

The Strengths of the Common Law
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by

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It is appropriate to begin by asking what is identified here by “the common law” which is maintained by the Basic Law¹. To offer some description, let alone a definition, of the term “the common law” is no easy task.

In its earliest sense, the common law was that body of law applied throughout the realm of England by the judges of the Plantagenet kings. The term “common” distinguished this law from local, regional or customary law. For the criminal law, the essential idea was conveyed by the term “the King’s peace”.

Today, in its most comprehensive sense “the common law” identifies that body of legal principle which is inherited both from courts of law (including courts of admiralty and of probate) and of equity. Two points should be made here. The first is that the common law by its rules respecting “choice of law” may admit evidence of the law of another jurisdiction which then

¹ *Lau Kong Yung v Director of Immigration* (1999) 2 HKCFAR 300 at 345 per Sir Anthony Mason NPJ.

determines one or more issues in the instant case; hence the common law is not self sufficient. The second point concerns statute law. A note of caution must be sounded. Much work of the courts involves the interpretation and application of statute law, not just as expressed in the pristine text but as interpreted in previous court decisions. A slim statutory text over time may bear a great weight of judicial exegesis. Section 4 of the Statute of Frauds² is a classic example. These curial interpretations themselves involve the application by the courts of “rules” of statutory construction. The “rules” themselves are product of the common law system, even where legislative attempts are made (by provisions in Hong Kong such as s. 19 of the Interpretation and General Clauses Ordinance (Cap 1))³, to restate (or modify) them by statute.

The first strength of the common law, so understood, which I would identify is its spatial dimension. This has seen and continues to see the adaptation of the common law to varied conditions in jurisdictions from one end of the globe to the other.

In Hong Kong, as in the colonies which were to become the Australian States, the “common law of England” was “received” at specified

² Re-enacted in Hong Kong by s 3(1) of the Conveyancing and Property Ordinance (Cap 219). Section 3(2) states that the law relating to part performance is not affected by s 3(1).

³ Section 19 reads:

“An Ordinance shall be deemed to be remedial and shall receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Ordinance according to its true intent, meaning and spirit.”

dates in the course of the 19th century, whether in 1843 for Hong Kong or 1828 for New South Wales.

What was the nature of this “reception”? Several points are to be made. The first was explained as follows by Windeyer J in *Skelton v Collins*⁴:

“To suppose that [the common law] was a body of rules waiting always to be declared and applied may be for some people satisfying as an abstract theory. But it is simply not true in fact. It overlooks the creative element in the work of courts...In a system based, as ours is, on case law and precedent there is both an inductive and a deductive element in judicial reasoning, especially in a court of final appeal for a particular realm or territory”.

The second point is the qualification, differently expressed in the various Imperial instruments and ordinances, to the effect that in some respects the body of English law would not be applicable to local circumstances. This qualification provides a large and diverse subject. The most recent and comprehensive consideration is given by Mr Justice McPherson, late of the Queensland Court of Appeal, in his work, published in 2007, “*The Reception of English Law Abroad*”⁵.

What effect was to be given by the “received” common law to any legal system already established in the colony? There was some analogy here to the “choice of law” doctrine of the common law. With respect to the

⁴ (1966) 115 CLR 94 at 135; [1966] HCA 14.

⁵ See, as to Hong Kong, pp 370-382. See also, Wesley-Smith, “The Reception of English Law in Hong Kong” (1988) 18 *Hong Kong Law Journal* 183 at 183-196.

recognition of systems of land occupation by indigenous inhabitants very different answers in the 19th century were given by the courts with respect to Australia on the one hand and Canada and New Zealand on the other.⁶ Today, the courts of these jurisdictions have come together to translate ancestral practices into modern legal discourse without, as McLachlin CJ very recently put it, forcing them “into the square boxes of common law concepts”⁷

Furthermore, the social conditions in the Australian colonies, as elsewhere, might make inapplicable certain English social institutions. In the Australia colonies the Anglican Church never enjoyed, above other Christian denominations, a position in law as the established religion as was the case in England⁸.

