Chapter 8

Australian Universities, Law Schools and Teaching Human Rights

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The subject of this address is the result of a compromise. I wanted to talk about the awful – and I mean awful – state of legal education in this country. The organisers wanted me to talk about the teaching of human rights in Australian law schools. The compromise is that I am going to do a bit of both.

I will start by giving you a very quick overview of the many problems with Australian universities generally; then I will take you through the problems more specifically with tertiary level *legal* education in this country – and, at the risk of spoiling the ending, law schools are in my view in a lot worse shape in Australia than what you see in the United Kingdom, or the United States, or Canada, or even New Zealand. Once I have laid out some of those defects and weaknesses, I am going to turn to the teaching of human rights in our university law schools. At any rate, that is the plan for this talk.

But before I embark on it, let me digress briefly and tell you about the ICC (the International Criminal Court). The University of Queensland law school where I work attracts the best-performing high school students in the State of Queensland. Well, we share the cream of the crop with our medical school. You have no hope of entry if you are not well inside the top two percent or so. (And, yes, I realise there will be people in the audience, especially those from Sydney, rolling their eyes and thinking, "well, hold on now, we are only talking about the brightest *Queenslanders*". But I am confident what I am about to say can be generalised across the country.)

So, back to these very bright law school students at a G8 university who had exceptional high school marks to get into law at the State's premier university. My point is that by the end of their degree a significant percentage of these students will think that the best thing they can do with their lives is to go and work for or with the International Criminal Court. This is the body set up to prosecute dislodged dictators and others for genocide and war crimes and the like. The ICC has received incredible amounts of money – $152 million in 2015 alone. And yet it has only ever had two successful prosecutions, ever. And only black people have ever been indicted, 36 of them.

Is it on balance worth having such an international criminal court? Maybe. It certainly sends a signal to those in power that they cannot rely on their own domestic laws – and on the attempted defence used at Nuremberg that "it wasn't against the law when we did it". You cannot rely on that because, now, what you have done – if it is horrific enough – will be against a rule of international law.

Nothing is free in life. Dictators and hard men around the world know all this. They know about the ICC. In the past you could (and, in fact, we did) negotiate with Idi Amin to get him out of power in Uganda with the promise of a beachside retirement in relative ease in Saudi Arabia for the last couple of decades of his life. Awful for the relatives of his myriad victims, no doubt. But pretty damn good for the future prospects of Uganda.

Today, you cannot make that deal because everyone – including Syria's Assad and Zimbabwe's Mugabe and all the rest of the world's nasty strong men – well, they know that they will be pursued and prosecuted by the ICC whatever is promised to them. So they have no choice but to go down fighting.

Now, if you are a consequentialist like me, that counts as a cost, a big cost, to pay for putting in place any ICC-type set-up. I do not say it is a knock-out argument against having an International Criminal Court. If pushed, I would say it is a razor-edged question whether to have one. In fact, I might well go for one, but it would be with no real confidence I was making the right call.

But I sure as heck would not see working at the ICC as the equivalent of doing God's work – as the most moral way I could spend my working life. And yet so many top law students do see the world that way. That is how they have been taught to think about rights and, more particularly, human rights. They learn to think about them in very non-consequentialist terms; call it deontological or natural law thinking or pseudo-theological.

And if that sort of thinking is not as regards the ICC, then it will perhaps be as regards the rights-infringing resolutions flowing from the UNHRC (United Nations Human Rights Council). These resolutions will be the mark of good and bad human rights conduct for them – with hardly a law student being aware that the UNHRC and United Nations General Assembly have issued more resolutions alleging rights-infringing conduct against Israel than against all other countries on earth, combined. That, and other factors such as some of the God-awful countries that in part make up this UNHRC, make it a joke of a body. But not to most law students. And if it is not the ICC or the UNHRC, well, maybe the law student's goal will be to work for some UN committee overseeing a rights-related convention, say.

The thought that a democratically elected legislature full of politicians (and, in law schools, you cannot say that last word, "politicians", without sneering and without self-righteous condescension oozing from your every pore), but the thought that these elected legislators might have as good a grasp of what is rights-respecting conduct, dare one say a better grasp, than some United Nations functionary (chosen to represent a country from whose leaders you would not take moral advice if your life depended on it – and people to boot who pay no income tax as UN employees), or better than some unelected and so unaccountable ex-lawyer judge, or better than some supranational European Union bureaucrat (and I note that a pre-Brexit survey of UK academics showed that 90 percent were for "Remain" – 90 percent! And be clear that that lop-sided ratio would be the same here in Australia) – well, the thought of any of that pro-democracy and pro-voting and "hey, rights questions are inherently full of reasonable disagreements over which nice, smart, well-informed people will disagree so counting everyone as equal and voting for MPs to decide these issues" – well, that pretty much does not enter the heads of far, far too many law students in this country. Or the law professors teaching them, for that matter.

