs *Dodds* (1819) 2 B and Ald 258 to do so, on the assumption that this decision was as binding in New South Wales as it was in England, where it had been decided. Convicts and emancipists were all affected by this ruling, and this created tremendous uncertainty for the whole colony, as a large proportion had not yet received pardons or were subject to sentences which had not expired. While the British Parliament passed Acts in 1823 and 1824 to provide retrospective validity to governors' pardons, the damage was done. The distrust created between the new colony and the British Parliament took a long time to dissipate.

The seeds sown by this early confrontation, between the Colonial Office and the colonists seeking to change the rules under which they governed their lives, is an indicator of the reasons why, when Australia became a nation, there was a general preference for Australian solutions as opposed to trying solutions applicable in other legal countries.

The same repressive attitude by the Colonial Office pervaded criminal law issues. The Colonial Office regarded the settlement, unsurprisingly, as a penal colony, and throughout the first decades of the settlement of New South Wales, there was constant debate in England about whether transportation to Australia was sufficiently punitive.[28] This debate, and the problems caused by the question of the law of attaint, was what led to the Bigge reports on the need for more rigour in punishment. The next governor (in 1825), Governor Brisbane, with the assent of the newly created Legislative Council, increased the power of single magistrates to punish summarily.[29] The discovery of gross abuses by magistrates did not persuade the Legislative Council to modify the statute it had just passed; instead they passed the *Justices Indemnity Act* 6 Geo IV No. 18 (11 October 1825) to confer retrospective protection for these past illegalities. Even under the more liberal Governor Darling, statutory

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[28] Woods, G. D., "A History of Criminal Law in New South Wales", *The Federation Press*, 2002, p. 72.
[29] *Male Convicts Punishment Act,* 6 Geo. IV num. 5, 1825.

reforms were still harsh; for example, under an 1832 statute known popularly as the "Fifty Lashes Act", the maximum number of lashes that could be inflicted by a magistrate for drunken disobedience was reduced from 150 to 50.[30]

The corrupting nature of convict labour, and its similarity to the slave labour system in countries such as the United States, were insightfully summarized by Chief Justice Forbes in 1825 as follows:

> *…there is something in Convictism, like slavery, corrupting to the mind. When we fasten a chain round the leg of a prisoner, and place it in the hand of a settler, we in effect bind two men in fetters; the one becomes a tyrant, and the other a slave.*[31]

The harshness of convict life meant that many convicts escaped into the bush, and by the 1820s "bushranging" (the Australian word for outlawry) was a significant law and order problem, leading to the *Bushranging Act* of 1830 in New South Wales, which remained in force until being allowed to lapse in 1856. This Act reflected the divided nature of colonial society up until that time. Brutal prisons remained a feature of the first seventy years of Australian history; Norfolk Island prison, one of the worst, did not shut until 1857. Similarly, the treatment of the indigenous population was marked by violent confrontations, such as the Myall Creek Massacre in 1838.

The establishment of colonies in Victoria, Tasmania (one of the most brutal gaols, Port Arthur, a popular tourist destination, is a stark reminder of its penal past), Queensland, Western and South Australia and the establishment of a non-convict settlement in South Australia attracted ordinary settlers, who wanted a new life in this faraway land. The strong evangelical movement in Britain to ban convict as well as slave labour, and concerns about convict treatment generally, eventually resulted in the convict era in Australia's history coming under increasing pressure. When the *HMS Buffalo* brought a cargo of French-Canadian political prisoners to the colony, the agitation against transportation reached flashpoint. Transportation ended with the suspension of the system as at 1 August 1840, with the last convict ship arriving on 18 November 1840. The settlements continued to exist as former penal colonies, but with increasing numbers of free settlers, particularly after the discovery of gold in the 1850s. However, it would be many years before Federation occurred.

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[30] Woods, G. D., *loc. cit.,* p. 74.
[31] *Ibidem*, Bennett, *Some Papers of Sir Francis Forbes,* p. 98.

The new Chief Justice, Francis Forbes, was a barrister with extensive experience in North America who had previously been the Chief Justice of Newfoundland. His approach was to adapt English law to local circumstances, saying in one case:

> *Of all evils upon society, I know of none more to be deprecated, than to be governed by unsuitable laws – they interfere with the daily habits and pursuits of mankind; they are opposed to their feelings and opinions, and carry in them all the consequences of oppression.*[32]

The right of convicts to sue, give evidence, own property and have reasonable working conditions were often the subject of civil proceedings during this time. Convict rights were central to the politics of the colony, and there was a lively press which took their side, resulting, on one occasion when the editor criticized the court with more than usual vigour, in a prosecution for criminal libel.[33]

3. *1860 to 1900 – the growth of a new country*

The system of government by Legislative Council of nominated members ended in New South Wales in 1842, when the Imperial Parliament legislated to introduce elections into the procedures for selecting Council representatives. The number of Council members was increased to 36, 24 of whom were to be elected, 6 nominated by the Governor and 6 by the Imperial Government. Those who were eligible to vote were men with property qualifications; there was now a sufficient class of these persons, and their property interests not only entitled them to vote but also led to the creation of civil courts and civil legislation to protect and promote that property.

Similar developments occurred in other colonies around Australia. Between 1855 and 1890 the six Crown colonies each successively became self-governing Crown colonies, managing their own day to day affairs, with specific British legislation adopted at the time of

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[32] McDonald *vs* Levy (1833) *http://www.law.mq/edu/au/scnsw/Cases1833-34/html/macdonald_v_levy_1833.htm.*

[33] *R.* vs *Wardell* (No. 2) (1827) – the jury disagreed so the prosecution was abandoned. Libel trials were common during this period. The editor of the *Monitor* was sentenced to prison six times for libel, four times for articles written while he was in gaol. The first civil action involving a jury in New South Wales was a claim against magistrates for damages after they convicted this editor, Edward Hall, for harbouring a prisoner who was his foreman printer.

becoming self-governing. The British Government retained jurisdiction over foreign affairs, defence, shipping and international trading issues.

As was the case in the United States[34] and other British settlements, civil law issues continued to be resolved in accordance with the English common law, and reliance upon Blackstone's *Commentaries* is commonly seen in legal writing, judgments and even in the advertisement sections of the newspapers of the time.[35] However, the emergence of Australia from its penal colony heritage was slow. Even with the discovery of gold, which led to immigration from Europe and Asia during the mid-nineteenth century, the tiny population of settlers and released convicts meant that the legal system remained fairly rudimentary.

Civil and commercial law during the late nineteenth century developed primarily through case law rather than by legislative reform. The struggle for supremacy between judges and parliament that enlivened much of British legal history during the second half of the nineteenth century (resulting in a raft of commercial law legislation for bills of exchange, contracts, bankruptcy, partnership, sale of goods and the like) was not a feature of Australian legal development, which essentially copied and followed English legal developments. The same occurred in New Zealand, where the *English Laws Act* 1858 specified what English legislation applied to this new addition to the British empire (British sovereignty was proclaimed over New Zealand in 1840, the same year that transportation of convicts to Australia ceased).

There were, however, opportunities for those in the new colony to propose important law reform. One of them, the Torrens title system, is of particular interest. The Torrens system of land registration in Australia, introduced in 1858 by the Governor of South Australia, Sir Robert Torrens, is a good example of legal transplantation occurring simply because the new system was better than the old.

4. *The Torrens system in Australia*

The land title system at common law required proof of ownership of a particular piece of land back to a good root of title, resulting in

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[34] The Honorable J. J. Spigelman A. C., "Blackstone, Burke, Bentham and the *Human Rights Act* 2004", *Australian Bar Review*, num. 26, 2005, p. 1.

[35] G Woods, *loc. cit.,* pp. 7-17 sets out a series of frequently referred to extracts from Blackstone on issues such as the rule of law and judicial independence; Prest, W. "Antipodean Blackstone: The *Commentaries* Down Under", *Flinders Jnl of Law Reform*, 2003 p. 151.

complex chains of documents that, in England, sometimes stretched back hundreds of years. The arrival in South Australia of free settlers in the early 1800s (this not being a penal colony) had led to land speculation, and when the boom collapsed most of the 40,000 land grants issued in South Australia were affected. The Governor, Sir Robert Torrens, introduced a system based around a central registry of all land. Each piece of land is given a separate folio. The owner of the land is established by the mere fact that the owner's name is recorded in the government's register, and easements and mortgages are similarly recorded. Thus the system operates on the principle of title by registration rather than registration of title.

