Constitutional and Judicial Recognition of Aboriginal and Torres Strait Islander Peoples: The Migration of Foundational Ideas from Canada to Australia

Louise Elizabeth Parrott

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Signed Statement

This thesis is my own original work.

Pages 147–170 (Sections C–E of ‘Impetuses for a Non-Discrimination Guarantee’) and 170–188 (‘Scope of a Non-Discrimination Guarantee’) are modified versions of papers I submitted for assessment in the ANU College of Law postgraduate coursework subjects ‘LAWS8016 Comparative Constitutional Law’ and ‘LAWS8175 Citizenship Law in Context’ as part of my Doctorate of Juridical Science.

Louise Parrott
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Abstract

Ideas that are migrating from Canada are already guiding advocates who seek greater judicial and constitutional recognition of Aboriginal and Torres Strait Islander peoples. However, there is a need for a conceptual framework through which to approach the lessons that can be learned from Canada in this area. Inspired by The Migration of Constitutional Ideas, an edited work by Sujit Choudhry, in this thesis I argue that by thinking about the migration and transplantation of foundational ideas and by differentiating between four ‘modes’ of migration (arguments of counsel, judicial determinations, academic critique and constitutional reform deliberations), it is possible to better understand some of the processes that are at play. In particular, by adopting the terminology of the ‘migration’ and ‘transplantation’ of ‘foundational’ ideas, I aim to demonstrate that it is dangerous to transplant foundational ideas, whether derived from the common law or constitutional law, without other ideas (particularly in relation to implications) also migrating.

This thesis is a response to two distinct but related topics: ‘Topic 1 — The Potential for Judicial Recognition of Indigenous Self-Government Rights: The Migration of Foundational Ideas from Canada to Australia’ and ‘Topic 2 — Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, the Race Power and an Anti-Discrimination Guarantee: Contemplating Canadian Approaches to Equality’.

Through these two topics I examine two of the recognised modes of recognition — judicial and constitutional — and focus on two discrete types of recognition — self-government and non-discrimination — and the lessons that can be learned from Canada.

In response to the first topic I consider the extent to which foundational ideas are migrating from Canada to Australia in the field of Indigenous self-government rights and whether these ideas could be used in Australian courts. In response to the second topic I consider the extent to which Canadian experiences may assist when exploring the potential implications of prohibiting discrimination in the Australian Constitution.
and when examining the various options that are available. As far as the migration of foundational ideas from Canada is concerned, in Topic 1 my starting point is to consider what could be learned from the Canadian jurisprudence in order to understand the ideas that have migrated or could potentially migrate to Australia. In contrast, in Topic 2 I start with an appraisal of the lack of recognition of Aboriginal and Torres Strait Islander peoples in the *Australian Constitution* and the perceived problems with s 51(xxvi) (the ‘race power’), and in so doing I consider what benefits (modified) Canadian transplants may offer, if any.
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