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Learning Land Law - and More



How sustainable is our system of land law?*

Most legal practitioners when hearing 'land law' mentioned will roll their eyes. Renowned as one of the most boring and archaic of the sub-disciplines taught in the law degree, they will recount their nightmares about the rule against perpetuities, future interests, and the doctrine of tenure.

But what if land law were taught differently? What if land law, rather than representing an archaic and irrelevant list of rules were viewed through a different prism?

I confess to having practised in land law (property and commercial law and some native title) for some 16 years, and to having taught it since 2004. But in all those years of experience, it is clear to me that this subject remains central to our understanding of the common law. The subject lies at the intersection of law and sustainability - sustainability of governance, of society and culture, of the economy and of the environment.

What is Sustainability?

I don't think that sustainability need have a particularly complex meaning.

It is, in my view, the *capacity to endure*.

The concept of ecologically sustainable development has been a global (and national) educational imperative for a decade now. The law has however been a little slow to embed this concept in its disciplinary framework - due no doubt to its preoccupation with certainty in language, and the somewhat diffuse meaning of 'sustainability' from a lawyer's viewpoint.

Ecologically sustainable development arguably became a legal term after the Brundtland Report. In Australia, it is embodied in a number of environmental statutes and is probably seen in legal terms as an 'environmental law' term.

I argue however that lawyers and legal educators need to see sustainability in a much broader way. If the law itself is the embodiment of rules designed to support civil society, then it must, for its own longevity, embrace the concept of sustainability. And I think that this takes a number of forms.

Governance

One of the first concepts canvassed in a law degree is the rule of law. We contrast this with the rule of man [sic] - the idea being that all are bound by the same system of laws, applied consistently. And importantly, that this consistent application of laws applies

ABOUT ME



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likewise to the state.

While the Magna Carta and its historical context can be critiqued, it represents, conceptually, the notion of the rule of law and all being brought within a 'common' law and system. The strength of the common law lies in its consistency and therefore its capacity to sustain governance.

There is of course a body of criticism of the common law as a representation of modes of thought that represent and reproduce a hierarchy of class, race and gender (amongst other things). Yet here I would like to allude instead to the overall notion of the capacity of the common law to sustain governance through its connection to society. This is the background for a more specific concern of sustainability in terms of land law.

Society

Implicitly related to the notion of sustainability of governance is that of sustainability of society. In terms of the law's capacity to sustain society, land law provides a wonderful case study. The origins of Australian land law in terms of native title and the doctrine of tenure demonstrate the intimate connection between legal structures and the sustainability of society.

For traditional owners in Australia, customary title is the lifeblood of community and culture. Its lack of recognition at common law for 200 years (or thereabouts) certainly punished Aboriginal and Torres Strait Islander Australians. Yet the law and lore surrounding land and connection to land remains strong. The question needs to be asked though, as to the capacity of the common law to sustain community and custom through its acceptance and extinguishment of traditional title.

The doctrine of tenure demonstrates the successful unification of a system of land holding and political and social organisation. Viewed in the English context, it is a fascinating story of development of a political and legal system through service - all attached to land. In the Australian context, the capacity (eventually) of the common law to accommodate native title within the strictures of the doctrine of tenure likewise shows an adaptability that is part of the capacity of the common law to sustain itself in a different context (see governance above...).

The twin of tenure, the doctrine of estates, marks the intersection of social and economic sustainability. The law in this area deals with the question of how long one holds their interest in land - and this has historically represented a means of sustaining family interest in land and therefore in wealth. So, both a social and an economic component.

Economy

What interests me about the history of the doctrine of estates is that it is a long narrative of the tensions between private citizens and the state in terms of asset and wealth protection. For every measure of the state to protect its revenues from land, there was a counter-measure developed by lawyers, to protect the wealth of the individual citizen. Likewise, in terms of governance, the doctrine of estates tells a story of the tensions between Chancery (the courts of equity) and the common law. The repercussions of this reverberate today in the laws of trusts and succession, both of which continue to take a wealth-maximisation approach to property ownership.

In a more contemporary vein, the Torrens system of land title was developed as a means of sustaining economic development in the colonies (of Australia). Imperatives of opening up the land, and developing infrastructure, required a far more nuanced approach to ascertaining good title than the inherited common law system. A state guaranteed title derived from registration, paramount, or indefeasible, against all unregistered interests, has proven to be a successful formula for a market in land - a formula that encourages investment based on certainty of title with a low transaction cost.

One of the big challenges now for economic sustainability of land registration systems in Australia, lies with the emerging imperatives of environmental sustainability.

Environment

There is an increasing body of work identifying the extent to which the estate in land, and the indefeasible title, is being encroached upon by statutes designed to regulate land usage - aiming to protect environmental values. Questions are now arising as to the effect of these statutes on title itself, and how increasing regulation of land usage may relate to the quality of the title to land.

Additionally, it is increasingly difficult to find how one's land usage is affected by

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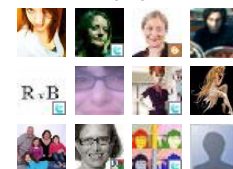
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regulation. Multiple environmental statutes potentially create multiple restrictions or obligations on land owners - not all of which are clear from a search of the register.

This leads to two questions: to what extent is environmental regulation of land effective against subsequent owners if they have no notice; and if this regulation is made clear upon the register, will this impinge upon the economic benefits of registered title?

That is to say: how sustainable is the present system?

But Why?

There are many many more issues that could be canvassed within this framework: the justification for private property in the first place; community title in urban environments; planning law and its intersection with administrative review; water allocations and mining rights independently of land title; food security...

It would be easy simply to list the rules applying to land and its regulation and to learn them - thus becoming a property lawyer. But as students of the law, and as legal practitioners, we are called upon to understand why the law is this way, and whether the law is any good. Of course there are a number of ways in which we may assess the value of a law and suggest improvements. For me, teaching land law, the 'lens' of sustainability provides a neat conceptual framework within which to understand the law; why it is the way it is; and what challenges we - as practitioners and citizens - are likely to face.

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Posted by Kate Galloway at 09:10

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