The principal difference between common law title (called "Old System Title" in Australia) and Torrens Title is that a purchaser in good faith can rely on information in the land register; it is not necessary to examine the certificate of title or chain of previous transactions. By comparison, at common law a vendor cannot transfer to the purchaser a title greater than that which he owns, so if the vendor's title is defective, so is the purchaser's. However, exceptions to indefeasibility of title under the Torrens system occur only in identified and limited circumstances, such as fraud.

There has been considerable controversy concerning whether the Torrens system was in fact the original work of Sir Robert Torrens, or whether he simply adapted the principles of the Hanseatic registration system in Hamburg with the help of a German lawyer, Ulrich Hubbe, who lived in South Australia in the 1850s.[36] Sir Robert Torrens acknowledged at the time adapting his proposals from earlier systems of transfer and registration such as the system of registering merchant ships in the United Kingdom. However, while Sir Robert Torrens did look at other systems before conceiving the principles upon which he drafted the Bill which became the pattern for legislation around Australia,[37] he not only drafted the legislation but convinced the public and the government to support it in the face of determined opposition from lawyers, who feared the impact of loss of the considerable fees generated by common law conveyancing.

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[36] For an exhaustive review of the evidence, see Taylor, Greg, "Is the Torrens System German?", *Journal of Legal History*, num. 29, 2008, p. 253.

[37] Australian colonies introduced this legislation between 1862 and 1875. It was introduced into Victoria in 1862, despite tenacious opposition from Victorian lawyers, as Dan Ernst pointed out in "Torrens System in Victoria", *Monash University Law Review*, num. 33, 2007 and it was introduced in New South Wales as part of the *Real Property Act* 1863.

The success of the Torrens title system in Australia resulted in the adoption of the system in New Zealand.[38] Parts of the system have been adapted by States in America (Washington, California, Massachusetts, Colorado, Minnesota, Oregon and Hawaii; the first Torrens legislation was enacted by Illinois in 1897).

The Torrens system is an early example of borrowing and transplantation between countries with a common law heritage. The Torrens system was one of a number of adaptations of the existing English law in Australia resulting from the very different geographical and population factors. Other reforms or changes to the system range from having a civil jury of four because of the small population (although the right to a civil jury would be taken away almost entirely at the beginning of the twenty-first century) to the defence, unique to Australia, of "unlikelihood of harm" to slander. Why did Australia's Torrens title reforms capture the attention of other common law jurisdictions, while this important defence to defamation did not?

5. *Slander and the defence of* "*unlikelihood of harm*"

The defence to defamation of "unlikelihood of harm" is applicable where the circumstances of the defamation (for example, a joking statement made at a social occasion, or a very limited publication to persons knowing the plaintiff well enough to have their own view) is not actionable. The NSW Law Reform Commission's 1971 Report on defamation law reform[39] noted the history of this unusual defence as arising from Australia's colourful past as a pioneer and convict colony:

> *When New South Wales in 1847 made slander actionable without proof of damage, doubtless it was thought desirable at the same time to discourage trivial actions for slander. The means adopted was to provide by section 2 of the Act 11 Vict num. 13 for a defence to an action for slander where the words complained of did not impute an indictable offence and were spoken on an occasion when the plaintiff's character was not likely to be injured. This defence remained part of the law in New South Wales up to 1959 when a generally similar section derived from a Queensland variant was introduced (Defamation Act 1958, s. 20(1)).*

The NSW Law Reform Commission went on to recommend that this defence should be extended in New South Wales from spoken to written publications, where the circumstances in which the written matter

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[38] New Zealand passed legislation adopting the Torrens system in 1875.
[39] NSW Law Reform Commission Report LRC 11, 1971, paragraphs 64 and 65.

was published were such that the plaintiff's character was not likely to be injured (e.g. the extent of publication is limited, or the publication is of a joking or informal nature). This defence was later adopted by all States and Territories of Australia in 2005 when uniform defamation legislation was enacted.

This was a significant reform to defamation law, not just one which was appropriate to a society which was established as a penal colony. Why was this useful reform not transplanted to countries troubled with limited defamation remedies (and high legal costs) such as Britain, where judges have repeatedly expressed concern at the bringing of defamation suits over trivial actions? In fact, British judges have recently arrived at the same result, but by a circuitous route of extension of the concept of abuse of process: *Lonzim plc v Sprague* [2009] EWHC 2838 (QB); *Williams* vs *MGN Limited* [2009] EWHC 3150 (QB).

What this second example demonstrates is that the process of legal transplantation is serendipitous, or even haphazard. Simple solutions to a problem in one country may be a useful reform elsewhere, but legislators and judges may err on the side of caution concerning the accepting of foreign solutions. The process of transplantation is much more than a simple process of adaptation of good ideas from other countries. Resistance from local lawyers, reluctance by parliament to embark on law reform of a controversial nature, or simple failure to appreciate the value of reforms in other legal systems may all be factors. These same factors may be at work in relation to the continuing reluctance of the Australian legislature to consider a Bill of Rights or of a defence similar to the United States' First Amendment concerning freedom of speech.

The next significant stage in Australia's legal history was the process of Federation of the various States and Territories which had been established around the island continent since the first colony was set up in 1788.

6. *The Australian Constitution of 1900*

The economic boom which coincided with the 1850s gold rushes and the end of transportation ended in the 1880s when problems caused by British banking crises and the collapse of the property market were worsened by dropping prices for Australia's two main staples, wool and wheat. The fragile Australian environment contributed a lengthy drought. Many were out of work and a massive strike in 1890 commenced on the wharves; miners and agricultural workers joined in

and there was a six month shearers' strike. Australia was no longer a working man's paradise.

There was a rising feeling of pride in being Australian and of resentment at the hardships caused by the banks and businesses of England. Magazines such as *The Bulletin* (with its unfortunate banner, "Australia for the White Man") and Australian writers such as Henry Lawson and "Banjo" Patterson began writing about Australia, contributing to an emerging national sentiment. The introduction of "one man one vote" in 1893 in New South Wales gave these angry people (as long as they were not Aboriginals, or women)[40] a voice. The establishment of the Labor Electoral League (later the Labor Party) in 1891 in New South Wales (and later elsewhere) gave them a party, and although it was not able to take office until 1910, this new political party was a significant threat to the landowning members of the "squattocracy" who had previously dominated the running of the colony.

There had been discussions about bringing together the separate Australian colonies as a single nation for some years, and in 1885 a largely ineffectual Federal Council was set up. However, differences over protectionism in trade, customs and border posts, transport (railways, for example, were not all on the same gauge) and choice of the nation's capital seemed insuperable problems.

Concerns about the widespread public unrest in the early 1890s, coupled with the powerful calls for a new, united Australian nation by the NSW Premier, Sir Henry Parkes, led to the establishment of a series of Constitutional conventions, resulting in the drafting of the Constitution. Many public meetings were held, and ordinary Australians became caught up in the excitement of becoming a nation, as those in power had hoped they would. However, Federation was in no way an attempt to depart from British influence.

Desire for Federation was not universal. Western Australia was concerned that it would be at a disadvantage and did not participate, nor is it referred to in the Constitution; it was listed conditionally, "should it choose to join".

In June 1899, after the British Parliament passed the *Constitution Act*, Western Australia held a referendum and with a majority "yes" vote joined with the other former colonies and territories. On January 1, 1901

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[40] See the comments of Dawson J. in *Kruger* vs *Commonwealth* (1997) 146 ALR 126 at 158 concerning the lack of consultation of "most women and many Aboriginals".

Australia celebrated the new century by becoming a new nation. The choice of capital was a compromise between the warring cities of Melbourne and Sydney; Canberra, an empty space at the time, was chosen because it was geographically equidistant from these two cities.

