Book Review: Judicial Reasoning and the Doctrine of Precedent in Australia

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Title: Judicial Reasoning and the Doctrine of Precedent in Australia

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The doctrine of the precedent is central to the judicial reasoning (or 'adjudication' as Americans like to call it) in common law countries, including most of the countries of the South Pacific region. It is well known that the modern doctrine of precedent emerged in nineteenth century England with the systematisation of the court system and the development of a competent, pervasive and accessible official reporting system in that country. In one sense it can be understood as a general attempt by courts to achieve consistency in the dispensation of justice, and therefore to reinforce the legitimacy of the court institutions themselves. There is something innately appealing, as certainly predictable, in having like cases treated in a similar way.

It is true to say that aspects of the doctrine, especially the tendency of judges to pay credence to decisions of other courts by something like analogy, can be found much earlier. Some sense of it is, according to Baker, evident even in the writings of Bracton in the Thirteenth Century. (Baker J.H. An Introduction to English Legal History Butterworths, London, 1979, p. 171). But precedent has become something more than respect for the decisions of fellow judges. It cannot be understood merely as an adoption of the principle that that similar facts ought to be accommodated under similar principles. Nor are the decisions of judges merely to be taken, as they once were, as evidence of a common erudition the repositories of which are the judges. Cases are now treated as a source of law in themselves. So far as legal reasoning can be taken as reasoning from authority, the cases themselves are now seen as one of the main foundations of that authority.

There may be a general readiness to accept that precedent can simply be brought to ground by appealing to notions of consistency, reasoning by analogy, the disposition to discover or to state the law rather than to make it, or the need to treat like cases in a similar way. But simplicity is often deceptive. Hierarchical notions of precedent are not quite consistent with vertical principles. The discovery of the *ratio decidendi* is not free from an element of interpretative subjectivity. Determinations of fact do play a much greater role in the discerning of the legal principles relevant to a particular case than is otherwise thought. Given the probity of Dworkin's analysis of adjudication, judicial decision making can hardly be a straightforward matter of selecting the correct authoritative principle and applying it to a given set of facts. (Dworkin, R. Taking Rights Seriously, Duckworth, London 1977, pp.22ff). Indeed, the judge must most often make a kind of policy determination to select between several non-consistent principles which achieves an appropriate result for the case at hand.

This book achieves an admirable level of analysis of the various complexities attending the doctrine of precedent. It is comprehensive in its treatment, but also easy to read. The discussion is appropriately structured and its arguments illustrated with copies references to decisions of the courts. Its focus is on the Australian context which has certain idiosyncrasies appropriate to its own style of federalism and court structure, but this makes it no less relevant to other common law jurisdictions.

With a subject matter such as this it is very easy for a text to be sidetracked into a sophistical discussion of theoretical issues. Unfortunately this often tends to obfuscation rather than explanation. This text does not

fall into that trap. It succeeds in explaining much of the theoretical context, without unduly prolonging the discussion in that area. As it stands, the book provides a most valuable contribution to the understanding of this central but complicated and sometimes enigmatic subject matter.

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