

Americanisation of Australian law and legal education? Implications for Japan

「オーストラリア司法・法学教育のアメリカ法化？日本法への示唆」

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1. Introduction

Japan's legal system, including recently its judicial system and legal education, is at a crossroads. Newspapers report unprecedented head-hunting of leading legal scholars by “meimon” law faculties, jockeying to take advantage of the inauguration of post-graduate law schools from next April. New entrants are emerging too, like “Omiya University” which has applied with the Daini Tokyo Bengoshikai to establish a law school.¹ In many ways, the upheaval parallels shifts in Japan's corporate world.² Media coverage of other legal issues has grown enormously too. Even commentators from the US, typically dubious about the pace and even direction of change in Japan, are beginning to take note. Indeed, a former student of one of the authors, Eric Sibbitt from Cromwell & Sullivan's Tokyo office, has recently joined with a young political scientist in the US to proclaim “the Americanisation of Japanese Law”.³

This goes too far, especially for those familiar with developments in continental Europa and the English law tradition. That was the consensus from a recent Continuing Legal Education seminar co-hosted by Sydney University Law Faculty and the new Australian Network for Japanese Law (“ANJeL”, centred on that Faculty and the Law Faculties of UNSW in Sydney and the Australian National University in the capital, Canberra).⁴ It is true that Japan has experienced considerable political fragmentation and economic liberalisation over the 1990s. This has led to a shift away from direct ex ante regulation of behaviour by the government, towards indirect control through more scope for ex post compensation claims by individual citizens, and the system has also become more transparent. Correspondingly, there is more role for the provision of a variety of legal services, and expansion in legal education, as recommended in the 12 June 2001 final report of the Judicial Reform Council. However, it is misleading to conclude that the shift amounts to “Americanisation”.

¹ 1 July 2003 Nikkei article, copied by Miyazawa for his talk in Australia.

² Nottage 2001 Nth Carolina article.

³ Kelemen & Sibbitt 2002

⁴ www.law.usyd.edu.au/anjel

Even in commercial regulation, a better description – or metaphor – is “Europeanisation” or broader “globalisation”, and there remains significant “indigenisation” – features peculiar to Japanese law. This is apparent in two areas of law introduced by Kelemen and Sibbitt: product liability (following the EU model in substantive law and general effects), and corporate law (as the backdrop to their discussion of securities law).⁵ Likewise, despite steady improvements and “professionalisation” of the human resources and roles of corporate legal departments over the 1990s, the fact that so few staff are qualified to practice in Japan remains a key distinction from “in-house counsel” in US firms.⁶ Tokyo’s large law firms are also busy merging and otherwise expanding.⁷ So far, however, they do not seem to have generated the “tournament of lawyers” process within their firms, which resulted in exponential growth in US law firms from the 1960s.⁸ That process also seems unlikely to emerge readily, as it requires assigning two associates to each partner, then promoting one and requiring the other to leave the firm – difficult in Japan, where departing lawyers probably have fewer skills transportable to other organisations, and where longer-term employment is still a more important practice than in the US.

Thus, looking more closely at the present transformations in Japan, especially from a broader comparative law vantage point, reveals a much more multi-layered – even chaotic – picture.⁹ Perhaps this is unsurprising, for Japan has always been adept at taking and combining what it finds useful from multiple sources.

To a lesser extent, this also seems true of Australia, over similar span of modern legal history. Australian law has tended to be quite pragmatic in approach, rather like Australians generally (or at least their self-perceptions).¹⁰ Not infrequently, Australian law has been willing to risk “change”, despite “continuity” of its inherited English legal tradition.¹¹ In its judicial system and legal education, in particular, Australia since the 1990s has experienced significant transformations, with some parallels to those now being implemented or debated in Japan and proclaimed as “Americanisation”. Yet Australia’s overall orientation remains much closer to the

⁵ Nottage PL book, forthcoming December 2003; Puchniak, forthcoming next issue of *Australian Journal of Asian Law*.

