FREEING THE LAW - BEYOND THE DARK CHAOS[#]

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I. THE ELUSIVE GOAL – ACCESSIBLE LAW

Two hundred years ago in England, Jeremy Bentham was fearlessly criticising the form and substance of English law. Although called to the Bar in 1767, he quickly abandoned legal practice, apparently in disgust. He devoted the rest of his life, and his formidable intellectual powers, to jurisprudence and to attacks on the complacency of the legal system on which he had turned his back. In John Stuart Mill's phrase he became "the great questioner of all things established".[1] But like a modern law reformer, Bentham's criticisms were not merely destructive. They were accompanied by detailed suggestions for reform and blueprints for the construction and administration of new institutions and systems by which the law could contribute to the great principle which he espoused - the attainment of the greatest happiness of the people.

Bentham attacked the mighty work of Blackstone which had attempted to collect, in a few volumes, all the laws of England to that period. He was no lover of the common law, which Blackstone put on a pedestal. On the contrary, he described the common law as a place of "dark Chaos".[2] He advocated substitution of the codification of law and its enactment in statutes passed by an elected Parliament which would take the place of the step by step accretion of common law principle, performed by analogous reasoning by judges of infinite variety. For him, codes and statutory principles would "mark out the line of the

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1 HLA Hart, biographical entry on Jeremy Bentham in AWB Simpson (ed), *Biographical Dictionary of the Common Law*, Butterworths (1984) 44.

2 JH Burns and HLA Hart (eds), *A Comment on the Commentaries and a Fragment of Government* University of London Althlone Press (1977) p 198.

subject's conduct by visible directions instead of turning [the subject] loose into the wilds of perpetual conjecture":[3]

> He had great powers of invective, often directed against 'Judge and Co' (ie the Bench and the Bar), whom he saw as a 'sinister interest' profiting from the operation at great cost to the public of an unnecessarily complex and chaotic legal system in which it was often impossible for a litigant to discover in advance his legal rights.[4]

Ironically, Bentham's writings[5] had a larger impact on the codifiers assembled by the Emperor Napoleon than they did against the resilient resistance of the common lawyers and legislators of England. Codification became a major and lasting export of Napoleon's empire. The civil law system, which took hold of France and the countries which France conquered in Europe and beyond the seas, remains to this day wedded to the idea that the law on any subject should be codified so that it will be accessible to the ordinary citizen. England and its mighty empire persisted with its curious mixture of common law, equity and statute law. It continued to put great trust in the judges to expound and develop the common law and equity to meet the needs of particular fact situations in precedents that could be used in the future by their contemporaries and successors to afford principles by which later disputes could be solved. The English system was, and is, resilient because of its adaptability over time and space and its capacity to provide solutions to entirely new problems, which solutions seem mostly just to the judges, lawyers, jurors and citizens of succeeding generations. But it is a messy system. Finding the relevant case, and extracting from the judge's discursive reasoning the principle that will bind or guide later judges to their decisions is a process in which there are many pitfalls. The greatest of these, until lately, has been that the cases were hidden in books, bound in velum or buckram in lawyers' offices and a few libraries. Knowing where to go to get the law was a daunting challenge even for the experienced lawyer. For a member of the public it was virtually impossible.

Everyone was equal under the law and everyone was deemed to know the law and bound to obey it. But precious little was done to bring its content (or the ways of finding its content) to the notice of the ordinary individual. Thus did 'Judge & Co' win the battle over Bentham in England. Their victory was exported to England's colonies. Australia, in this regard, was no different from the rest.

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3 *Ibid*, p 95. See also P Schofield, "Jeremy Bentham: Legislator of the World" (1998) 51 *Current Legal Problems* 115 at 122.

4 Note 1 *supra* at 45.

5 Especially J Bentham, *A Fragment on Government*, JH Burns and HLA Hart (ed), Cambridge University Press (1988, c1977) and J Bentham, *An Introduction to the Principles and Morals of Legislation*, JH Burns and HLA Hart (eds), Athlone Press (1970).