At a quite different level, there was the impact upon legal thought of distinctive physical and environmental conditions. Take liability of a landowner in negligence for the spread of a bush fire to the adjoining land of the plaintiff. *Hargrave v Goldman*⁹ was such a case. The properties were in rural Western Australia. The fire had started from a smouldering 100 foot high red

⁶ *Cooper v Stuart* (1889) 14 App Cas 286 at 291; *R v Symonds* [1847] NZPCC 387 at 391-392; *St Catherine’s Milling and Lumber Co v The Queen* (1888) 14 App Cas 46 at 53-54; cf *Mabo v Queensland* [No. 2] (1992) 175 CLR 1; *Calder v A-G (British Columbia)* [1973] SCR 313.

⁷ *Tsilhqot’in Nation v British Columbia* 2014 SCC 44 at [31] – [32]; reference is made there to a statement to similar effect in *Western Australia v Ward* (2002) 213 CLR at [89]; [2002] HCA 28.

⁸ *PGA v The Queen* (2012) 245 CLR 355 at 372 at [26]-[27], [48]; [2012] HCA 21.

⁹ [1967] 1 AC 645 at 662.

gum tree which had been struck by lightning and left unextinguished by the defendant. The Privy Council upheld the decision of the High Court in favour of the plaintiff. Lord Wilberforce carefully observed that the High Court “may be taken to be aware of the present day conditions regarding bush fires.”

So much then for the strength of the common law in its adaptability across diverse jurisdictions.

The second strength to which I wish to refer is the common law method of adjudication. This produces a body of principles from interaction between bench and bar in deciding on the evidence in particular disputes, and in reviewing those decisions by appellate procedures. What is involved here is not merely a particular body of rules but what Windeyer J called “the method and spirit” of the common law¹⁰, as practised by a skilled legal profession.

There are three particular aspects of that common law method to which I want to refer.

The first concerns the development of principle. This involves not the formulation of a theory in absolute terms, with which the case for decision

¹⁰ *Skelton v Collins* (1966) 115 CLR 94 at 135.

must comply, but the process described as long ago as 1783. In *Ringsted v Lady Lanesborough*¹¹ Lord Mansfield said:

“General rules are, however, varied by change of circumstances. Cases arise within the letter, yet not within the reason, of the rule; and exceptions are introduced, which, grafted upon the rule, form a system of law...[If] there is no case precisely in point; we must therefore make a precedent from reason and analogy.”

Much later, Lord Goff said that while “our continental colleagues” tend “to reason downwards from abstract principles embodied in a code”, common lawyers “tend to avoid large, abstract, generalisations” and “to reason upwards from the facts of the cases before us”.¹² As Judge Posner has expressed it¹³:

“In top down reasoning the judge or other legal analyst invents or adopts a theory about an area of law – perhaps about all law – and uses it to organise, criticise, accept or reject, explain or explain away, distinguish or amplify the existing decisions to make them conform to the theory, and generate an outcome in each new case as it arises that will be consistent with the theory, and with the canonical cases, that is, the cases accepted as authoritative within the theory.”

An example of the “upwards” method is the development in the United States¹⁴ and in Australia¹⁵ of the principles of restitution. This has built

¹¹ (1783) 3 Dougl 197 at 203-204 [99 ER 610 at 613].

¹² Robert Goff, “The Future of the Common Law” (1997) 46 *International and Comparative Law Quarterly* 745 at 756.

¹³ “Legal Reasoning from the Top Down and from the Bottom Up: The Question of Unenumerated Constitutional Rights” (1992) 59 *The University of Chicago Law Review* 433 at 433.

¹⁴ Restatement 3rd, Restitution and Unjust Enrichment (2010).

¹⁵ *Australian Financial Services and Leasing v Hills* (2014)88 ALJR 552. See Eli Ball, “Yes, there is an Australian Law of Unjust Enrichment”, paper presented at Obligations Law Conference at the University of Hong Kong on 17 July 2014.

upon what was said by Lord Mansfield in *Moses v Macferlan*¹⁶ respecting the action for money had and received and its analogy with a bill in equity. An example of the “downwards” or “top down” method is the somewhat rigid structure of restitution law, looking to such criteria as “change of position”, which in recent years has attracted some judicial support in the United Kingdom.