⁶ See generally Kitagawa & Nottage, forthcoming 2003. Cf Henderson 1987, arguing that *kigyohomuin* should be counted amongst Japan’s “quasi-lawyers” when comparing the size of the “legal profession” in Japan and the US.

⁷ Nagashima & Zaloom 2002 UW conference paper.

⁸ Galanter & Palay 1991.

⁹ Nottage 2002; Nottage & Wolff, forthcoming book chapter also on corporate law 2004; Nottage & Wolff forthcoming book 2005.

¹⁰ Smith book chapter 1997.

¹¹ Parkinson 2001 2nd ed.

English law tradition, in its new incarnation influenced by EU law and Blair's "new left" government.¹² This article illustrates such resilience, briefly introducing some key features of Australia's legal tradition and appraising some developments in its judicial system in more recent decades (Part 2), as well as outlining shifts in Australian legal education (Part 3). It concludes by speculating on some implications for Japan (Part 4).

2. Australian Law and the Judicial System

Sydney University Law Faculty Professor Patrick Parkinson argues that Australia legal tradition has been characterized by three main features.¹³ First, it has been a "received tradition", inheriting and heavily influenced by seven centuries of English common law prior to the settlement of Australia from the late 18th century. Secondly, it has been an "evolved tradition", emerging out of British colonialism without a revolution as in the United States. Although Australia developed considerable de facto independence, and formally gained to right to independence in 1931, this was only taken by Australian states in 1986. Thirdly, Australia has had a largely British "monocultural tradition". The land rights and culture of Australia's Aboriginal peoples, dispersed across a vast continent, were scarcely recognized. This only began to change in the 1990s, thanks to pathbreaking decisions of the High Court of Australia (replacing the Judicial Committee of the Privy Council in London as the highest court of appeal for Australian in states only from 1987).¹⁴ A longer standing transformation has been the declining relative importance of migrants from Britain, compared especially to those from Asia, reflecting a parallel shift in trade and investment flows. Again, however, since the late 1990s the Howard government appears to be "disengaging" from Asia, focusing its diplomatic and trade policy more on the United States.¹⁵

A major issue for the contemporary Australian legal system has been how to acknowledge and adapt to a more diverse population, especially to ethnic minorities from non-British backgrounds and to indigenous peoples. Parkinson suggests that "the future of Australian law" turns on "the challenge of inclusion".¹⁶ He points out that especially from the 1970s Australian law increasingly conferred broad

¹² Brivati & Bale 1997.

¹³ Above n ..., ...

¹⁴ Subsequently, under intense political pressure, the federal government enacted legislation to limit the effects of some of this judicial activism. See generally Butt et al 2001 book.

¹⁵ See generally Dalrymple 2003 book.

¹⁶ Above n ..., ...

discretions on judges, for example to set aside contracts for unconscionability or to provide remedies for “deceptive and misleading” practices in trade, but that a foundation of shared values to help legitimize the exercise of such discretion has come under increasing pressure. Parkinson also argues that more discretionary rules also assumed that “they will be used by courts in deciding cases, rather than by parties in settling disputes in the shadow of the law”, yet legal aid for civil litigation is now being scaled back and Alternative Dispute Resolution (ADR) has been successfully promoted.¹⁷ He calls this the problem of “centripetal law”, and advocates instead a shift towards “centrifugal law” – more detailed rules, conferring “clear bargaining endowments which could facilitate settlements” by a broader array of citizens.¹⁸

In many ways, Australian law seems to have moved in that direction in the last few years. In the 1990s, more diversity was acknowledged in the legal system, with one judge appointed to the High Court of Australia (Michael Kirby) making public his homosexuality.¹⁹ Yet the Chief Justice at the time, Sir Anthony Mason, was confident enough to lead the Court in developing and applying new broad principles to resolve a range of private and public law issues.²⁰ The current Chief Justice, however, is known for his critique of such “individualized justice”, and the latest appointment to the Court (a former Dean of Sydney Law School) is an even more overt “judicial conservative”.²¹

