

# LEGAL RESEARCH

## The value of comparative legal scholarship

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### Introduction

It is such a pleasure to write on comparative legal scholarship for the 25<sup>th</sup> anniversary of the *Coventry Law Journal*. This is an area of research and teaching I have conducted for over 25 years and it is such a celebration of the importance of legal scholarship across so many disciplines and jurisdictions. This article will address when and why I became interested in comparative law and the seven articles I have published in the journal. At a deeper level, the substantive reason why law students, legal academics and lawyers need to understand comparative law.

### 1984 ‘The Power to Punish Pupils’ dissertation

During my time studying law at Coventry (Lanchester) Polytechnic, the former institution before Coventry University, I had studied predominantly domestic UK law (England and Wales, not even Scotland or Ireland!). Although the European Union had been formed, the UK joining (and later exiting in 2020) was a recent event and EU laws had only started to really impact UK laws. Legislation started to be passed that were driven by EU Directives rather than domestic legal problems.

My personal tutor and honours dissertation supervisor, Dr Brobbey, had an interest in international law (although taught Property/Land Law) and encouraged me to select a comparative topic. I was also dating a high (secondary) school teacher, who believed in corporal punishment (smacking). I had a fundamental and philosophical objection to corporal punishment and thought it would be a great topic. My honours dissertation was entitled “The Power to Punish Pupils” and examined the UK law on children and compared it to the European Court of Human Rights decision in *Campbell & Cosans v UK* [1982] ECHR 1.<sup>1</sup> The issue was whether a Scottish teacher had the legal right and protections to cane or smack a child under their care. The Court found that the teacher was not *in loco parentis* and was not protected in the same way a parent of the child could administer reasonable force to correct a child. The case was controversial and was the beginning of the abolition of corporal punishment in UK schools.<sup>2</sup>

The other area of law in my final year, was an elective subject called Intellectual Property, which had a Privy Council case on the tort of passing-off. This case, *Cadbury Schweppes Pty Limited v Pub Squash*<sup>3</sup> [1980] UKPC 30, had colour photographs in the paper law reports [1981] 1 WLR 193 of the two products in question. They were cans of soft drink, one called Solo and one called Pub Squash.<sup>4</sup> On my first trip to Australia in 1986, I tracked down a can of both solo and pub squash and could see the confusion – both fizzy lemonades with real lemons! This obviously set my mind to examine comparative law, but also multi-disciplinary approaches (particularly the impact of economics and finance research.

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<sup>1</sup> <https://www.bailii.org/eu/cases/ECHR/1982/1.html>

<sup>2</sup> Corporal punishment at school: the origins of its abolition in the United Kingdom - Newsroom (coe.int)

<sup>3</sup> [https://www.bailii.org/uk/cases/UKPC/1980/1980\\_30.html](https://www.bailii.org/uk/cases/UKPC/1980/1980_30.html)

<sup>4</sup> <https://swarb.co.uk/cadbury-schweppes-pty-ltd-and-others-v-pub-squash-co-pty-ltd-pc-13-oct-1980/>

## Australian Legal Academic Life

Australia is a Federated country under a constitution passed by Queen Victoria, to establish the Commonwealth of Australia in 1901.<sup>5</sup> The Federal government was created and specific powers granted to the Commonwealth, with all other powers belonging to the jurisdiction of the States and Territories.<sup>6</sup> Thus, in my main area of corporate (company) law research in 1989, the relevant law was based in an New South Wales (NSW) act of parliament (which was based upon a Commonwealth model legislation. But each State and Territory had a slightly different version. In 1990 the Commonwealth attempted to pass a Federal Corporations Act, which was challenged in the High Court of Australia and found to be unconstitutional. *New South Wales v Commonwealth* is known as the Incorporations Case<sup>7</sup> and should the comparative law issues. It took another decade to finally have the States and Territories to agree to refer their constitutional powers to the Commonwealth to pass the Corporations Act 2001 (Cth).<sup>8</sup> This law is still in power, but it causes challenges with the Federal regulator and which court should matters be brought in – the Federal Court of Australia or a State Supreme Court, such as the NSW Supreme Court. Forum shopping and expedience of court processes impact where litigation may take place and also if the matter involves equity or common law matters (breach of contract, breach of fiduciary duties of a director etc.).

