Legal Education and Judicial Activism in Australia

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I  INTRODUCTION

This paper discusses recent developments in legal education in Australia and their relationship to a major debate on "judicial activism".

1  Australia and legal education

Australia is a Common Law country like its parent, the United Kingdom and its elder cousin, the United States. Our current dominant system of legal education was inherited from England, and originally was a four-year undergraduate University degree. There were also non-university alternatives. The university qualification now lies between the English undergraduate University law degree and the post-graduate North American law degree. We offer the majority of our students a combined degree program in which they receive two undergraduate degrees, one in law and the other in a faculty of their choice. This half-way house is reflected in the type of training we offer our students and in the background of our legal academics and graduates.

Like Japan, Australia also has introduced new post-graduate qualifications for professional admission purposes in the past three years, modeled on the US J.D. degree. However, unlike Japan, the new degrees are taught in the existing law faculties and are not intended to replace the traditional structure. They will operate in parallel, as an alternative for those who have
already graduated from another faculty. Both the traditional undergraduate degrees and the new post-graduate degrees are essential qualifications for admission to legal practice in Australia, which has shaped their content, and how they are taught. This has linked legal education to the debate on judicial activism.

2 Academic ethics and the Social responsibilities of academics in Australia

The second part of my paper comments on the duties to society and the ethics of legal academics in the modern era. A legal culture in a society depends heavily on the education people receive about law. More specifically, the legal education of professionals has a very heavy impact on the legal culture. My task has been made easier by the publication of an extraordinary critique of the judiciary in Australia by the most recent appointee to the High Court of Australia. In a wide-ranging paper arguing that "judicial activism" threatened the "rule of law", Justice Dyson Heydon has placed part of the "blame" on the modern legal academic for the willingness of modern judges to stray from their allotted role as adjudicators and to consciously seek to make new law,\(^3\). He has raised the issues of the proper roles of both judges and law teachers.

II LEGAL EDUCATION IN AUSTRALIA-THE TRADITIONAL MODEL

From the beginning, the Law Faculty in Australia has attempted to bridge two cultures:

- As an intellectual enterprise that would qualify as a university discipline, and
- As a training that would fulfill the requirements of the first stage of professional admission.
a. Traditional influences

Four main changes in society have reshaped legal education in Australia in my lifetime. These changes have changed the basic underlying characteristics of our legal system, that have been summarized by Professor Patrick Parkinson as:

- Australian law is a received tradition (it came from England with the English settlers)
- Australian law is an evolved tradition (we have had no revolutions)
- Australian law was a mono-cultural tradition (it was English)
- Australian law was a patriarchal tradition
- Australian law was part of the Western tradition of law.

The last thirty years have seen a marked change in these characteristics, which has translated into changes in our undergraduate legal education in Australia.

b. Social change

The first great change was a result of the massive immigration since the late 1940s, that has forced an essentially Anglo-Saxon community to embrace multiculturalism. I am told that there are now over 140 languages spoken in the homes of my home city of Melbourne. Australia has chosen the Canadian path of valuing diversity and encouraging a cultural mosaic, not a melting pot like the United States. There has been significant political opposition to the idea of valuing diversity, but it has happened. The children of the post World War Two migrant families arrived in our law schools in the late 1950s.

This new population has challenged cultural assumptions in law. These assumptions used to be synonymous with English standards. Who now is the cultural standard of the reasonable man (now person of course) in tort law? What cultural standards set the levels at which people can be provoked for
the purposes of the criminal law? While our courts have accepted the idea of diversity in our population, in some cases they are yet to fix adequate standards of evidentiary proof of the content of cultures.6)

The second change was to the status of our indigenous peoples, and their laws. In 1967, our indigenous peoples were granted constitutional recognition for the first time. In 1992, in the landmark Mabo decision of the High Court of Australia, their laws, though not any of their claims to sovereignty, were recognized, after 200 years of deliberate neglect.7)

Two other major evolutions also occurred in these last forty years that impact heavily on our law and culture. We have cut our legal ties to our parent culture in the United Kingdom, and women have claimed an equal place in our society and have attacked laws that embed inequality.

Exposure to the reality of indigenous legal systems, the diversity of the experiences of our immigrant populations, and the acceptance of an equal voice for women has meant we have had to focus as never before on the core values of our Australian system of laws and culture. Cutting our ties to the United Kingdom also forces a re-evaluation of what elements of law and culture are truly Australian. Gender equality had exposed many of the underlying inconsistencies in our claimed implementation of the western liberal democratic value system, anchored in the rule of law and equality. Contemporary legal academics see it as their duty to address these issues. How do we deal with these changes in Australian legal education?

c. Changes in University legal education

I have not done a proper sociological survey of all the Australian law schools' curricula, or the opinions of my colleagues in the law schools in Australia, so my comments are anecdotal. They are based on my 40 years of association with law schools in Australia, Japan, the United States and Canada. When I began my career as a law student in 1964 at the University
of Melbourne, a revolution was well under way.