In tandem, the legislature has reacted to perceptions of a “litigation explosion”, especially in tort law, by trying to clarify substantive law principles, rather than welcoming such a development as proof of success in improving access to justice for a broader spectrum of Australia citizens. For example, rises in general liability insurance premiums, coinciding with the shocking collapse of a large insurance group,²² and media allegations of excessive tort litigation generally, led politicians in federal and state governments to propose “tort reform” legislation restricting claims for personal injury. In New South Wales (Australia’s most populous State), with retrospective effect to 20 March 2002, the *Civil Liability Act 2002* (NSW) imposes caps on general damages (for non-economic loss), on economic loss, damages awarded for

¹⁷ Ibid, 240. ADR took root in Australia from the 1980s, first in certain tribunals, then in private processes, and more recently in court proceedings. See Astor 2002 and Nottage Lawasia 2003 conference paper.

¹⁸ Above n ..., 240.

¹⁹ Taylor, Toki no Horei 1999.

²⁰ Saunders ed re Mason Court. See also Braithwaite, Ziegert, Syd L Rev 1995.

²¹ Gleeson 1995 and 1999; Justice Heydon ‘Quadrant’ lecture.

²² See the website of the HIH Royal Commission of Inquiry initiated in 2001, at <<http://www.hihroyalcom.gov.au/>>, and e.g. Baxt 2002.

gratuitous care (compensating family members for domestic and other assistance to plaintiffs), and lawyers' fees payable to successful plaintiffs in smaller claims. It also prohibits awards of punitive damages in negligence cases, and requires lawyers to bring proceedings only if they believe there are reasonable prospects of success. With effect from 6 December 2002, the *Civil Liability Amendment (Personal Responsibility) Act* 2002 (NSW) further clarifies or limits negligence liability principles, such as 'reasonable foreseeability' in relation to the duty of care, causation and damages, as well as adjusting limitation periods.²³ On 2 October 2002, the Federal Government released a *Review of the Law of Negligence* prepared by a Panel (comprising a semi-retired NSW Court of Appeal judge, a law professor, a professor of medicine and a NSW municipality mayor), pursuant to a joint initiative of federal and state ministers and Terms of Reference stating:²⁴

The award of damages for personal injury has become unaffordable and unsustainable as the principal source of compensation for those injured through the fault of another. It is desirable to examine a method for the reform of the common law with the objective of limiting liability and quantum of damages arising from personal injury and death.

The 61 recommendations in the Review, which the federal Assistant Treasurer announced on 15 November were agreeable to all state Ministers,²⁵ developed caps on damages and other measures adopted in the NSW legislation, and included many other measures designed to limit claims for negligently-caused personal injury. For example, it recommended that a medical practitioner should not be considered negligent if treatment provided accorded with an opinion widely held by a significant number of respected practitioners in the field, unless a court considered such an opinion irrational. The Review also recommended, for example, that claims be barred after the earlier of (i) three years of discoverability of the injury (subject to limited court discretion), or (ii) an absolute "long stop period" of 12 years after the events on which the claims were based (like delivery of negligently produced goods).²⁶

In some respects, this "tort reform" process tracks the US experience from the 1980s. As in that country,²⁷ there was little detailed empirical analysis of the extent and causes of the initial "crisis". However, the generation and implementation of the

²³ Clark & Harris 2003.

²⁴ Review, para. 1.3

²⁵ 13 *Australian Product Liability Reporter* 96 (2002).

²⁶ Above note ..., paras. 3.5-3.19, paras. 6.1-6.40.

²⁷ Galanter 1986.