Too many of our law students have a grasp of human rights that looks a lot like what you might get in a 40-minute video/tutorial put on by the activist organisation GetUp! By the way, and before you get too down on the students for succumbing to the GetUp! worldview, you could say pretty much the same thing about the High Court of Australia's prisoner voting case in *Roach* – a more flabbily reasoned, argument-in-the-service-of-an-agenda case it is hard to find. Well, unless you look at their next voting rights case of *Rowe*, which Professor Anne Twomey

picked as the worst-reasoned and least convincing High Court of Australia case ever. And one's understanding of rights was not wholly peripheral to that decision.

Universities

But enough of this introductory stuff. Let me turn to a quick over-view of the problems in Australia with universities and then, more specifically, with law schools before moving back to the teaching of human rights. To get you in the mood to hear about universities, let me tell you a joke that should resonate with anyone who works in a university and is judged on the calibre of his or her peer-reviewed publications. It goes like this: "A peer reviewer walked into a bar and he immediately started complaining that this was not the joke he would have written."

I have written elsewhere about the poor state of Australia's universities, most verbosely in *Quadrant*. Here I will simply touch on a few highlights or, rather, lowlights. First off, Australia has the Anglosphere's most centralised and bureaucratic universities. More than 60 percent of employees at all Australian universities are doing something other than lecturing and publishing. They are non-academics, some sort of administrators. To adapt the language of psychiatry, "this is crazy". And it is not just low level administrators there to fawn over every academic's needs. Those sorts of administrators seem to be an endangered species. Before I came to Australia, and based on the solid groundings of the concept of comparative advantage, I never entered marks, or put exams into alphabetical order, or did that sort of office work. It is now commonplace to have the professors do it. The explosion of administrators is at the top and middle of universities. Marketers. Supposed teaching gurus. Grant-getting advisers. Etcetera. And it is so top-down in universities that in my 11 years I do not recall a single time when our law school got to make a single important decision on anything by having a meeting and voting. That is how it was when I worked in New Zealand. And in Hong Kong. And in Canada and the United States in 2013. Not here. In Australian universities the centralisation, the top-down management structure, the one-size-fits-all approach rivals General Motors in the 1950s, or maybe the former East Germany.

I have been writing since the Coalition Government came into office in 2013 with suggestions about how to start to tackle this. Here is a good place to begin. Make every single Australian university publish the salaries of its top 25 earners, together with what they do. I can tell you that you would be lucky to find a single professor who publishes and teaches in that list anywhere in Australia. It would be our Vice-Chancellors on salaries of more than a million dollars per year – so multiples of what a prime minister or a chief justice gets.

And then the "Team" of DVCs, PVCs, Deans of Schools, Heads of Diversity or Equity or Whatever it is called that tries for a balance of reproductive organs on campus.

Let me say this. The bureaucratic and centralised nature of Australian universities simply beggars belief. And the Liberals have done nothing about it. Zero. Nada. Nothing. Why? Perhaps because they seem to take their advice from sitting vice-chancellors, your Greg Cravens and Glyn Davises.

Then there is the obsession with grants. This country's universities are obsessed with grants and grant-getting. This is the science model imposed on the rest of the university. To get promoted you need to find someone to give you money to do your research, with the most kudos coming to you if it's the ARC (Australian Research Council) – meaning the money comes from the taxpayer.

Now let us be blunt. If you are in history, most parts of law, the Arts, much of Business, and big chunks of the rest of the university you can publish in top journals without soliciting a cent of grant money. But then you will never be promoted. The universities have huge grant-getting bureaucracies that need to be fed.

Here is an example I have used at various times in the past. Take two academics in the same area who have published in the exact same top line peer-reviewed international journals. Academic A gets no grants. He is, in effect, doing his research on his salary without more taxpayer monies. Academic B, by contrast, gets huge amounts of grant money (providing work for all sorts of university bureaucrats). She produces not a jot more than Academic A. The outputs – the things that ultimately matter – are the same.