The revolution of the 1950s and early 1960s saw:

- The development of university based law degrees in law faculties staffed by full-time, professional academics.
- The development of the US-style case-book teaching method, to replace lectures by part-time practitioners, often using roneod lecture notes handed down from their predecessors over many years.
- The establishment of US-style academic law reviews managed by student editorial boards.
- A gradual shift in post-graduate training and in the location of academics' overseas research destinations from the UK to North America.
- A gradual broadening of the training of legal academics to include formal qualifications in at least one other discipline.
- A shift in focus from training lawyers for the legal profession to training people in law for a wide range of future occupations.
- The development of combined degree programs.

Justice Heydon's comments imply that he regrets all these developments.8)

III THE SOCIAL AND ETHICAL RESPONSIBILITIES OF LEGAL ACADEMICS

1 The Heydon critique of Legal academics

In explaining the rise of judicial activism, Justice Heydon regretted the loss of judicial probity. One key factor leading to a loss of judicial probity, he argued, is that proud judges seek to be recognized and praised by the new generation of law teachers. Their pride demands that they be cited in "Australian and overseas university or professional law reviews (the now-bloated (sic) numbers of these being to some extent a by-product of a world wide
explosion in law school numbers, and hence academic numbers, in the last forty
years)." This seems to say that the expansion of professional and aca-
demic publications is bad, and that the increase in the number of legal
academics is also bad.

Worse still, he says this judicial pride has been engendered in modern
Australian judges "partly because almost all modern judges were educated
in law schools staffed by professional law teachers as distinct from practi-
tioners teaching part-time, and a critical analysis of the merits of legal rules
was a significant aspect of that education." In Heydon's view, full time,
university based academics are also bad, essentially because they criticize
the legal systems they teach about. Justice Heydon blames this evil of
criticism of the merits of legal rules on Australian academics catching the
American disease of a socially aware academic and judicial method.
Academics are dismissed as socialists and journalists "...because since the
early 1960s the fashion has been for legal intellectuals to be quarante-
huitard, to be dismissive of what they do not fully understand and to think
like an editorial in the Guardian." 

Should we agree with him?

I personally think it is a central task of the legal academic to critically
analyze the laws and the legal system in both our teaching and writing. I
would hope that our analysis was based on a clearly articulated methodol-
ogy grounded in rational analysis, not unargued value judgments or asser-
tions, which have no place in academic discourses. Since academics are not
deciding disputes between parties, like a judge, they should feel free to apply
knowledge from other disciplines in evaluating a legal principle, institution
or system.

I have no formal training in another discipline, so am envious of my
colleagues who can apply a professional economic, sociological, historical
or philosophical analysis. I think the quality of teachers in the modern law school is much more attuned to the needs of the community than the part time programs of the 1920s or 1940s that focused essentially on the traditions and needs of the Bar. This ethos was perpetuated through the reliance on barristers to teach. This ethos was evident in the many subjects that were still taught by practitioners in the senior years of my law degree in the 1960s.

In the modern Australian law school, the great majority of subjects in the undergraduate LL.B. degree are taught by full time teachers. Our graduate subjects are enriched by the participation as teachers of many distinguished practitioners, but the majority today are specialist solicitors, not barristers. I think the dominant ethical duty of the modern legal academic is to follow the traditions of the University and seek new knowledge through the application of transparent methodologies.

We have a duty to present to our students, and future graduates, a clear picture of the state of the existing law, but also an understanding of the institutions and processes that will allow them to understand future changes in the legal system. Contrary to Justice Heyson's view, I think we have an ethical duty to provide our students with the facility to critically evaluate the law and legal institutions. Otherwise, how will they protect the rule of law?

Our LL.B. graduates are clearly moving into a broad spectrum of careers. It is too early to talk about the career destinations of our JD graduates, but a key element of that program is that it does qualify graduates to take the next step towards professional admission. Does our ethical responsibility change depending on the perceived destination of our graduates? I don't think so.
2 The "judicial activism" debate in the profession and in the Academy

Why has the debate on judicial activism in Australia become so heated?

To a civilian lawyer, a key difference between a civil law system and a common law system may well be the idea that civil law is based on legislation and judges do not make law, whereas in common law systems judges do make law. The contemporary debate in Australia is not so much whether they make law as how they make law.

Since the 1960s, Australians have followed English judges in recognizing that judges do make law, not just declare it. The protagonists tend to compare the views of former Australian Chief Justice Dixon (1954–64), who described himself as a strict legalist, with the activities of later courts. Justice Heydon contrasts "the legitimate role of the appellate courts in changing the law by a Dixonian process of development and adaptation" with "the conscious making of new law by radical judicial destruction of the old". The most contentious area of change seems to be where judges base their review of existing law on their interpretations of the following sorts of expressions selected by Justice Heydon: "the contemporary needs and aspirations of the society" or "contemporary values" or the "view society now takes" or "enduring values".