“reforms” has been much quicker and more pervasive than in the US.²⁸ This illustrates the comparatively limited extent of Australia’s federalism. (Another example is that the High Court of Australia, unlike the Supreme Court of the United States, hears appeals from the highest courts in each of the states on almost all private law matters and therefore has a much stronger unifying role in this area.) In addition, there appears to be much greater focus on legislative restatement of more detailed rules, driven by the view that “bright line rules” should discourage litigants from proceeding through the court system. That is a very “English” view of the “rule of law”, encouraging “formal reasoning”, compared to the more “substantive reasoning” (open to looser “moral, economic, political, institutional, or other social consideration[s]”) characteristic of the American law.²⁹ In other words, some features of Australia’s legal system do look increasingly “American” – pressures towards more recognition of diversity, a federal system, (ill-defined) growth in some areas of civil litigation, and a “tort reform” reaction – but the predominant motivation and some specific reforms are quite “English”. Substantive tort law (especially product liability law) also remains much more English (with European Union influences) than American, despite the latter’s shift also towards somewhat more bright-line rules since the 1990s.³⁰

A similar point can be made about other aspects of Australia’s judicial system and legal profession. Last year, for example, there was a strong attempt to politicize the judiciary, an accepted fact of the US legal system. A senior member of the Howard government alleged in Parliament that Justice Kirby had had sexual relations with an under-age boy. However, the evidence submitted by the Parliamentarian turned out to have been forged, and Australia’s Attorney-General (the politician responsible for the legal system) was widely criticized for not upholding more effectively the independence of the Courts.³¹

Another transformation in Australia’s judicial system, which has managed to take root, is the rapid expansion in lawyer numbers. The growth of large firms of solicitors nation-wide (and even overseas, especially in major Asian cities) has been remarkable.³² These firms have found or created demand for specialist services within

²⁸ Cf generally Zollers et al 2000; and Nottage forthcoming PL book, above n

²⁹ Atiyah & Summers 1987; Nottage PhD thesis 2002.

³⁰ Stapleton 2002; Nottage book. On shifts in contract law in the US, see also Nottage PhD thesis.

³¹ See eg Simon Sheller, “Justice Kirby and the Attorney-General” 76(5) *Australian Law Journal* 277-81 (2002).

³² Consider, for example, the firm where one of the authors (Saito) worked in the mid-1990s, Allens Arthur Robinson. Despite a management upheaval, the firm

a broad-based organization. On the “supply” side, they seem to have been quite adept in implementing US-style “tournaments of lawyers” within the firms, generating very strong growth. However, the nature of the “tournament” and other patterns are probably not identical to what occurred in the US at an earlier stage (namely from the 1960s), although there has been very little empirical study of Australian firms to confirm this. Despite very significant transformations and enormous pressures to commercialise all aspects of these mega-firms, our experience is that a sense of broader professionalism – including duties owed to the Court and the broader public – remains stronger than in US counterpart firms. That sense is reinforced by the separate profession of barristers still found in all Australian states, who continue to form the overwhelming majority of those appointed as judges. Overall, therefore, the Australian legal profession shows more affinities with the current English profession. The latter has also evolved significantly over the last few decades – partly towards a more “American” common law model, to be sure, but also influenced by other borrowings (notably European Union law) and heavily influenced by a much longer and distinctive “English” common law tradition.³³

3. Legal Education

The resilience of the English law tradition is also apparent in legal education throughout Australia. Although each state has different institutions and processes, most illustrate common trends. First, as in other Anglo-Commonwealth legal systems like New Zealand’s,³⁴ there has been a shift since the 1960s away from law faculties providing training and knowledge for narrow “professional” development, using many practitioners as part-time instructors. Instead, full-time academics have become the norm, although most have had experience in legal practice and continue to do some outside consultancy work for law firms or the like. Full-time academics came to be expected (and required) to pursue research and to teach law “in context”, bringing law into closer contact with other academic disciplines and also preparing students to pursue a broader array of more or less “law-related” careers. A key element allowing universities to achieve this shift – including financing of the extra staff – has been

reports that it still has “hundreds of lawyers, and 11 offices in seven countries”, and that independent surveys “consistently ranked us among the top law firms of the Asia Pacific” (<http://www.aar.com.au/services/index.htm>). The website for one of the largest Australian firms, Minter Ellison (www.minterellison.com), proclaims that it “has been ranked the 15th largest law firm in the world by recent UK and US reviews. The firm has more than doubled in size since 1995 with over 2000 people working in seven countries”.