So, how do they fare, comparatively speaking? Academic B will be feted and promoted. Academic A will never, ever get a promotion and may be fired. This is true throughout Australia. It is bonkers. Universities treat inputs (grant money to allow research to be done) as outputs (what is produced). In fact, they care *more* about the input grants. It is exactly analogous to you choosing to buy your car based on which car company got the most taxpayer support, the most subsidies, the most grants. That is your proxy for excellence. Bonkers, right? (Well, I suppose that actually explains how we buy submarines in this country, but I digress.)

Worse, no academic outside Australia judges you based on your grant-getting prowess. They want to know what you have written, and where. Full stop. Again, the Liberals have done nothing about this insanity. And they could fix it without having to pass a bill through the Senate. This is a Lambie-free zone.

And notice that I have been careful not to say a thing about the left-leaning nature of ARC grants in the social sciences. If you favour stopping the boats or Bjorn Lomborg responses to carbon dioxide reduction or a successful plebiscite before changing the definition of marriage, you can guess your chances of the ARC giving you grant money. It rhymes with a Roman Emperor. The fifth one – the pyromaniac.

Next, there is the lack of competition between universities in this country when it comes to attracting students. Next to no one sends his or her kids away to university. Yet that is largely what happens in my native Canada. And in the United States. And in the United Kingdom. And even in New Zealand. So, in Canada, the University of Toronto has to compete with McGill in Montreal and the Queen's University in Kingston and the University of British Columbia in Vancouver for the best students. It has to improve. Ditto everywhere else in the Anglosphere.

But not in Australia. Brisbane students stay in Brisbane. I generalise but the best come to the University of Queensland. Next best go to the Queensland University of Technology. Then to Griffith University. And so on down the perceived hierarchy.

UQ could be functionally braindead – and in some ways it comes close to that – and yet we would still get the best students in Queensland. I doubt that a team of Nobel Prize winners could figure out how to change this. And it applies to Sydney, and Melbourne, everywhere, because there is no cross-country competition in this country, competition between G8 unis such as the universities of Sydney and of Melbourne and the University of Queensland. Why? Almost no-one leaves home to go to university so any competition is intra-city. Basically, it does not exist save for a bit of the intra-city sort between Sydney and the University of New South Wales and between Melbourne and Monash.

This is not a problem if you do not believe in competition and its powers to produce good outcomes. It is a problem, though, if you believe competition is a force for good. From all appearances the Liberals are not for competition.

Penultimately I will just say a quick word on the rankings of universities that our million-dollar-a-year VCs like to tout. Believe me, these rankings are worthless, meaningless fluff for 99 percent of all questions related to universities. They are focused ONLY on the natural sciences. They have nothing to say about undergraduate life and teaching (indeed, your university's ranking probably goes up if the top professor has been able to win a grant to buy out his teaching responsibilities and so never sees an undergraduate student). They use criteria such as surveys by others of your perceived prestige, number of international students and "number of Nobel Prize winners on staff " – the last of these literally implying that a university could go out and hire a Nobel laureate, put her up in a five-star hotel drinking champagne all year, and its ranking would go up. A lot!

These rankings say nothing at all about picking a university for an undergraduate – and it is here that Australian universities are particularly awful. Moreover, the rankings criteria seem almost to have been chosen specifically to stop 48 of the world's top 50 universities from being US ones, when in fact they are. Put Oxford and Cambridge in the mix near the top and the other 48 are US universities. See where academics go. See where the money is.

Lastly, I suppose the "diversity" or "equity" bureaucracies are worth a quick mention. These are highly paid university bureaucrats whose goal is to get a statistical match between a percentage of something you find in the population at large and what you find in jobs or the student body at the university. The "diversity" that is being aimed at is one of the type of reproductive organs you bring to the table, or the type of skin pigmentation. Now I am opposed to all forms of affirmative action but, if you are aiming for diversity at a university, maybe the place to start is with a diversity of political outlooks in the Arts and Social Sciences and Law. Forget it. Australian universities lean massively to the left.

Law Schools

I am now moving down to the more specific level of law schools and will mention some of the problems with legal education in Australia. I mention them but without any optimism that anything much will improve in this country. And I say it again, in my view law schools in this country are in worse shape than in other comparable Anglosphere countries.