The question is quite rightly asked "how can these aspirations or values be established in a court?" Australian courts have not tended to encourage the Brandeis brief to establish social trends. The contrary argument to that of "strict legalism" is that of Chief Justice Mason, also quoted by Heydon, that "the ever present danger is the 'strict and complete legalism' will be a cloak for undisclosed and unidentified policy values...". Did not the High Court, of which Dixon was part, frustrate the will of Parliament in the Communist Party Dissolution Case by ignoring Parliament's careful statement in the relevant legislation of its findings about the dangers facing
Australia in the early 1950s, and statements to the Court by counsel for the government on the Executive's view, and instead take "judicial notice" of its own view of the state of Australia's defence situation? How does this the use of judicial notice differ from the later reliance on judicial assessments of social trends?

Whatever the problems of proving social facts to the satisfaction of a court, I would argue that the rules are clear for academics pursuing their function in the University. We have disciplinary tools to present to our students to illuminate their study of the law and the environment in which it operates, and a duty to provide the fullest possible intellectual environment for our students. We should be engaging them in debates about community values, and how they find out what they are.

3 Three recent cases: "activism" or "proper judicial decisions"?

Three cases I put before my first year students this year demonstrate the difficult issues confronting courts, and in my view the careful way in which the judges involved framed the issues so that they answered a legal issue by reference to principle, not a social issue by means of judicial legislation. I will not be able to analyze the judicial method adopted in each case in depth, but I hope the general structures will emerge.

The first case involved the so-called "widows discount". In one of the great legislative reforms of the 19th Century the English Parliament overruled the common law principle that said that a person's right of action died with them. In accident compensation cases for wrongful death the partner and close family of the deceased now had a right to pursue an action. However, although the legislation did not require it, the courts began to discount the amount a widow recovered by reference to the court's estimation of the financial benefit of her possible remarriage. In a case from Western Australia that took ten years to resolve, the trial judge discounted
the widow's award by 5% for this reason, and the appeal court raised the discount to 25%. On appeal, in November 2002, the High Court of Australia said that such a separate discount was no longer acceptable.

The majority view was that the possibility of remarriage was just one of the speculative contingencies that judges consider as a whole in arriving at an amount for damages. Most of the judgments discussed the changing social status of women, but none based the decision on that ground. Several judgments discussed the recommendations of a recent Law Reform Commission Report, but did not use it as the basis of the decision. Some referred to legislation in other jurisdictions that had abolished the rule, but said it did not apply to Western Australia. Most referred to prior judgments and judicial expressions of disquiet about the imprecision of the calculation the court was expected to make. Only Kirby J., referred to a range of material on the social context of the issue, but he did not rely on it. In the end, it was the lack of principle involved in the calculation that seems to have persuaded the majority of the court.

The second case involved a challenge to the application by a couple to register their marriage in New South Wales. One party was a transsexual person, who some time prior to the application to marry had under NSW legislation legally changed his birth certificate to reflect his change of gender to a male. He had been registered at birth as a female. The federal government, which now administers the registration of marriages under the Marriage Act, opposed the registration of the marriage, and the federal Attorney-General argued before the Full Family Court of Australia that "marriage" had the meaning it generally held at the time the word was inserted in the federal Constitution in 1901. "Marriage" was not defined in the Constitution or in the Marriage Act, but the Attorney-General argued that the generally accepted meaning in case law in England and Australia
is “a union of a man and a woman”, and that in 1901 gender was determined at birth.

The Full Court disagreed in a unanimous judgment. It said that according to the legislation of the NSW Parliament, people could change their gender. The male partner had followed all the required legal steps and was legally a male in NSW. Accordingly, his gender according to law was to be determined at the time of marriage, not his birth. The Full Court also rejected the contention that words in the Constitution were frozen in time, in 1901. “Marriage” holds the contemporary meaning. This is a very important decision in terms of interpreting the powers of the national Parliament, as listed in the Constitution (s.51). However, the members of the Full Court were very careful to stress that their decision was not about so-called “same sex” marriages.

It would be hard to call this judgment activist, or to criticize the methodology the Full Court followed. The Full Court framed the question in such a way that it could answer it by reference to law, and not to policy. The relevant parliament had made the law on change of gender, and the court could not question that policy. Whether words in legislation have a contemporary or fixed meaning is one for parliaments to decide. Where the parliaments say nothing, judges have preferred the contemporary meaning, if it is clear. In this case, marriage was not defined in the Constitution or in the Marriage Act itself (except perhaps in s.46 in which the marriage celebrant is required to use a form of words that includes the accepted meaning set out above).