The Australian Constitution and the substantive supporting documentation is a mixture of imperial and local legislation and consists of the following documents:

— The Commonwealth Constitution, which is itself S 9 *Commonwealth of Australia Constitution Act* 1900 (UK);

— Sections 1-8 (which are the "covering clauses") of this Act, which provide, inter alia, that the British monarch is also the monarch of Australia;

— The *Statute of Westminster* 1931 (UK) and the *Statute of Westminster Adoption Act* 1942 (Cth), legislation Australia reluctantly adopted when it became clear that Britain's war commitments meant its capacity to help Australia was reduced;

— The *Australia Act* 1986 (UK) and the *Australia Act* 1986 (Cth), mirror legislation which abolished the capacity of Britain to legislate for Australia and was introduced by a progressive Labor government;

— The *Royal Styles and Titles Act* 1973 (Cth); and

— Individual Constitutions of the States and self-government legislation for the two Territories (the Northern Territory and the Australian Capital Territory).

This is not the history of a nation struggling to be free from a foreign oppressor. Australians came to full legal independence from Britain reluctantly in 1942 and as late as 1999 voted to retain the British monarch in an Australia-wide plebiscite.

The Constitution is a quaint document, littered with archaisms (such as the salary of the Governor-General being fixed forever at "ten thousand pounds"[41] and the failure to refer at all to the indigenous population) and drafted with the intention of curbing federal power in the interest of the States and in particular the primary industry lobby in the

[41] *Commonwealth of Australia Constitution Act*, S 3.

States. There are a number of provisos giving power to the ruling Monarch of Great Britain, including the power of the Governor-General to reserve legislation for reconsideration by the Monarch (s 58), who had power to disallow it (s 59), a procedure not unlike the Presidential power of veto in the United States. However, neither Queen Victoria, nor any of the subsequent rulers, has ever exercised this right, and it has fallen into disuse.

The power of the Governor-General to sack the Government was invoked in 1975, in circumstances discussed in more detail below. It is an issue which divides Australians to this day, but it has never led to constitutional reform.

Although the Constitution appears to accept the doctrine of the separation of powers in the first three chapters, it does not follow, for example, the Constitution of the United States in identifying what that understanding is. As Stewart points out,[42] the placing of the Territories power (s 122) outside the section on the separation of powers and inside a chapter dealing with State power has created difficulties of interpretation.

One feature the Australian Constitution does share with the American Constitution is that of amendment by plebiscite. The Constitution can only be amended by Australia-wide plebiscite after approval by both Houses of Parliament where the majority must be a majority in each of the six States as well as of the general population (again, a result of the powerful primary industry lobby in the less-populated States to ensure large city populations could not force amendments). Only 8 of the 44 proposals put to a referendum have succeeded; one of these was the 1964 referendum to permit Aboriginal persons to vote.

A feature of the movement towards Federation in Australia is that, unlike the constitutional history of many other nations, such as the United States, it was of a peaceful nature. As a result, many of the provisions of the Constitution were not the subject of significant debate. The Constitution did not confer the kind of independence that countries like the United States were able to achieve. These limitations need to be borne in mind when considering its terms. For example, the Preamble refers to the agreement of "the people of the colonies" to unite, but it is unlikely that this kind of popular sovereignty in fact gives rise to any implications which could limit legislative or executive power.

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[42] Stewart, *loc. cit.*, at footnote 25.

7. *The relationship between the Common Law and the Australian Constitution*

The High Court has confirmed that where the Constitution applies, the common law in Australia must conform to the Constitution.[43] However, the federal structure assumes in many areas outside the Constitution that there will be the same rights regardless of the forum.[44] There is a lively debate in Australia as to whether the Constitution has, or should, prevail over common law in areas unrelated to the Constitution[45] and whether the perceived weakness of the common law in areas such as freedom of speech should lead to the enactment of a Bill of Rights.[46] As is set out further below, this debate includes discussion of a "legal transplant" nature by considering reforms in other countries which had already followed this path.

8. *Conclusions concerning the development of civil law in Australia as at 1914*

As a group of individual States and Territories which remained colonies of Britain until 1900, Australia's commercial and civil law at the turn of the century were shaped by considerations of local power versus Commonwealth power just as much as by national power versus the Colonial office and British government. Even when the six Australian colonies federated into the Commonwealth of Australia in 1900, the barriers to full independence were still in place, and these would only start to fall away after World War I.

Australian legal development was also greatly influenced by what some writers have called "the tyranny of distance".[47] Australia was simply too far away from Europe and the Americas, and the country lay in a region where most other significant territories or countries were colonies of Britain, Holland, France, Germany or the United States. China was

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[43] *Lange* vs *ABC* (1997) 189 CLR 520 at 566 (concerning the implication of the existence of a right of freedom of speech on political and governmental issues); *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503 at 540 (concerning common law choice of law rules for torts with an interstate element).

[44] Gummow J, "Full Faith and Credit in Three Federations?" (1995) 46 *South Carolina Law Review* 979 at 988, writing about delictual liability.

[45] See the articles collected at footnote 7 by Pamela Tate in "Some Observations on the Common Law and the Constitution", *Sydney Law Review*, Vol. 30, 2008, p. 121.

[46] Iain Stewart, "Structure of the Australian Legal System" in *Convergence of Legal Systems in the 21st Century: XVIth Congress of the International Academy of Comparative Law,* 2004, p. 181, arguing at p.192 that there is no constitutional right to liberty and security of the person and that under the Constitution "genocide would be legal" (citing *Nulyarimma* vs *Thompson* (1999) 165 ALR 621.

[47] This term was first used by Geoffrey Blainey in his book "The Tyranny of Distance: How Distance shaped Australia's History", Sydney, 1982.

effectively under the economic control of the West. Only Japan and Thailand were free of colonial control.

While Australian legislators and judges came up with some interesting solutions to legal problems arising from Australia's isolation and small population, the vast majority of legislation was English in origin, and judges tended to follow English decisions uncritically. However, the establishment of Australia's High Court at the time of Federation, and the event of Federation, would inevitably lead to changes during the next period of Australia's history, namely the period 1914 to 1989.

9. *The third period: 1914 to 1989*

The period 1914 to 1989 was marked by more concrete moves towards Australian independence from British influence. Some significant developments include:

> — The Constitution envisaged Australia remaining a country where all legislation would be subject to prior approval and indeed veto by the British monarch. The successive British monarchs on the throne after 1900 in fact never exercised this power to see or refuse legislation under ss 58 and 59 of the Constitution. It came to be accepted during the 1920s (culminating in the Balfour Declaration of 1926) that Australia could enter treaties and have its own diplomatic representatives, although it did not commence to do so until just before World War II;
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> — The Constitution did, however, envisage that the Governor-General acted on the advice of the Australian Government, not the British Government. On one notorious occasion, in 1975, Sir John Kerr (the Australian Governor-General at the time) sacked the Whitlam Labor Government by reason of a deadlock in the Senate preventing the passing of the Supply Bill. He did so without consulting the Queen or the British Government. This caused furore of an unprecedented nature;[48]

[48] Sir John Kerr used his so-called "reserve powers" under ss 62 and 64 of the Constitution in November 1975 to dismiss the Whitlam government, on the basis that it was unable to pass the Supply Bill in the Senate. While one of the conventions of responsible government is that he should exercise his power on the advice of the Federal Government (which is formed by the party with the majority of seats in the House of

— In 1931 the Statute of Westminster gave the Commonwealth substantial independence as a legislature without restraint by the *Colonial Laws Validity Act* 1865, but this Statute was not adopted until 1942;

— Australian courts, notably the High Court, began examining and defining laws and rights, building up a base of Australian-made law. In particular the High Court, in decisions such as *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129, identified wider forms of federal power than had been thought to exist at the time. However, as Justice Heydon points out[49], the importance of powers such as the corporations power, a legislative power of great importance for commercial law, was not realized until 1971.

During this period there was, however, uncritical acceptance of the British monarch as the head of the government, and it was only after the end of this period that public discussions concerning Australia becoming a republic became widespread.

10. *The growth of a national identity - 1964 to 1989*

The entry of Britain into the Economic Union and the increased prosperity of Australian life led to a greater sense of national identity.