I have mentioned the obsession with getting grants, which also infects our law schools and for most law professors is a complete waste of time. Then there are government-mandated "let's try to measure the quality of the research" exercises. In Canada and the United States such comparisons are done by private magazines to sell to would-be students; they are based on woolly assumptions and weird criteria; and they end up producing an ordinal ranking of universities and of law schools. At least it costs the taxpayers nothing.

In Australia there is a bureaucratic "research assessment" exercise that I believe – having made the mistake of being an assessor in the first round – produces wholly meaningless data. Gobble-de-gook. If anything it is worse than the North American results. The difference is that our one is a government-mandated, bureaucratic one that costs tens of millions of dollars (not counting the huge costs of treating academics' time in helping with this nonsense as a free good).

It is a joke! In a sense it does not even assess individuals while still purporting to give a judgment on research excellence.

There have also been attempted rankings of journals lists that have produced laughable results. Soon they are going to try to "measure" an academic's "impact". The judges in the room should be laughing out loud at this one for law professors. (The thing you need to realise in Australian universities is that meaningless data is much preferred over no data, as people can be employed to work with meaningless data.)

And leave all that aside and turn to teaching. Our universities are so centralised that professors, including law professors, get told how much we must assess students. I am under immense pressure to record my lectures, as most University of Queensland lecturers do this already *under orders*, as is the case widely throughout the country.

Why? Because so many of our law students work. They are supposedly doing a full-time degree and, yet, they work downtown in law offices three, even four days a week. That is a core reason why the expectations for our law students are way, way lower than what they are in Canada, the United States and Britain, where being a full-time student means – wait for it – *being a full-time student* (with maybe a bartending job one night a week). Not here. The inevitable result is that our expectations in Australian law schools are lower than they are in law schools in other Anglosphere countries. You can not read as much when you are a student working three or four days a week at a big law firm. I suppose I could ask for a grant to try to prove that, but would it be a good use of taxpayers' money?

Oh, and the lowered expectations go hand-in-hand with pretty massive grade inflation!

At any rate, law firms are partly to blame for this phenomenon of supposedly full-time students working full days downtown three or four days a week. Actually, some judges employ students as law clerks before they have finished their degrees so they are to blame, too.

Then there is the fact we have so many law schools for the size of the country. It was 42 or 43 law schools at last count, though if you go to sleep the number can go up on you – and 13 in NSW alone! To put that in context, in English Canada (so that is about 27 million people or so) there are 17 law schools. Most take only 150 to 180 students per year.

Here, in Australia, we have the Queensland University of Technology and Monash taking in, what, more than a thousand students each a year. In fact, per capita, we now turn out more law students than the United States. Boy, that is surely the way to achieve the Turnbullian "innovation" revolution dream – by flooding the country with lawyers.

So we have too many law schools, taking in too many students each, and allowing students basically to be working near on full-time while supposedly studying full-time (by listening to recorded lectures each night and by the university's keeping expectations way down and grades way up). And these law schools all exist in a wider university that is massively too centralised, too regulated, too one-size-fits-all, and too top down.

We are also supposed to pretend that all the law schools in the country are more or less equal. This is a lie. Some are awful. Even the best law schools in Australia are not as good as Otago law school in New Zealand, and certainly nowhere nearly as good as the best in the United Kingdom, the United States or even Canada.

And now I should return to the topic of teaching human rights. Here is a nice segue that takes us from law schools to understandings of human rights. In the Brisbane area we have four

or five main law schools. The quality varies distinctly, at least if you go by the calibre of high school students who gains entry to them.

In 2015 we had a senior partner from a big Brisbane firm come to our law school and say that all student applications for jobs were now taken by his human resources department and the name of the law school was blacked out. You could only see their grades. This is the weirdest sort of "equality" mindset I have possibly ever encountered, with the exception of the judgments flowing from the European Court of Human Rights of course. I noticed that this law partner had a Master of Laws from Harvard, which he advertised in his promotional bio. So I asked him why he mentioned Harvard. Did he think the Harvard Masters of Law was better than one from the University of Arkansas or the University of Vermont. Why did not he just list his grades?

He was more or less speechless.

Unless you believe that high school marks are completely meaningless, then this example shows a bizarre sort of genuflecting at the altar of some mutant understanding of egalitarianism and equality. The University of Queensland takes in 280 to 300 students virtually all of whose high school marks are better than the very top student at the next university down the Queensland hierarchy. On what planet does it make sense to delete the name of the law school and just look at marks? Is this law partner someone you would want giving you legal advice? At least he saw the point with his Master of Laws degree and I am told that this law firm has now stopped this idiotic practice.