Australian courts, particularly the appellant courts of States and the Commonwealth rely upon persuasive authorities for the final courts in other jurisdictions. This can include other common law countries, such as the UK, New Zealand, South Africa, Canada, Malaysia, Singapore and sometimes the United States of America Supreme Court.

In researching corporate law issues, it was often advantageous to examine at concepts from other common law jurisdictions and see if the concepts would work in an Australian context. For example, I wrote on small business entities<sup>9</sup> (in Australia called Propriety Limited companies) with the South African Close Corporations legislation and the USA Limited Liability Companies.

## Previous Coventry Law Journal articles

From 1998 (Volume 3 Cov. Law Journal) to 2018, I have published seven separate articles. Most of the articles deal with issues relating to corporate law, but more significantly they have been comparative – a focus on comparing Australian legal issues with the equivalent issue in the UK.

The first in 1998 was entitled “Corporate law developments in Australia and UK”<sup>10</sup> and this was followed with my co-author, Michael Whitehead, in 1999, called “Recent developments in Australasian law”.<sup>11</sup> The next year, 2000, Whitehead and I were joined by a third University of Technology Sydney (UTS) law lecturer, Christopher Clark, to produce “Recent developments in Australian Corporate Law”.<sup>12</sup> The following article was a sole authored around comparative law and also had the title “Latest developments in Australian corporate law”.<sup>13</sup>

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<sup>5</sup> Commonwealth of Australia Constitution Act 1900 - [http://classic.austlii.edu.au/au/legis/cth/consol\\_act/coaca430/index.html](http://classic.austlii.edu.au/au/legis/cth/consol_act/coaca430/index.html)

<sup>6</sup> New South Wales; Victoria, Tasmania, Queensland, South Australia and Western Australia are the states. Australian Capital Territory and Northern Territory are the two territories which apply both Commonwealth powers and Territory powers.

<sup>7</sup>[1990] HCA 2 <http://www8.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/HCA/1990/2.html>

<sup>8</sup> [http://www5.austlii.edu.au/au/legis/cth/consol\\_act/ca2001172/](http://www5.austlii.edu.au/au/legis/cth/consol_act/ca2001172/)

<sup>9</sup> Adams, M; "20 Year Snap-Shot of the Developments in the Regulation of Small Corporations" in (2010) 4(4) *Journal of Business Systems, Governance and Ethics*, 7.

<sup>10</sup> (1998) 3(2) *Coventry University Law Journal* 17.

<sup>11</sup> (1999) 4(2) *Coventry University Law Journal* 1.

<sup>12</sup> (2000) 5(2) *Coventry University Law Journal* 52-55; (2000) 6(1) *Coventry University Law Journal* 12.

<sup>13</sup> (2001) 6(2) *Coventry University Law Journal* 98.

Then I moved institutions from UTS to be Dean of Western Sydney University (WSU) School of Law in 2007. In 2017 I published a large international comparative article on board of directors' diversity. This article was published as "Board diversity and corporate governance: Lessons from Australia, India and Asia".<sup>14</sup> Finally, just before I moved from WSU to be the Head of the University of New England (UNE) Law School, I published with my PhD student, Dr Kardel, an article "The development of a legal framework for Iran's oil and gas industries: from the 1979 revolution to Iranian Petroleum Contracts".<sup>15</sup>

### **Rationale for comparative law scholarship**

There is a real value in looking at different jurisdictions, whether it be within one country or across the European Union or between different countries. It is generally easier to compare common law jurisdictions, as there is a clear interplay between case law and legislation. However, although language barriers can be an issue, comparing a common law country, like Australia with a Civil Code country like China, can provide valuable insights on a global scale.

Approximately a third of the world applies a common law system and a third applies the Civil Code. The final third is either a mixed or hybrid system, with *Sharia* (Islamic law system) as an integral part of the country's legal system. Some countries like South Africa, have a particularly complex systems of law covering common law and Civil Code and traditional (indigenous) laws.

There is no doubt that over the 25 years of the *Coventry Law Journal*, technology has developed in such away that it is much easier to access primary legal materials than ever before. Today, with a few clicks via the Google search engine, I can directly compare the UK Companies Act 2006<sup>16</sup> with the Australian Corporations Act 2001 (Cth)<sup>17</sup> from their official government websites. Other electronic free versions are available from the databases of BAILII<sup>18</sup> and AUSTLII<sup>19</sup>. To make accessing all the comparative free legal databases, the work of WORLDLII<sup>20</sup> is amazing, covering over 30 different countries legal systems.