In a seminal essay, "The Cultural Cringe", A. A. Phillips argued that Australians undervalued Australian products and talent, and looked too slavishly to other countries and in particular to England. In 1987 Jim Cameron characterized the Australian preference for English law over the previous fifty years as a "legal cringe".[50]

Representatives) this convention was not honoured in 1975. Sir John Kerr's Statement of Reasons can be found at *http://whitlamdismissal.com*, which is an archive of documents concerning the dismissal of the Whitlam Government. A bibliography of the many publications on this issue is available from the Whitlam Institute and the National Archives of Australia. The ambit of the reserve powers and the possibility that they might again be exercised independently of advice remains a significant issue in current debates concerning whether Australia should become a republic.

[49] Heydon, J. D., "Some developments in commercial law in the lifetime of the Australian Law Journal", *Australian Law Journal*, vol. 81, num. 8, 2007, p. 577.

[50] Cameron, J., "Legal Change over 50 Years", *Canterbury Law Review*, num. 3, 1987, p. 198. the use of the word "cringe" was invoked by the Attorney-General in his views concerning a Bill of Rights in his presentation "Against Cultural Cringe: The Protection of Human Rights in Australia", delivered 21 June 2002. This concept of "cringe" has come to be shorthand for Australian rejection of foreign ideas.

The passing of the *Australia Acts* in Britain and Australia, the abolition of appeals to the Privy Council and the growth of a body of Australian common law precedents created an atmosphere where there was a greater degree of confidence in the Australian legislative and judiciary. Two areas of the law in which this was particularly apparent are the fields of administrative and commercial law.

The British heritage of Australian administrative law –the prerogative writs of certiorari, mandamus and prohibition– had been products of judicial activism in the Middle Ages which, with the growth of central government during the nineteenth century, came to play an increasing role in the control of administrative (as opposed to judicial) power.[51] Dissatisfaction with procedural and technical rigidities led to the increasing use of the declaration and injunction as public law remedies. This development was accompanied by the emergence and growth of the welfare system.

By the 1960s, public law in England was lagging well behind its European counterparts. In 1961 Kenneth Culp Davis expressed dismay about the future of judge made public law in England, in terms of failure to ensure judicial fairness or to grapple with policy issues.[52] Davis said he was shocked by the extent to which English courts failed to inquire whether serious injustice had been done in the administrative process. Similar problems existed in Australia and New Zealand, where administrative law was still something of a new subject for lawyers and judges alike. Dame Sian Elias notes[53] that one change that was made was to appoint judges who had studied administrative law and legal method in the United States and United Kingdom, with the result that the revolution in English law brought about by the decisions of Lord Denning and Lord Reid was able to be fully utilized.

Prerogative writs were part of Australia's inheritance of English law; S 75(v) of the Constitution defines the remedies (mandamus, prohibition and injunction) and judicial review actions under S 75(v) have always formed a significant part of the High Court's caseload, particularly

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[51] Cane, P., "The making of Australian administrative law", *Australian Bar Review*, num. 24, 2003, p. 114.
[52] Davis, K. C., "The Future of Judge Made Public Law in England", *Columbia Law Review*, num. 61, 1961, p. 201.
[53] *Loc. cit.*, p. 33.

in industrial matters. However, the dissatisfaction with a remedial-driven system of judicial review led to a series of reports calling for reform.[54]

The same concern for reform in public law issues was felt in Australia. Gleeson CJ[55] explained the need for this as being because:

> *The development in the Australian community of a cultural expectation that those in authority are able and willing to justify the exercise of power is one of the most important aspects of modern public life.*

Two hundred years before, Australia had been a penal colony where the courts had preferred the Australian way of doing things, from the very first, and where the populace –whether convict, settler or native– had found the weight of foreign law crushing. It is not surprising, then, to see that Australian courts have tended to prefer their own views, and retreated from a strict application of the ultra vires rule and to acknowledge the wide discretionary powers and supervisory jurisdiction which are features of modern legislation, and to place emphasis on justification from the government rather than leaving this all up to the aggrieved individual. The availability of government information under freedom of information legislation was one of a number of important reforms to administrative law in Australia in the 1970s which led to greater transparency. Again, there is a preference for Australian solutions, although on a common law basis, and a degree of caution concerning overseas solutions.

11. *Commercial and corporations law*

Commercial law is essentially concerned with rights and duties arising from goods and services in trade, and it revolves around sale of goods and services and financing sales transactions. It includes not only sales law, insurance and negotiable instruments, but relevant aspects of property, torts, equity and public law. When considering this vast area of the law and its interpretation by the Australian legislature and courts, a thematic approach is preferable to a general overview, so I have referred only to a few of the major changes during this period.

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[54] Report of the Commonwealth Administrative Review Committee, Parliamentary Paper No. 144 of 1971 (the Kerr Report); Parliamentary Paper num. 56 of 1973 (the Elliot Report). The result was the enactment of the Administrative Decisions (Judicial Review) Act, 1977 (Cth) conferring extensive judicial review powers on the newly created Federal Court.

[55] Gleeson C. J., "Outcome, Process and the Rule of Law", *Australian Journal of Public Administration* 5, num. 65, 2006, p. 12.

Central to the interpretation of commercial law by the High Court has been its commitment to equity and the notion of unconscionable conduct as a basis for reforming the law and changing entitlements. This has resulted in the creation of a body of judgments based on common law precedent but where the case law cited is Australian rather than case law from England and Wales or other Commonwealth jurisdictions.

A feature of this period of history for all countries, including Australia, has been the economic interdependence of countries arising from the domination of world markets by multinational corporations, which has resulted in a redefined relationship between globalisation and what Frank Carrigan has called "legal transnationalisation".[56]

The emergence of multinational corporations at the end of the nineteenth century arose partly from important inventions such as refrigeration and speedier transportation and partly from these companies' export of capital as well as goods. Towards the end of the twentieth century, the 15 top global corporations had a combined income greater than that of over 120 countries.[57] The OECD noted that foreign direct investment was growing faster than world trade. The opening up of China was a key factor in this growth, as was the internationalization of banks. One of the difficulties for countries with small populations, such as Australia, has been to keep up with these changes.

The major changes to the Australian legal system during this period consisted of consumer protection legislation and perhaps Australia's most successful statute, the *Trade Practices Act* 1974 (Cth). The impact of this statute, and in particular S 52, which provided remedies for conduct in trade or commerce which is misleading or deceptive, was so dramatic that Professor Warren Pengilley compared it to the Exocet missile.[58] This legislation, which was followed by similar legislation in Australia's States and Territories, was a significant weapon not only in the hands of consumers but also business rivals, regulators and, most of all, lawyers.

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[56] Carrigan, F., "Globalisation and Legal Transnationalism" (1999) 10 *Australian Journal of Corporate Law* 1.
[57] Harman, C., *Economics of the Madhouse*, London, 1995, p. 65.
[58] Pengilley, W., "S 52 *Trade Practices Act*: A plaintiff's new Exocet?", *Australian Business Law Review*, num. 15, 1987, p. 274. In fact, S 52 was much more powerful than an Exocet missile, as the latter is now a footnote in history.

Significant amendments to the *Corporations Law* over this period, as well as the setting up of regulatory bodies such as ASIC and APRA, have also occurred. It is not possible in this short overview to do justice to the raft of legislation passed over this period, and to the cases in which these statutes and the relevant principles of common law were interpreted and applied.

What can be said with confidence, however, is that the vast bulk of these statutes and cases derived from English statutes and authorities, although a feature during this time was the increasing stature of the High Court of Australia. Although the United States was, in economic terms, the centre of the world, and a common law country with similar legislation and problems, American decisions and statutory provisions are rarely if ever referred to in Australian judgments over this period, and its statutes were not used as models. The reasons for this are as puzzling as they are little studied.

II. THE POST-MODERN PERIOD: REJECTION OF COMMON LAW TRENDS OVERSEAS

The period since 1989 has seen a marked movement away from the common law system not only in Britain but also in the United States, and a movement towards acceptance of Australia's historical origins and the rights of indigenous people.