II. THE INTERNET AND AUSTLII ARRIVE

Into this bleak and chaotic scene there has emerged in the present decade new hope for relief. Bentham, in his dismembered state in London, must be smiling at the prospect that his fundamental idea - free access to the law by the people - may yet be accomplished by the miracles of automated information technology. Yet, it is happening in Australia with the full cooperation of the judiciary, the governmental agencies, the Parliaments which make the statute laws and the legal profession which is itself a major user of AustLII's national legal research infrastructure.

The growth of the internet, and the prospect of cyberspace in the coming millennium, is itself an astonishing story. Its world-wide expansion leaps ahead. It presents many advantages and not a few problems to lawyers and law-makers.[6] But in the work of AustLII we have a wonderful service which hosts 80 full text data bases of Australian primary legal materials. AustLII's National Law Collection includes legislation of all nine major Australian jurisdictions. In addition, the decisions of the Supreme Courts of all states and territories, the decisions of all Federal Courts and the decisions of the High Court of Australia are now within the service.

As well as the foregoing court decisions, the reasons of a further 20 courts and tribunals throughout Australia are also available. AustLII has provided access to the decisions of all courts and tribunals which have asked it to do so. The decisions of most courts and tribunals are available within hours of their being handed down. This is a fantastic service which is so different from the long delays that used to attend the distribution of printed versions of court opinions.

In addition to the basic national law collection, AustLII provides special collections including those dealing with treaties to which Australia is a party, reports of the Australian Law Reform Commission, Indigenous law materials in the *Reconciliation and Social Justice Library* and much more. Every three weeks, on average, AustLII adds a new data base to its collection by devising its own standardised style or template for decisions, encouraging media neutral citation now common throughout the Australian court system, adopting common forms of court provided 'keywords' and inventing a search engine (SINO) which provides very fast retrieval and is specific to legal needs.

AustLII ensures that the hidden crevices of statute and common law are at last opening up. This service costs the people of Australia who use it nothing. All they need is a connection to the internet. An ever increasing proportion of Australian households now has that connection.

Not everybody will use the internet to trudge through the subtle nuances of the reasons of the High Court. To some the *Tasmanian Dams* case,[7] *Mabo*[8] and *Wik*[9] are the last thing they would look for on the internet. But the Rubicon of principle has been crossed. No longer are legal materials the captive of 'Judge &

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6 M Kirby, "Privacy in Cyberspace" (1998) 21 *UNSWLJ* 323.

7 *Tasmania v The Commonwealth* (1983) 158 CLR 1

8 *Mabo v Queensland [No 2]* (1992) 175 CLR 1.

9 *Wik Peoples v Queensland* (1996) 187 CLR 1.

Co', hostage to a university training and privy to the lawyers who can afford the leather bound books. Now the law is where it should be: at the fingertips of the citizenry. At least in Australia, Jeremy Bentham's dream may slowly but surely come true. Law to the people is free and is accessible. And the people are beginning to respond.

III. USE OF AUSTLII'S FACILITY

The significance of AustLII as a national research infrastructure in Australia is evidenced by the access statistics which are truly astonishing.

- There are now more than 200 000 hits on the AustLII data base every day.
- During 1998 there were more than 10 million hits in all for Australian legislation. There were 3.2 million hits on case law data bases usually for the text of the whole case.
- In 1999 access rates have continued, like use of the internet itself, to escalate rapidly. There are now more than 1 million hits each week on the AustLII data bases.
- About 80 per cent of AustLII usage comes from within Australia. About 20 per cent comes from identifiable sources in the educational sector. About 55 per cent come from the .com.au and .net.au subdomains which comprise important business sector users, including lawyers.
- A survey as recently as 7 May 1999 shows that AustLII is by a large margin Australia's highest ranking law-related site. It ranks 83 out of all Australian websites. The next most popular such site is Foundation Law, which is principally a gateway to AustLII. This is followed by Butterworths legal publishers, CCH publishers, the NSW Attorney-General's Department Law Link, the Family Court, IP Australia, the Commonwealth Attorney-General's Department and the Australian Industrial Relations Commission, Lawnet at Ozemail, ScalePlus and Osirus.
- But there is a huge and unquantifiable number of users at home, representing ordinary Australian citizens who are seizing advantage of the free access to Australian law which AustLII provides.
- The only government sites ranking higher in access than AustLII sites are ATO, ATSIC and the Department of Workplace Relations. The only education sites (.edu.au) ranking higher than AustLII are the front pages of the five largest universities.
- At the end of 1998, AustLII had 46 case law data bases and more have now been added. It held nearly 100 000 cases available for retrieval, which is no mean number in a country the size of Australia.