The third example literally involves a life and death decision. Under recent Victorian legislation, a person is entitled to decline “medical treatment” but cannot reject feeding as part of “palliative care”. A husband recently brought an action on behalf of his seriously ill wife to cease what he alleges is medical treatment. His wife has not been able to communicate
with anyone for over six years and is in a bed-ridden state in a nursing facility. Medical opinion was that she would die over five years ago. She is being kept alive by a tube inserted by surgery into her stomach over five years ago as a temporary measure. The tube is also used to feed her medication. The husband argues this is medical treatment and should cease. The Public Advocate (a lawyer) was appointed by a lower court to represent her interests. The lower court found that the tube constituted medical treatment \(23\). The Public Advocate asked the Victorian Supreme Court for a declaration that this is correct, as doctors want to be sure before they remove the tube \(24\). The Supreme Court has granted the application \(25\).

The issue has been defined as whether the insertion or use of the tube is "medical treatment" under the legislation, not whether Victoria recognizes a right to die. However, the effect of removing the tube will be that the woman cannot be fed and will die. A judgment of the English House of Lords was relied on by the lower court as the justification for its view \(26\). Under the Victorian law, the courts must adopt the interpretation of the relevant law which best promotes the Victorian Parliament's intention in adopting the legislation, which clearly was to allow terminally ill people to refuse further medical treatment \(27\).

If "judicial activism" is measured by the importance of the social result, then all three cases I have discussed involve activism. However, if "activism" is measured by the judicial method followed by the judges, then none of these cases departs from accepted judicial method. Nor, I would argue, does the Mabo decision, often cited as the most notorious example of Australian judicial activism, depart from accepted judicial method. Indeed, I would argue that the decision in Mabo came down to a dispute about the legal impact of a change of sovereignty on rights under the prior legal
system. The majority said prior rights would continue until they were extinguished by an act of the new sovereign. The minority of one argued that prior rights would only survive if the new sovereign explicitly recognized their continuing validity. Each side cited prior case law for their view. There was no binding precedent. The High Court could state the law in those circumstances. I would argue that it is the task of the academic to evaluate both the methodology and the social implications of these important judicial decisions.

IV CONCLUSION

Law Schools in Australia have developed enormously over the last forty years, in numbers, in size, in the scope of their activities and in their multi-disciplinary approach to teaching and research. Our over-riding responsibility to society is to educate new generations of socially and legally aware citizens who are prepared not just for national professional roles, but also are equipped to contribute to an international society. The disparaging remarks by Justice Heydon are far from the reality of legal education in Australia.

1) This paper is based on a larger work prepared for a 50th Anniversary Symposium at Osaka City University held on July 5-6, 2003. The initial research and drafting was undertaken during a period of research leave at the Graduate School of International Development at Nagoya University in 2002. I am grateful for the comments of colleagues at Nagoya University and Osaka City University who listened to earlier versions with great patience.

2) The diversity of possible education pathways is reflected in the educational background of the seven justices of our highest court, the High Court of Australia. Four have Law and Arts degrees from Australian law schools. Two from this group also have Master of Laws degrees from Australia and a third has a BCL from Oxford. One has an undergraduate law degree from Australia. One qualified via the
Barristers Admission Board of New South Wales and has no law degree. The most recent appointee has an Arts degree from Sydney University and a BCL from Oxford, but no Australian law degree.


5) And also in Canada, where I also have taught.

6) See Jo-Anne Fiske, "positioning the Legal Subject and the Anthropologist", (2000) 45 Journal of Legal Pluralism 1, 1-4 for problems of proving indigenous customs and laws. There has been a problem in Australia of courts accepting statements about cultures in the adversary context of the defence of provocation that have been refuted later by the communities concerned.


8) Heydon, above note 8 at 14.

9) Heydon, above note 8 at 14.

10) ibid (italics mine).

11) ibid.

12) ibid. Quaran' te-huitard is a reference to those who think like the 1848 French revolutionaries and the Guardian is the left-wing English newspaper.


14) Heydon, above note 8 at 17 (italics mine).

15) ibid at 21.

16) quoted in ibid at 21.


19) Ibid, see joint judgment of Gaudron, Gummow and Hayne JJ, para 46 & 79 and Kirby J, at para 161. Gleeson CJ, thought it should only be a separate consideration in special cases, at para 39.


21) Births, Deaths and Marriages Registration Act 1995 (NSW), s.49.


23) Medical Treatment Act 1988 (Victoria) see s.3 for definition of “medical treatment”. The proceedings were in the Victorian Civil and Administrative Tribunal (VCAT). BWV [2003] VCAT 121 (28 February 2003).


27) Interpretation of Legislation Act 1984 (Vic) s.35.

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