I shall briefly examine four main areas of law reform:

— Post-modern reconciliation – the *Wik* and *Mabo* decisions on native title rights;

— The concept of "personal responsibility" in tort law and of freedom of expression;

— Contract, corporations and commercial law; and

— Administrative law.

1. *Post-modern reconciliation – the Wik and Mabo decisions*

An example of the Australian courts leading the way to social change may be seen from the landmark High Court decisions *Wik Peoples and Thayorre Peoples v Queensland* (1996) 187 CLR 309 ("*Wik*") and before it *Mabo* vs *Queensland (No 2)* 175 CLR 1 ("*Mabo*").

The effect of the *Wik* decision was to hold that the granting of a pastoral lease, whether or not it had expired, did not necessarily extinguish all native title rights and interests of the indigenous Australian tribes who had occupied the area beforehand. The decision did not hold that the Wik people had native title, nor did it remove or alter the existing rights of pastoral leaseholders.[59] The *Wik* decision recognized that native title rights (for example, the right to fish) might co-exist with the pastoralist's right in much the same way that a government officer might have a statutory right to enter to monitor water levels, or to catch or tag fish, as these rights can be exercised without affecting the rights of the pastoralist.

The arguments in the *Wik* case were:

Whether any of the pastoral leases that had been granted over the land the subject of the claim were leases in the generally understood common law sense (i.e. conferring exclusive possession in the lessee) and consequently leaving no room for rights and interests of a native title holder kind; and

Whether the mere grant of a pastoral lease (or any other interest in land) changed the underlying entitlement of the Crown by creating a reversion expectants, and brought to a permanent end the prior radical Crown title which was subject to the burden of Crown title. This second argument was the more difficult to overcome.

In the earlier case of *Mabo*, Brennan J. explained (at 68) the problem as follows:

> *A Crown grant which vests in the grantee an interest in land which is inconsistent with the continued right to enjoy a native title in respect of the same land necessarily extinguishes the native title. The extinguishing of native title does not depend on the actual intention of the Governor….but on the effect which the grant has on the right to enjoy the native title. If a lease be granted, the lessee acquires possession and the Crown acquires the reversion expectant on the expiry of the new term. The Crown's title is thus expanded from the mere radical title and, on the expiry of the term, becomes a plenum dominium*".

Thus what this case was about was a collision between the English doctrine of tenures which was inherited by Australia, and brought into play as soon as the Crown granted an interest in land, with the

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[59] For a collection of useful essays see Hiley, G., *The Wik Case: Issues and Implications*, Butterworths, 1997.

entitlements of the traditional owners of the land. Brennan J. noted that this assumption had been made for so many years since the English doctrine came into effect that it was not appropriate to alter it at this late stage. The consequence of this assumption was that the mere granting of an interest in the land not only conferred title rights on the grantee but expanded the underlying title of the Crown from mere "radical title" to full beneficial title, so that when the land reverted to the Crown the native rights had been extinguished.

How did the High Court deal with this argument? The Court essentially held that the Crown did not acquire a reversion expectant upon the granting of the relevant pastoral leases. The Crown title effectively continues to be radical title, subject not only to the benefits but also to the burdens on that title, including whatever native title rights and interests could be established to have existed at that time.

The approach of the majority in the *Wik* case was to develop traditional English concepts of land tenure going back to feudal times to enable the Australian law to have regard to pre-existing native title rights of a kind wholly alien to the common-law-based Australian legal system. The focus of this approach was upon the Australian legislation. Toohey J. touched upon the ongoing tension between the increasing use of legislation to modify the common law:

> *To approach the matter by reference to legislation is not to turn one's back on centuries of history nor is it to impugn basic principles of property law. Rather, it is to recognize historical development, the changes in law over centuries and the need for property law to accommodate the very different situation in this country*.

Critics of the *Wik* judgment have commented on what is asserted to be the anachronistic approach of the Court to Australia's legal history. Dr Jonathan Fulcher[60] comments that these leases were not some hangover from feudal times but a creation of the British Colonial Office in the 1840s with the policy of locking up the land for future development. It was in fact intended to exclude Aboriginal people because of fears of frontier violence, and the purpose of the lease was in fact to extinguish the right.

The end result is, however, an Australian adaptation of the common law which favours the needs of the local inhabitants over the

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[60] "Sui Generis History? The Use of History in *Wik*", in G Hiley, "The *Wik* Case: Issues ant Implications", *loc. cit.*, pp. 51-56.

principles of common law from which Australian law is derived. This process is not unlike the response of the civil courts at the beginning of Australia's colonial history, when judges disregarded the law of attainder.

2. *Personal responsibility*

A. *a move away from "the Americanization of our legal system"*[61]

At the beginning of the 1990s there was increasing concern by legislators and commentators about what was sometimes called "jackpot justice"[62] in the form of frivolous suits and excessive damages. The American jury award of $US2,860,000 (of which $2,700,000 was punitive damages) to a woman scalded by coffee at McDonalds resulted in a frenzy of publicity which overlooked the facts of the case (including the fact that the 79-year-old plaintiff received third-degree burns and the 700 prior complaints about the scalding heat of McDonalds coffee). The sensationalist reporting of the result of this and other American trial verdicts was one of the reasons for significant modifications to personal injury and negligence law throughout Australia during the first decade of the 21st century. In fact, contrary to what was being asserted in Australia, plaintiffs in the United States only received punitive damages in 2-4% of civil cases generally,[63] but the pervasive belief that not just the insurance industry but the whole Australian way of life would collapse unless legislation was enacted to restrict legal rights.

Speaking in the NSW Legislative Council concerning the NSW Bill, the Hon Michael Egan, the NSW Treasurer, explained:

> *But I emphasise that these reforms are not only a response to the current problems regarding insurance. It is important to remember that these reforms are not only about reducing premiums.*
>
> *The insurance crisis served to highlight just how far the law has drifted away from the concept of personal responsibility. This is the Americanization of our legal system.*
>
> *I want this Parliament to seize the opportunity to wind back this culture of blame. If we do, we will help to preserve the community's access to socially important activities.*

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[61] This quotation is taken from the speech by the Hon Michael Egan, Treasurer, on 19 November 2002 (Hansard, p. 6986 ff) concerning the enactment of the *Civil Liability Amendment (Personal Responsibility) Bill* 2002 (NSW).

[62] McFetridge, K., "Medical litigation", *Insurance Law Journal*, Australia, num. 16, 2005, p. 41.

[63] Klinck, R. A., "The Punitive Damage Debate", *Harvard Journal on Legislation*, 2001, num. 38, p. 469.

Our community deserves our best efforts to preserve the Australian way of life. That it what it is about.

Mr. Egan went on to explain that this Bill "modifies particular aspects of the common law" and "does not establish a complete code".[64] Australia was moving away from the United States, but not towards a codified legal system.

The call to personal responsibility and the move away from "Americanization" (by inference, a bad thing) is a further indication of the Australian reluctance to have regard to foreign ways of doing things, even where the foreign jurisdiction is another common law country with an English-speaking background and a body of case law and statutes of international repute.

B. *International Conventions and overseas decisions concerning freedom of expression*

While references to American decisions and statutes are rare in contract and commercial law judgments, in tort law they are even more rare. The rejection of American tort law transplants is particularly strong in the area of defamation law, where legislators have resolutely refused even to consider a First Amendment-style right of freedom of speech, or to apply it in circumstances where the article was written in the United States but downloaded in Australia: *Dow Jones* & *Company Inc v Gutnick* (2002) 210 CLR 575; (2002) 194 ALR 433; (2002) 77 ALJR 255.

The intersection of international and domestic law in areas of the law such as freedom of expression has led to some tensions in the law, as international law exerts a pull on local law to bring it towards international standards, as well as involving transfer of concepts and doctrines between international and domestic law. One example of this process of cross-fertilisation is the introduction of the doctrine of the margin of appreciation into Australian jurisprudence, particularly in decisions of the High Court concerning freedom of expression.

The concept of the margin of appreciation is a development of the European Court of Human Rights during the latter part of the twentieth century, for the purpose of allowing a measure of discretion when interpreting provisions of the European Convention of Human Rights. It is derived from provisions of the Convention (notably articles 7-11 and 15) which allow the court to take into account what is necessary

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[64] Hansard, *loc. cit.*

for the good order of society: see for example *Ireland v United Kingdom* (1978) 2 EHRR 25.