Teaching human rights in Australian law schools

Let us return to where I started with the claims about so many students hoping one day to work for the International Criminal Court. This is part and parcel of how the supranational human rights world is taken at face value as somehow, "by definition", a force for moral goodness. Remember, in the last 25 to 30 years the teaching of law subjects that might plausibly fall under the aegis of "human rights related" has mushroomed. Disability law. Public international law. Anything to do with bills of rights. Or discrimination. Women and the law. The list goes on.

Meantime, the number of law schools that teach a compulsory jurisprudence course can be counted on one hand, mine being one of those disappearing few. Yet this is the course that should teach students that rights are correlated to duties and the two are connected by rules; that there are legal rules and non-legal rules, so legal rights and non-legal rights; that the latter of those, and the whole natural law tradition, sits on pretty insecure foundations; that bills of rights finesse that legal v non-legal rights distinction, allowing the point-of-application interpreters (but no-one else) to transmogrify one of their own personal "oughts" into an "is" – to make a non-legal "ought" become a legal "is".

Alas, the vast preponderance of law students in this country finish their degrees without reading Hohfeld, or H. L. A. Hart's, *The Concept of Law*, (which every educated lawyer should have read, or been forced to read). They get almost no exposure to serious writers on the foundations of non-legal rights.

At the risk of caricature, a risk I am prepared to run, a lot of law school human rights courses start with an understanding of human rights that can be put quite frankly and simply. On this approach you just ignore the issue of foundations as far as possible. You sweep the question under the carpet and pass along in silence. The thinking here goes something as follows: If a commitment to fundamental human rights is the foundation of political legitimacy, then we just

have to assume such human rights (whenever we stray into the non-legal realm) actually exist. Or, as US law professor Stephen Smith puts it, without in any way endorsing such an approach, and in regards to the related issue of equality:

> Just as in one kind of philosophy elusive but indispensable things like causation, time, space and continuity of personal identity are not so much observable facts *in the world* as commitments or categories we *bring to and impose on the world*, so equal moral worth is a starting point or necessary presupposition that we assume in order to deal with the normative and political world as it is. That presupposition need not be justified . . . on any other grounds. (Steven Smith, "Equality, Religion, and Nihilism" (2014) 14-169, *San Diego Legal Studies Paper*, 9-10)

I call this the Eleanor Roosevelt school of human rights thinking. Where you just pretend that everything starts with the Universal Declaration of Human Rights, sweep all the hard questions under the carpet, and go from there. If you do that you will be inclined to see the United Nations as a font of moral goodness – it is not. And you will be predisposed to favour supra-nationalism over the hard and dirty work of compromise and winning elections that comes with "democracy". And if, in the international rights-related legal world, they have not much time these days for a vigorous approach to free speech, well, then, the students and their professors will not either.

Let us be honest. On any half-way decent understanding of so-called human rights – their foundations, aspirations, weaknesses and strengths – you have at least to have a basic understanding of the debate in meta-ethics between the moral realists and the non-cognitivists or moral sceptics. And between consequentialists and deontologists. In our 36 Australian law schools I venture to say there is not a lot of that understanding out there.

Pick a law student at random and ask him or her what a right is. It is a hard question. Many law school courses just assume human rights are somehow self-evident. So the law professor can move on with satisfying armchair work of assuming the decisions of the European Court of Human Rights will, if implemented, make the world better.

Or, take it as read that the view of human rights held by unelected judges or by the members of some United Nations committee that monitors some rights-related convention are by definition the "right" view. Better than yours, a mere teacher's or plumber's or Member of Parliament's. Before you know, you end up with some such committee making the sort of idiotic assertions about rights and allegations of false imprisonment that they made about Julian Assange.

All of us living in the post-Second World War Anglosphere are living through an era that is seeing the rebirth of the dominance of a natural law world-view. For 150 years before, it was Benthamite consequentialism that dominated, arguably even in the United States (just look at Justice Oliver Wendell Holmes). How many law students know that J.S. Mill was a utilitarian, a disciple of Bentham? Or that Mill's defence of free speech was through and through a utilitarian one? Is it any surprise they do not have much concern for free speech?

As for our current post-Second World War era's dominant world-view, we have renamed this reborn Jeffersonian natural law outlook using the language of human rights. But it would do all law students well to understand its strengths and weaknesses; its inherent distrusts of democracy; and what can plausibly claim to be its foundations.