³³ See eg Flood ref in Kitagawa/Nottage book chapter.

³⁴ Nottage 2000 Gekkan Shiho Kaikaku = 2002 Sapporo booklet.

obtaining primary control as the “gatekeeper” to qualification as a legal practitioner (barrister or solicitor). In New South Wales, although it is still possible to qualify without completing the undergraduate (LLB) law degree offered by the universities, by sitting separate examinations offered by the Admissions Board, the vast majority of practitioners nowadays do first complete an LLB (and the AB courses are anyway run mainly by the Law Extension Committee, a separate part of the University of Sydney). Then they undertake a short period of practical legal training, at the College of Law (no longer at Law Faculties, which offered such courses on a part-time basis until the 1980s). Further training or forms of apprenticeship are then available for those wishing to develop careers as solicitors or barristers.

The other important development has been to require students doing the undergraduate LLB degree to do another degree in a different discipline (like Arts, Commerce, or Science). That can be either in parallel (through what USydney calls the “Combined Law” programme), or before doing the LLB (the “Grad Law” programme). The idea is that to be well-rounded “lawyers”, even in law firms and certainly in other “law related” jobs (in government, companies, etc), students should appreciate how law interacts with its broader social and economic context. Thus, like legal academics nowadays, students are expected to be “multi-functional” – learning principles and skills in legal analysis which can be immediately applied in “professional” life in a narrow sense, but also seeing and engaging with the bigger picture.

Another interesting trend, at least among the longer established law faculties in Australia, has been to capitalize on this development, and the earlier tradition of universities having close links with the legal profession, by developing extensive postgraduate programmes – mostly involving part-time students already in legal practice (broadly defined). At Sydney University Law Faculty in 2002, for example, 280 entered as Combined Law students and 85 as Grad Law students, meaning there were just over 1000 undergraduate LLB students. A similar total is enrolled in various Masters and a few post-graduate Diploma programmes offered by the Law Faculty (or, more recently, in collaboration with other Faculties). The Law Faculty also now offers an SJD degree (including some coursework), as well as supervision for the PhD in Law (involving just one longer thesis). The Masters programmes, in particular, are very popular among younger practitioners as “continuing legal education” (in addition to its regular one-off CLE seminars, usually in the evenings). Completing a Masters from an established university has become very important for promotions within law firms, as well as helpful in keeping up to date with new

developments in the law. Interestingly, even in areas where the law can become very technical (like tax or corporate law), part-time students already working in practice often are less interested in “black letter law” (*kaishakuron*, or immediately applicable knowledge from the latest legislation or case law), as they deal with that all the time in their own work. Rather, they are attracted to the broader policy or comparative/international dimensions emphasised in many postgraduate courses, which these students often do not have the time or occasion to investigate yet which may offer new perspectives or long-term direction in approaching a range of problems in the relevant area of law. Overall, the postgraduate courses and students are extremely important, especially at Sydney University Law Faculty (with the largest and most diverse programme in Australia). As well as tying in more directly with research projects and publications, which is increasingly important to – and linked to – financial well-being of the Faculty and individual academic staff, the postgraduate programme generates significant fees which can be used to “cross-subsidise” teaching in “small groups” in the undergraduate LLB degree. That move was made in the late 1990s, following its success at Sydney University’s main rival in the area (the University of New South Wales, UNSW), because lectures to large numbers of students – even supplemented by tutorials – were being criticised as ineffective in teaching a broader array of skills and “legal knowledge in context”, as well as “black letter law” analysis.