The High Court, in cases concerning freedom of speech, has referred to these sources in the course of developing the common law rule of proportionality (i.e. that the exercise of legislative power be proportionate to the end that is sought to be achieved). This has been a feature of a number of the High Court's decisions on administrative law, which are discussed further below; in the area of the common law, it arose principally in the course of the High Court's development of the concept of a freedom of speech implied into the Constitution.

In *Australian Capital Television v Commonwealth* (num. 2, 1992) 177 CLR 106 the question was whether there was an implied right of freedom of political conversation and if so, whether this was to the exclusion of restrictions on freedom of speech such as defamation law. In a section of the judgment headed "Proportionality", Brennan J, referring to *The Observer and the Sunday Times v United Kingdom* (num. 2) said at 159:

> *If the content of the implied freedom of political discussion were ascertainable by reference solely to the constitutional text, and without reference to the political conditions in which the impugned law operates, the scope of the freedom would have to be expressed as a mere matter of form, not as a matter of substance. If it were to be expressed as a mere matter of form, the court would be the only forum competent to express it definitively but the court could hardly evaluate with any pretence to accuracy the substantive effect of a freedom thus expressed on the political milieu in which the law is to operate. It follows that the court must allow the Parliament what the European Court of Human Rights calls a "margin of appreciation".*

Brennan J. confirmed this view in "Theophanous *vs* Herald & Weekly Times Ltd.", *CLR*, num. 182, 1994, pp. 162-163 and "Levy *vs* State of Victoria", *CLR*, num.189, 1997, p. 579 (both cases on the implied right of freedom of speech), and in "Cunliffe vs Commonwealth", *CLR*, num. 182, 1994, p. 272 (concerning rights of interstate practice by solicitors) was joined by the Court.

The doctrine has since been considered by the High Court in fields other than freedom of communication. In *Leask* vs *Commonwealth* (1996) 187 CLR 579, a case concerning the characterization of anti-moneylaundering legislation, reference was made to the European Court of Human Rights' doctrine of the margin of appreciation, but Brennan CJ and Dawson J went on to note that the concept of proportionality had

no applicability to the question of the characterization of Australian laws as valid or invalid exercises of constitutional power.[65]

However, the most interesting example of the use of this doctrine occurs in a case where the implied right of freedom of speech was invoked in a case where the facts bring vivid reminders of Australia's convict past, namely a claim by a prisoner, in the original jurisdiction of the High Court, challenging the validity of legislation denying him the right to vote: *Roach v Electoral Commissioner* (2007) 239 ALR 1.

Gleeson CJ's opening words go straight to the heart of the issue of legal culture:

> *[1] The Australian Constitution was not the product of a legal and political culture, or of historical circumstances, that created expectations of extensive limitations upon legislative power for the purpose of protecting the rights of individuals. It was not the outcome of a revolution, or a struggle against oppression. It was designed to give effect to an agreement for a federal union, under the Crown, of the peoples of formerly self-governing British colonies. Although it was drafted mainly in Australia, and in large measure (with a notable exception concerning the Judicature — s74) approved by a referendum process in the Australian colonies, and by the colonial parliaments, it took legal effect as an Act of the Imperial Parliament. Most of the framers regarded themselves as British. They admired and respected British institutions, including parliamentary sovereignty. The new Federation was part of the British Empire; a matter important to its security. Although the framers were concerned primarily with the distribution of legislative, executive and judicial power between the central authority and the states, there remained, in their view of governmental authority affecting the lives of Australians, another important centre of power in London.*

Gleeson C. J. went on to cite an American academic (albeit through a reference to a Canadian decision) to support this argument (at [13]), before adding (at [16]) that "even allowing for the margin of appreciation", there was a danger that the uncritical translation of the concept of proportionality from Canadian or American authorities could lead to "the application in this country of a constitutionally inappropriate standard of judicial review of legislative action" (at [17]). These decisions had turned largely on the margin of appreciation which neither party to the litigation had submitted (wisely, Gleeson CJ apparently considered) applied to the interpretation of the Australian Constitution.

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[65] For more examples, see C Ward, "The Margin of Appreciation in Australian Jurisprudence" (2003) *Aust Bar Rev* 189.

Gummow Crennan and J. J. Kirby in their joint judgment, refer at [51]-[59] to early texts concerning the impact of conviction for an "infamous crime" (including, at [56], to Blackstone) but not, sadly, to the early decisions of the Australian courts overlooking the law of attaint. Their Honours note at [64], concerning the relevant provisions in the Constitution, that "Australia has not followed the United States" on this issue. Their Honours concluded at [102]:

> *Given the nineteenth century colonial history, the development in the 1890s of the drafts of the Constitution, the common assumptions at that time, and the use of the length of sentence as a criterion of culpability founding disqualification, it cannot be said that at federation such a system was necessarily inconsistent, incompatible or disproportionate in the relevant sense. Further, in the light of the legislative development of representative government since federation such an inconsistency or incompatibility has not arisen by reason of subsequent events. Despite the arguments by the plaintiff respecting alleged imperfections of the 3-year voting disqualification criterion, such a criterion does distinguish between serious lawlessness and less serious but still reprehensible conduct. It reflects the primacy of the electoral cycle for which the Constitution itself provides in s28. There is, as remarked earlier in these reasons, a permissible area in such matters for legislative choice between various criteria for disqualification. The 2004 Act fell within that area and the attack on its validity fails.*

Heydon J (who agreed with Hayne J that the prisoner's application must fail) had the following to say about reliance upon international covenants:

> *The plaintiff relied on the terms of, and various decisions about and commentaries on, certain foreign and international instruments-the International Covenant on Civil and Political Rights, the First Protocol of the European Convention on Human Rights, the Canadian Charter of Rights and Freedoms and the Constitution of South Africa. The plaintiff's primary arguments were fixed, as they had to be, on ss 7, 8, 24, 30 and 51(xxxvi) of the Constitution, and on implications from these provisions. It is thus surprising that the plaintiff submitted that those arguments were "strongly supported" by decisions under the last three instruments "which found that prisoner disenfranchisement provisions were invalid". It is surprising because these instruments can have nothing whatever to do with the construction of the Australian Constitution. These instruments did not influence the framers of the Constitution, for they all postdate it by many years. It is highly improbable that it had any influence on them. The language they employ is radically different. One of the instruments is a treaty to which Australia is not and could not be a party. Another of the*

> *instruments relied on by the plaintiff is a treaty to which Australia is a party, but the plaintiff relied for its construction on comments by the United Nations Human Rights Committee. If Australian law permitted reference to materials of that kind as an aid to construing the Constitution, it might be thought that the process of assessing the significance of what the committee did would be assisted by knowing which countries were on the committee at the relevant times, what the names and standing of the representatives of these countries were, what influence (if any) Australia had on the committee's deliberations, and indeed whether Australia was given any significant opportunity to be heard. The plaintiff's submissions did not deal with these points. But the fact is that our law does not permit recourse to these materials. The proposition that the legislative power of the Commonwealth is affected or limited by developments in international law since 1900 is denied by most, though not all, of the relevant authorities — that is, denied by 21 of the justices of this court who have considered the matter, and affirmed by only one.* [At [181]; emphasis added].

The tentative view expressed by Christopher Ward in his 2003 article that "the doctrine of the margin of appreciation has found a place in Australian jurisprudence"[66] has not come to fruition. Its importation and application in Australia is viewed with such caution that its role as a doctrine is largely illusory.

It is one of history's ironies that the factual matrix of Roach recalls the very issues upon which judges in the first colonial courts went against centuries of English precedent, for reasons which sound very much today like proportionality and the margin of appreciation. The High Court of Australia not only rejected these theories, but does not even refer to these earlier judgments of Australian courts, or to Australia's early history concerning attainder.

What this illustrates is the continuing conservatism of the Australian courts, and this is in turn reflected by the legislature. While there are references to decisions of overseas courts and international treaties, the law which still applies is the common law derived from Great Britain, albeit as interpreted by Australian courts, and with a preference for Australian decisions on these issues.