- The biggest overseas users have been in the United States of America (3.4 per cent), the United Kingdom (3.2 per cent) and New Zealand (0.8 per cent). But there are growing users based in Malaysia, Canada, Singapore, Germany, Hong Kong and elsewhere in the region.
- The top 20 cases which were accessed in 1998 included the *Maritime Union* decision of the High Court, the *Wik* and *Mabo* cases, the *Hindmarsh Island Bridge* case, *Garcia* (a case of a wife guarantor), *Qantas v Christie* (a case of alleged discrimination against an air pilot retired on the ground of age), *Green* (a case of provocation and the so-called homosexual advance defence), and *Breen v Williams* (a case which was settled but which concerned damages for so-called wrongful life after failure to diagnose a pregnancy). The list is not surprising. It shows discernment in the people's choice. The people, in their magnificent aggregate, are rarely, if ever, wrong.

IV. AUSTLII AND THE FUTURE

Unsurprisingly, those who live with this dynamic technology and who are in charge of the developments of AustLII are not standing still. They are proposing and adopting many further enhancements of the system that will spread its utility even more widely. However, amongst the general advances for the future it can be anticipated that there will be two:

A. Regional Collections

I know from my former work as President of the Court of Appeal of Solomon Islands that one of the major problems of the common law nations of the Pacific is gaining access to legal material: not only cases and other laws in Australia and New Zealand but their own statutes and case law. So far none of the 14 Pacific Island States in our region that follow the common law has acquired access to a systematic legal information data base similar to that in AustLII. An important priority for AustLII is to work in the region, in cooperation with New Zealand, to develop accessible systems for both local and foreign law. This may sound unduly advanced and technological. But it is actually a much more economic way of delivering access to legal information. And if it is right that Australians (and New Zealanders) should have access to their laws, the same principle must apply to the citizens of Pacific Island States. It is simply a basic norm of democratic government. This is the kind of initiative in good governance which our Department of Foreign Affairs, the Asian Development Bank and other foreign aid funders would do well to support. Can there be rule of law and good governance without accurate and accessible access to statue law and important court decisions?

B. Multi-lingual

So far the internet is dominated by users in the English language. So is AustLII. But most of the law of the world is written in languages other than English. The extension of access to foreign language law is a major new challenge for bodies such as AustLII. Although the power of the English language will continue to expand, and be enhanced by the internet, it would be a tragedy to omit from the facility Australian access to foreign language laws and the access of foreign users of Australian data bases to key international language translations which summarise some of our main legal developments. In due course, software, already available in early forms, will be used to simplify translation of the gist, and ultimately the accurate content, of English language data bases. But thought needs to be given to foreign language law. Anglophones, perhaps especially in Australia, tend to be rather complacent about the dominance of the English language. Whilst the sun has set on the empire, a new empire of the English language continues to spread its pink hue over the internet map of the world.

V. MATTERS FOR REFLECTION

Whilst the story which I have recounted, of AustLII, an Australasian adventure, is a most exciting and admirable one, there are still many problems. I am sure that these are fully recognised.

A. Absorbing the Data

Making certain that users of AustLII do not make the mistake (which many photocopiers of books, articles and judgments may make) that gaining access and even gaining a copy somehow puts the information into the head and judgment of a human being. The data in AustLII is only as good as the brain cells of the people who use it. A printout and hard copy are meaningless unless the substance is digested, understood and analysed in a way that is useful and legally relevant. Nothing is worse, in a court of law, than suddenly being bombarded by a thousand undigested cases. A small proportion (if at all) may have relevance to the task in hand.

B. Thinking Conceptually

Thinking conceptually (indeed thinking reflectively at all) is still a great challenge to some lawyers. Bentham was not wrong. The danger of the common law methodology, from precedent to precedent, is that conceptual differences between circumstances, are papered over by superficial similarity between the facts. Ready access to court decisions is no substitute for proper legal analysis. Indeed, it may be dangerous for people to assume that everything said in a reported judgment represents the law. The judge cited may be in dissent as, alas, I sometimes am myself. The passage cited may be inessential to the resolution of the case - *obiter dicta* which do not bind later courts. The court

in question may not have the authority to require that its decision be followed by those who come later. The decision may itself quickly be overtaken or even overruled on appeal.