Overall, many of these shifts parallel those in England. Leicester University Law Professor Anthon Bradley (2003) identifies there a tension similar to that found in Australian law faculties, between “excitement” and “malaise”. On the one hand, legal academics are encouraged by the strong growth in full-time faculty members over the last few decades, their engagement with other academic disciplines (in research and, increasingly, in diverse teaching techniques), improved staff-student ratios, better library and other resources (especially through IT), and more scope for interaction with colleagues around the world. This exciting environment helps make up for mediocre salaries, with many recently graduated students soon earning much more in large law firms than their lecturers (and even professors). On the other hand, there is increasing concern about the “new managerialism”, part of a broader process of directly importing private business techniques into the public sector, reinforced by loose talk of “accountability” (pp –22).

La Trobe University Law Professor Margaret Thornton (2001) strongly criticises the onslaught of the “corporatised university” in Australia. Yet she would agree with Bradley that there is considerable scope for “resistance” against such trends.

Compellingly, Bradley advocates sustaining and extending comprehensively into contemporary legal education a tradition of “liberal education” dating back to the mid-19th century. Rather than becoming vocational training schools, Newman’s 1852 lectures urged universities to nurture a liberal “habit of mind” among teachers and students, to last through life, characterised by “freedom, equitableness, calmness, moderation, and wisdom” (p. 37). Drawing on that sort of tradition, and embedding it in contemporary law faculties at both undergraduate and postgraduate levels, is critical to maintaining a sound balance between narrower professional training and broader legal education in universities in England, Australia, and further afield.³⁵

4. Implications for Japan

One general conclusion from this brief comparison of Australian law is that traditions, especially legal traditions, are very powerful. As Parkinson observes:³⁶

it is the strength of traditions that, once established, they can outlast the disappearance of those conditions which were essential to their formation and early development.

Contrary to the view of a well-known comparativist (specialising in Roman Law), novel legal ideas do not always travel easily across borders.³⁷ This should not surprise us. Self-referentiality within a legal system, like any other developed sub-system of society (perhaps even university bureaucracies!), is one way that societies can deal with growing complexity.³⁸ This should make it difficult for Australian law, or Japanese law, to be readily “Americanised”.

Another implication for Japan is that it should probably just continue doing what it has done effectively for centuries: extensively research legal developments in other countries, determine what might best “fit” within its own legal tradition, and be prepared for reiterations of “trial and error” in implementing legal change. Experimentation and vision are essential, and reformers should not be tempted into

³⁵ Different universities may end up with different balances. Sydney University Law Faculty (Australia’s oldest), has a strong tradition of doctrinal scholarship, closely related to legal practice in the narrower sense, despite becoming the crucible for legal realism in Australia in the mid-20th century. UNSW Law Faculty, established in 1971, has always professed to take the idea of “law in context” much further.

³⁶ Above n ..., 242.

³⁷ Cf Watson 2000

³⁸ Ziegert 2002.

acting just for short-term gain.³⁹

Finally, in many ways, the Australian legal system resembles the Japanese legal system.⁴⁰ Both share an odd mixture of formal and substantive reasoning, and supporting legal institutions, although Australian law probably still tends more towards the former (due to the English law tradition) whereas Japanese law tends more towards “substantive reasoning” (and therefore, quite ironically, often bears important similarities to US law). Hopefully, this reinforces the potential for Australia to point the way towards a more cost-effective (and therefore sustainable) model for ongoing reforms to legal education in Japan, a model which also finds a good balance between nurturing narrower “professional” knowledge or skills and a broader appreciation of how law interacts with social and economic context.

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³⁹ Nottage 2000 Juristo.

⁴⁰ Cf Mal chapter in FS for Fujikura.

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