3. *Corporation and Commercial Law*

As is the case in tort law, the development of legal principles concerning corporation, contract and commercial law since 1989 has

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[66] *Loc. cit.,* at p.189

resulted in courts placed increasing emphasis on the decisions of Australian courts. The very high quality of the judgments of the High Court of Australia has resulted in Australian judgments being referred to on a regular basis in the English courts, but the trend in Australian courts has continued to be one of preference for Australian precedent. A recent development has been, in New South Wales, for the decisions of interstate appellate courts to be regarded as *stare decisis*.

There has, however, been a degree of legal transplanting in administrative law, to which I now turn.

4. *Administrative Law*

The former Chief Justice of the High Court of Australia, Gleeson CJ, has explained the difference between Australian solutions in judicial review and those of comparative jurisdictions as arising out of Australia's constitutional and statutory framework, and in particular the separation of powers and system of merits review:

> *A search for jurisdictional error, and an insistence on distinguishing between excess of power and factual or discretionary error, remain characteristic of our approach to judicial review…Australian administrative law has not taken up the North American jurisprudence of judicial deference, nor has it embraced the wide English concept of abuse of power as a basis for judicial intervention in administrative decisions*.[67]

However, critics continue to point to the absence of a Bill of Rights as being one of the factors making it more difficult for Australian courts as well as the lingering tradition-bound historicism of the High Court and the legislature.[68] For example, in common law countries where there is a Bill of Rights or human rights issues to take into account, such as England, Canada and New Zealand, unreasonableness as a standard of review is giving way to proportionality analysis. The four sequential tests for proportionality, which include whether the benefit exceeds the detriment, is in use for human rights cases in New Zealand. Whether this will be extended into other areas, and whether this will become a future area for change in Australian law remains to be seen.

One of the impacts of globalization is that countries have moved from being individual shuttered communities where there is a one-sided

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[67] *Loc. cit.,* p. 24 and 25.
[68] See for example Peter Cane, "The Making of Australian Administrative Law", *Centenary Essays for the High Court of Australia*, 314, 2004, p. 332.

battlefield between those in power and those who are not. If the wars of the future are to be "culture wars", to use the term coined by William Eskridge,[69] those battles will be about issues such as whether or not women may cover their heads, faces or whole bodies for religious reasons,[70] or women can engage in combat duties (*X v The Commonwealth* [1999] HCA 63). The increasing role of human rights legislation and the need to consult current social values may reduce the role of precedent, rendering this area of the law open to convergence between common and civil law systems in search of universal human values.

Notwithstanding the very different Constitutional arrangements for Australia and Britain, English law and Australian law were very consistent until the impact on the English courts of the growing influence of human rights law.[71] New Zealand, too, has moved down the path of human rights legislation.[72]

5. *Legal issues and transplanting in the future*

Australia's legal system in the twenty-first century faces a number of challenges which may result in transplanting from other legal systems. Three of these are of particular interest. They are:

1. The cost of civil proceedings and access to justice.

2. Should Australia consider enacting a Bill of Rights, First Amendment freedom of speech, or other human rights legislation?

3. Should Australia become a republic?

A. *Cost of Proceedings and Access to Justice*

Fundamental to all civil law systems is the question of cost, timeliness, efficiency and accessibility of the civil justice system.[73] This

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[69] William Eskridge, "Pluralism and Distrust: How Courts Can Support Democracy by Lowering the Stakes of Politics" (2000) 114 *Yale LJ* 1279 at p. 1298.

[70] *R (SB) v Governors of Denbigh High School* [2005] 1 WLR 3372; [2007]1 AC 100; *R v Head Teacher and Governors of Y School* [2007] 1 All ER 249. Australia has yet to contribute to the head scarf debate.

[71] For a discussion of the reasons for this, see Gleeson CJ, "Singapore Academy of Law Annual Lecture 2007: Australia's Contribution to the Common Law" (2007) *Singapore Academy of Law Journal* 1, p. 25.

[72] Rt Hon Dame Sian Elias, "Judicial Review Today", 2008 *Bar News*, p. 32.

[73] Australian Law Reform Commission Discussion Paper 62: Review of the Federal Civil Justice System, "Change and continuity in the federal civil justice system", at 2.2-2.6; McDonald, R., "Study paper. Prospects for civil justice", *Study Paper on prospects for civil*

includes not only a justice system capable of resolving disputes quickly and cheaply, but one in which the public can have confidence, and one which is not afraid to use non-litigious resolution of matters by promoting ADR and mediation. In recent years, problems with access to justice caused by complex commercial proceedings (resulting in the creation of what is now called "mega-litigation") has been a major preoccupation of the legislature and the courts.

"Mega-litigation" was a neologism first generally used by Chief Justice Gleeson at an Australian Law Reform Commission seminar on 19 May 2000 (the paper is available at www.highcourt.gov.au/speeches). The term achieved instant notoriety when it was used by Sackville J in *Seven Network Limited v News Ltd* [2007] FCA 1062. Sackville J at [2]-[6] presided over electronic-courtroom proceedings which had taken 120 days to hear, resulting in 9,530 pages of transcript, thousands of exhibits and a "truly astonishing" (at [4]) 2,500 pages of submissions from both sides of the bar table. Sackville J noted the judgment had taken nine months to write. What concerned Sackville J was that the legal costs (around $200 million) which would have exceeded the sum claimed if the plaintiff had won, which his Honour considered to be not only wasteful, but to border on the scandalous (at [10]). What is more, the plaintiff did not win. In *Seven Network Limited v News Limited* [2009] FCAFC 166 the Full Court dismissed Seven's appeal, noting at [1079] the size of the costs involved.

The causes and solutions to the problems of "mega-litigation" have been the subject of comment by distinguished jurists (e.g. the Honourable Justice Pagone, "Lost in Translation: The Judge From Provider to Consumer of Legal Services" in "The Art of Judging", Southern Cross University Law Review vol. 12, 2008 at p. 160; the Honourable Justice Hayne, "The Vanishing Trial" (2008) *The Judicial Review* 33). Justice Hayne's observations about the steadily reducing number of trials in courts have led to fears for the future of the adversarial trial process if the trial process means litigation is "too horrible to contemplate" (to quote Sackville AJ in "Meeting the Challenges of Complex Litigation: Some Further Questions" (2009) *The Judicial Review* 197).

Concerns about late amendments and delay, and the risk this creates in the trial process, have now been confronted by the High Court

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justice, Ontario, Ontario Law Reform Commission, 1995, p. 89; Davies, G., and Lieboff, J., "Reforming the civil litigation system: streamlining the adversarial framework", *Queensland Law Society Journal*, num. 25, 1995, p. 114.

in *AON Risk Services Australia Limited v Australian National University* [2009] HCA 27. The passing of the *Access to Justice (Civil Litigation Reform) Amendment Bill* 2009 (Cth) is intended to copy the *Civil Procedure Act* 2005 (NSW) and to ensure that justice is, to quote S 56 of the NSW Act, "just, quick and cheap".

The problem of complex commercial cases is a significant issue in most common law countries. In the United Kingdom the report of the Commercial Court Long Trials Working Party[74] in 2007 led to the adoption of new practices to streamline complex litigation in the commercial courts.

The flexibility of the common law system is both a strength and a weakness. The greater degree of independence afforded by the adversarial system may also permit a greater degree of trial by ambush, and escalating legal costs. These problems are some of the major challenges the common law system faces in Australia today.

B. *A Bill of Rights*?

While Australians agree that rights such as freedom of expression are fundamental values in our society, there is no consensus as to the form and content of a statute to protect such rights, or whether such legislation is even necessary.[75] The addition of a Bill of Rights to the Constitution is a practical difficulty because of its construction (which is a result of "transplanting" a Constitution from Great Britain which was designed to be altered as little as possible), and proposals to amend the Constitution to strengthen guarantees of individual rights have been defeated.[76]

When the Constitution was drafted, there was consideration of a proposal to guarantee due process of law, in a form similar to the 14th Amendment to the United States Constitution, but it was defeated at one

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[74] *http://www.judiciary.gov.uk/docs/rep_comm_wrkg_party_long_trials.pdf*.