AustLII can help with some of these problems, especially the last. But access by the people to the law requires an understanding of how legal principles are derived from cases and then used in later cases to guide the decision-maker to a conclusion. Providing undigested legal material is not enough. It is essential that we provide citizens with the tools of thinking through problems, finding the applicable legal rules and deriving from legislation and case law any principle that must be obeyed.

C. The Context of Civics

From this problem comes another. It is an important article of faith for the coming celebrations of the centenary of Australian federation that we must do more in the second century of the Constitution to teach Australians about their law and how it operates. The large number of school students who now study legal studies indicates the thirst for information of this kind. But with the decline of instruction in civics over the past 30 years, there has been a growing ignorance of the way Australia is governed and how its legal system works. Throwing onto the plate of people, with fundamental misapprehensions about their legal institutions, a huge mass of undigested legal data will not truly make the law free and more accessible. It is the duty of schools and universities to help the next generation, including the overwhelming majority who are not lawyers, to appreciate the way in which law is written, may be found and is applied - at least in those matters which are of greatest concern to the ordinary person. Otherwise, Bentham and his followers will have been outfoxed once again by Judge & Co.

D. Up-To-Dateness and Comprehension

In the mass of legal material which must now be absorbed by the legal profession it is as well that (coinciding with this burden) have come AustLII's data bases. As courts impose heavier burdens of up to dateness and comprehensiveness upon lawyers, so that they are required to keep abreast of the law (and not to ride forever on their law school notes) it is just as well that AustLII is there. Any lawyer today who lives by textbooks that may be two, three or more years out of date does so at a great professional peril. The most efficient way to keep up to date is available at the lawyer's fingertips with AustLII. Lawyers - even older lawyers - must learn to use the facility if only out of self-protection.

E. Remaining Sceptical

The final danger is a belief that everything that comes out of a machine is authoritative: that because it is there in electronic form, it must be right. This is a large danger for automated information systems generally. Electronic legal systems are not immune. As citizens, and as judges and lawyers, we must keep

our critical faculties vigilant. We should not take electronic script as wholly writ. The law serves the people. It must adapt to the people's needs. In times of enormous social change, it should not be assumed that old statutes and words in old judgments necessarily represent the law today, or if they do, that this must be accepted without challenge for reconsideration and reform. Maintaining a critical faculty is the privilege of the citizen in a democratic state. Just because the law comes out of AustLII does not mean that we should accept it forever. Take the ghastly convolutions in which Australia's *Corporations Law* is written today.[10] It may satisfy Bentham's demand of a statute in the place of the chaos of the common law. But sometimes, one suspects, the chaos of the common law has been replaced by the chaos of the statute book. Simplicity and conceptualisation are strangers to that particular body of law. Yet it must govern a myriad of decisions of ordinary people who cannot always have a lawyer armed with AustLII to guide commercial judgments.

The achievements of AustLll are remarkable. We do well to praise them. But we who are lawyers with access to AustLII can scarcely be carried away with self-satisfaction. As contemporary constitutional discourse demonstrates, most Australians know very little about their laws. Many cannot read properly or comprehend dense test, whether in printed or electronic medium. Much such legal text is user unfriendly to an extreme degree. Many see the law as alien. Most cannot afford a lawyer when they need one or do not trust lawyers and demand to represent themselves. Not a few who attempt to read our statutes and court opinions on AustLII will come away from the experience more confused than when they began. Few would understand the analogical reasoning of courts. Given the lack of attention paid by Parliaments and courts to communicating the laws, we can hardly blame them for this alienation.

Unless in the new century lawyers and citizens can cooperate in providing real access to the law it will remain a grim, unknown but ominous and remote mystery. Some would prefer to keep it that way. Not I. The law belongs to the citizens. AustLII is by no means the miracle that will truly make the law freely available to those who are not legally trained. But it is a great boon to Australian lawyers. For others, it is a step in the right direction.

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10 Cf *Byrnes v The Queen* (1999) 73 ALJR 1292; [1999] HCA 38 at [77].