As well as the free case law and legislation that the legal information institutes provide, the major commercial legal publishers have great legal databases. Most university law school libraries have access to LexisNexis and Thomson Reuters (WestLaw), as well as more local law publishers.

Thus, a legal practitioner (solicitor, barrister, in-house lawyer) as well as legal academics and students, can now easily access both primary materials and the vast amount of secondary commentaries. These secondary sources often include journal articles and practitioner works, as well as the classic textbooks. All these materials are often cited in courts as proof of statements or concepts to help (both) parties in litigation.

### **Some difficulties**

The power of language should never be under estimated. Ignoring the issues of translation, even in official language documents for the United Nations or the European Union, there can be challenges with English speaking nations. For example, one of my former doctoral students was working on a question in corporate law in respect of "enforceable undertakings" by regulators. This term does not come up in UK or USA legal databases, as it is unique to Australia. However, once thorough the academic literature it became obvious that a similar concept called a "consent order" was used, the

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<sup>14</sup> (2017) 22(1) *Coventry Law Journal* 1.

<sup>15</sup> (2018) 23(1) *Coventry Law Journal* 1.

<sup>16</sup> <https://www.legislation.gov.uk/ukpga/2006/46/contents>

<sup>17</sup> <https://www.legislation.gov.au/Details/C2019C00216>

<sup>18</sup> British and Irish Legal Information Institute: <https://www.bailii.org/>

<sup>19</sup> Australasian Legal Information Institute: <http://www.austlii.edu.au/>

<sup>20</sup> World Legal Information Institute: <http://www.worldlii.org/>

comparative legal scholarship became more interesting and more in depth. What are the similarities and more important what are the distinctions?

Another example from my personal experiences was teaching corporate law in China (Shanghai Justice Bureau) in 2004, when two Mandarin-English translators could not agree on the meaning of “civil penalty”. This is a corporate law concept whereby a director of a company can commit a criminal offence (criminal law) or have a shareholder bring a civil action (such as the tort of negligence) (civil law). But under the Corporations Act 2001 (Cth) Parliament created a civil penalty, which is a hybrid of civil law (single judge in court without a jury) but the penalties involve major fines and banning directors from continuing to be company officers for five years. This was difficult concept for a Chinese lawyer to understand as they do not have any equivalent provisions in their law. This is found in Part 9.4B of the Corporations Act 2001, commencing at section 1317E.<sup>21</sup>

## Conclusion

Over the last 30 years, I have enjoyed an academic career in corporate law teaching and research, which is predominantly based around one developing statute – the Corporations Act! However, it has been wonderful to make it more interesting to place it in an historical context and a multi-jurisdictional context for students and researchers (as well as government policy-makers and law reformers). We have greater awareness of the legal world and the easy access to free legal materials, such as WORLIDLII, has developed the ability to apply new theories and developing principles. One final example is the final court in Australia, the High Court of Australia helped determine the conflicts of law for comparing Civil Code (French) negligence law with the UK common law tort of negligence in *Renault v Zhang* [2002] HCA 10.<sup>22</sup> Similarly, the issue of who and where is there jurisdiction for the tort of defamation, when it is in cyber-space has been resolved in *Dow Jones v Gutnick*<sup>23</sup> [2002] HCA 56 and *Australian News Channel v Voller*.<sup>24</sup>

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<sup>21</sup> [http://www5.austlii.edu.au/au/legis/cth/consol\\_act/ca2001172/s1317e.html](http://www5.austlii.edu.au/au/legis/cth/consol_act/ca2001172/s1317e.html)

<sup>22</sup> <http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/HCA/2002/10.html>

<sup>23</sup> [2002] HCA 56; 210 CLR 575; 194 ALR 433; 77 ALJR 255 (10 December 2002) (austlii.edu.au)

<sup>24</sup> *Fairfax Media Publications Pty Ltd v Voller*; *Nationwide News Pty Limited v Voller*; *Australian News Channel Pty Ltd v Voller* [2021] HCA 27 (8 September 2021) (austlii.edu.au)