[75] Many Australian studies reflect this uncertainty by having question marks in their title. See for example the honorable Anthony Mason, "A Bill of Rights for Australia?", *Australian Bar Review*, vol. 5, 1989, p. 79; Hiebert, J. L. "Why Must a Bill of rights be a Contest of Political and Judicial Wills? The Canadian alternative", *Public Law Review*, vol. 10, 1999, p. 22; the honorable Justice David Malcolm A. C., "Does Australia Need a Bill of Rights?", *Murdoch University Electronic Journal of Law*, vol. 5, num. 3, 1998; Anon, "Should Australia Have a Bill of Rights?", NSW Bar Association, *www.nswbar.asn.au*.

[76] Williams, G., "The Federal Parliament and Protection of Human Rights", *Parliamentary Library, Research paper*, num. 20, 1999. The difficulty of having a referendum passed is best illustrated by the failed attempt, at the height of the Cold War, to have the Communist Party outlawed as the referendum to do so failed.

of the pre-Constitution meetings.[77] The opponents of the provision pointed out, inter alia, that legislation to discriminate against Chinese workers would not survive scrutiny.

The difficulties with a constitutionally entrenched Bill of Rights include that it imposes the values of one century upon the next, in much the same way that the Constitution imposes the values of the nineteenth century upon a twenty-first century society. Some argue that courts, and judges, can protect human rights, particularly in an environment where international human rights norms can be transplanted to have a legitimate and powerful influence on domestic law, pointing to decisions such as the *Mabo* and *Wik* decisions.[78] In addition, Australia has been an active proponent of human rights in the United Nations; it was one of eight nations which drafted the Universal Declaration of Human Rights.[79]

It is, however, one thing for courts to opine on rights, and another for there to be legislation to protect fundamental freedoms. The question is, however, what kind of legislation should be considered, and there has been a great deal of interest in "transplanting" a Bill of Rights based on the *European Convention for the Protection of Human Rights*, the *Human Rights Act* 1988 (UK), the *Canadian Charter of Rights and Freedoms*, the Constitution of the United States and the *New Zealand Bill of Rights Act* 1990. The *International Covenant on Civil and Political Rights*, to which Australia is a party, would be a logical starting point.

What has been holding the debate back, in my view, is the lack of research into the process of "legal transplants". Although debate about the need for a Bill of Rights periodically revives when a human rights violation appears to have occurred, the discussion to date has consisted largely of empirical comparisons with one or more overseas models, followed by concerns about the form and content which the legislation would take. Finding the way forward, in the absence of structured debate about the legal transplanting process, is likely to be problematic.

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[77] For the text of the proposal see Justice Ronald Sackville, "A Bill of Rights: Form and Substance", *Australian Bar Review* , num. 19, 2000, p. 102.
[78] *Ibidem*, p. 104.
[79] The other nations were the USSR, China, Chile, Lebanon, France, Great Britain and the United States.

C. *Constitutional amendments*

While the effect of the *Statute of Westminster* and the *Australia Acts* has been to terminate Australia's constitutional ties with Great Britain, the language of the Constitution still contemplates a significant role for the monarch and her representative, the Governor-General of Australia. The limits of the convention for consultation with the government and the doctrine of responsible government requiring the Governor-General to act with the advice of the legislature, doctrines only partially reflected in the Constitution, are starkly illustrated by the 1975 sacking of the Whitlam government by the Governor-General of the time. In addition, there is considerable public sentiment that it is inconsistent with Australia's status as an independent nation to have a foreign-born head of state. This has led to calls for Australia to confirm its status as an independent republic by removing all references to the Queen from the Constitution.[80]

The failure of the Howard government to determine fundamental issues for the benefit of the referendum such as whether the new head of government should be popularly elected or appointed by the Government is a good example of failure to take advantage of international legal culture and legal transplantations. Despite having the benefit of the 1993 Republic Advisory Committee's reports of how the process was achieved in other countries, the Howard government failed to put a sensible, well-researched proposal to the Australian people.

This failure is instructive, in that it shows, as does debate about the Bill of Rights issue, the need for transplantation of systems and ideas from other countries to be properly researched and constructed before legislative changes can be effected. One of the benefits of the system of reports set up by Professor Jorge Sanchez Cordero and his colleagues will

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[80] See the Republic Advisory Committee, *An Australian Republic: The Options* (volumes 1 and 2) submitted to the Australian Government in 1993. Part of volume II contained an analysis of international experience of legislation for countries moving from a monarchy to a republic. Six reports were obtained, four from former Commonwealth countries which had been monarchies (India, Ireland, Trinidad and Tobago and Mauritius) and two from countries which had undergone regime change when their own countries replaced monarchs with republics (Germany and Austria). The recommendations made by the Committee were never voted on. The Keating Labor government lost office in 1996 and was replaced by the conservative Howard government. The new Prime Minister, John Howard, was implacably opposed to a republic, but yielded to public pressure for a referendum, which took place in 1999. However, the republican movement was split as to whether the new Australian Head of State should be elected by the Australian people or appointed by the government; this was one of the reasons for the 1999 referendum failing. 54.87% of Australians voted against a republic, a decisive majority.

hopefully be further research and analysis, not only of legal culture and transplantation, but on when and in what circumstances legal cultures will be benefited by transplanting.

III. CONCLUSIONS

As Australian history demonstrates, civil law is not only a product of harmony with history and cultural traditions, but also inextricably connected to the criminal law and legal system from which it has sprung and developed. As a country which spent the first sixty years of its life as a penal colony, and the next 60 years as a series of disparate colonies spread out over a vast continent, Australia's civil law system is not only a very recent one, but one which bears the scars of the penal colony history which produced it.

The dominance of English culture and English language, features Australia shares with the United States and Canada, facilitated the acceptance of the English common law tradition during the nineteenth century. In other words, this was a passive reception of a civil law tradition for the legal transplant of civil law as a function of colonization. It was driven solely by external forces, and it was imposed on the native inhabitants violently if they resisted.

Even after Federation in 1900, Australians remained curiously reluctant to leave the colonial nest, and it took the exigencies of World War II to bring about the enactment of the Statute of Westminster. Even so, it was not until 1986, when the *Australia Acts* were passed, in an atmosphere of a new national sense of identity, that Australians began to consider themselves a nation capable of independence from Britain. The failure of the 1999 referendum on becoming a republic is an indication that this process is still far from complete.

Australia is essentially a product of its convict past. In a timely reminder of the connection of civil to criminal law, V. A. C. Gattrell,[81] writing a history of capital punishment and penal change ("The Hanging Tree"), comments:

> *Not much of history marches to the tunes of humanity, after all. As the century of the concentration camps closes with new atrocities, we know what a fragile construct civility is. If western societies over long time-spans have generally contained collective passions within their "civilizing process", there have always been fractures through which violence recurrently breaks free. Come*

[81] *Loc cit.,* pp. 11 and 12.

> *a collapse in the structure of authority or in the material rewards which sustain our social collaboration, and repudiated instincts are easily unleashed. Even in stable times violence is immanent…Social orders today rest on camouflaged violence which most of us choose to know nothing about.*

The sole legal model to have been received by Australia is the British common law system, and this has been modified to suit Australian cultural and social needs. The development of international treaties on issues such as human rights and the impact of globalization have perhaps not played the role in changing the legal culture through transplantation that might have been expected. While there have been changes of attitude towards issues such as freedom of expression and the rights of the Australian indigenous people, these changes are still seen as part of Australia's history as a common law nation inheriting a legal system from Great Britain which judges and legislators are reluctant to alter by transplants from foreign legal systems. There have been significant changes to the law, but they are what I would call "common law with Australian characteristics".[82] As is the case with "socialism with Chinese characteristics", those changes do not alter the substance of the system upon which they rest.

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[82] I borrow this phrase from Deng Xiao Ping's famous description of China's political system as "socialism with Chinese characteristics" in his 1984 speech to the Japanese Delegation to the second session of the Council of Sino-Japanese Non-Governmental Persons, entitled "Build Socialism with a Specifically Chinese Character" (30 June 1984), *http://english.peopledaily.coingm.cn/dengxp/vol3/text/c1220.html.*