A difficulty with “top down” theorising is that it begins with a genus which in the world of practical affairs and adjudication of disputes must then be broken down by the course of decision into a series of species. *Donoghue v Stevenson*¹⁷ provides an example of this process. Lord Atkin wrote that he devised his famous “general conception of relations giving rise to a duty of care” by building up from the “particular instances” in the cases found in the books. But, I suggest that, in truth, and as the subsequent and protracted development of the tort of negligence shows, the “neighbour” principle has proved to be a classic and troublesome instance of top down reasoning.

The second aspect of the common law method of adjudication concerns the position of the judges. It has been suggested that what marks off the common law system from the civilian systems of Europe and elsewhere is the doctrine of precedent based upon reasoned decision making, and different

¹⁶ (1760) 2 Burr 1005 [97 ER 676].

¹⁷ [1932] AC 562 at 580-581.

procedures of fact finding. That is no doubt so, but what also is highly significant is the position in the common law system of what by comparison is a small group of known and widely skilled judges, whose contribution to the case law survives them. By way of contrast, a German scholar of my acquaintance, with reference to *Moses v Macferlan*, told me that he could not name one German judge who had been a contemporary of Lord Mansfield.

The third aspect of the common law method of adjudication is its emphasis upon balancing competing interests and recognising that a just outcome may be a qualified one. This is an aspect of the inheritance which for more than a century has seen the administration of law and equity within the one court structure where civil cases today largely are tried by judge alone.

The point may be better understood by consideration of the passage set out below from the joint reasons of Dixon CJ, McTiernan and Kitto JJ in *Jenyns v Public Curator (Q)*¹⁸. This reads:

“The jurisdiction of a court of equity to set aside a gift or other disposition of property as, actually or presumptively, resulting from undue influence, abuse of confidence or other circumstances affecting the conscience of the donee is governed by principles the application of which calls for a precise examination of the particular facts, a scrutiny of the exact relations established between the parties and a consideration of the mental capacities, processes and idiosyncrasies of the donor. Such cases do not depend upon legal categories susceptible of clear definition and giving rise to definite issues of fact readily formulated which, when found, automatically determine the validity of the disposition. Indeed no better illustration could be found of Lord

¹⁸ (1953) 90 CLR 113 at 118-119. See, further, *Kakavas v Crown Melbourne Limited* (2013) 87 ALJR 708 at 713 [16]; [2013] HCA 25.

Stowell's generalisation concerning the administration of equity: 'A court of law works its way to short issues, and confines its views to them. A court of equity takes a more comprehensive view, and looks to every connected circumstance that ought to influence its determination upon the real justice of the case': *The Juliana*¹⁹ ..."

The application of equitable doctrines and remedies fixes upon a properly informed and instructed conscience. This is a judicial construct, over time, of values and standards against which the conduct of suitors, not just of defendants, is to be judged. The application of this experience to the instant dispute requires the hard work of advocates and judges to yield a reasoned outcome.

By way of example, something should be said of the modern law of contract. On one view, proceeding "top down" from particular economic theories concerning the efficient use of resources, a party is at liberty to break its contract at the price only of paying damages to the plaintiff.²⁰ But that is not the whole legal picture. A negative covenant may be enforced by injunction, and an executory contract may attract a decree of specific performance. Yet, here again, considerations of a balanced outcome are in play. So it is that not all contracts attract the remedy of specific performance, delay may defeat what should have been an urgent application for injunctive relief, and non-disclosure to the court upon an *ex parte* application may have dire consequences.

¹⁹ (1822) 2 Dods 504 at 522 [165 ER 1560 at 1567].

²⁰ See *Tabcorp Holdings v Bowen Investments* (2009) 236 CLR 272 at 285-286 [13]; [2009] HCA 272.

My overall conclusion, then, is that the greatest strength of the common law system now operating in so many jurisdictions lies in the hands of an independent minded, intellectually rigorous bench and bar which holds the scales between competing interests as they appear from time to time, and yields reasoned outcomes that are bespoke tailoring to fit the particular circumstances. Without such a professional mentality, and without supporting resources, the system cannot operate effectively.

From time to time novel situations will be presented for adjudication. They may call for the striking of a new balance between continuity and change, as Lord Mansfield noted in the passage from *Ringsted* set out earlier in this paper.

In looking ahead, as this will require, it will be prudent to have regard to whence we have come. Lord Simonds LC captured the thought here in *Chapman v Chapman*²¹. He said that it was “even possible that we are not wiser than our ancestors.”

²¹ [1954] AC 429 at 444.