

# The American Law Institute and its Restatements as a Source of the Common Law

## Judicial Institute of Hong Kong

The Hon Robert French AC\*

6 July 2017, Hong Kong

Justice Fok, Acting Chief Justice Tang, members of the Hong Kong judiciary, the profession and the legal academy; thank you for inviting me to address you this evening. It is an honour to be here, to have been appointed to the list of Non-permanent Judges of the Court of Final Appeal (CFA) and to have had the opportunity of sitting with the Court in the last month.

It is a product of its colonial history that Hong Kong is a common law jurisdiction. That history goes back to the *Supreme Court Ordinance 1844* which provided in s 3 that the law of England should be in full force in the Colony of Hong Kong, except where the same should be inapplicable to the local circumstances of the Colony or of its inhabitants. That application was continued in the *Supreme Court Ordinances* of 1846 and 1873 and the *Application of English Law Ordinance 1966*. The latter was displaced ultimately by Art 8 of the Basic Law, which nevertheless continued the common law and rules of equity. Hong Kong, as Professor David Donald has written, began very early a tradition in which its statutory law was locally controlled and its case law linked to a constantly developing body of decisions originating in England and its colonies.<sup>1</sup> Article 84 supports the continuation of that linkage by providing that Courts of the Hong Kong Special Administrative Region may ‘refer to precedents of other common law jurisdictions’.

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<sup>1</sup> David C Donald, *History's Marks on Hong Kong Law: From British Colony to Chinese SAR* (3 November 2011) Centre for Financial Renovation and Economic Development, Working Paper No 5. Available at SSRN: <https://ssrn.com/abstract=1953830> or <http://dx.doi.org/10.2139/ssrn.1953830>

The term ‘common law’ does not have a single definition. Justice Gummow discussed the definitional issues in an address delivered to your Institute on 10 July 2014.<sup>2</sup> He said:

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 probate) and of equity.<sup>3</sup>

He made the important point that much of the work of the courts involves the interpretation and application of statute law, but that the body of judicial decisions that builds up over time with respect to statutes involves common law rules of statutory construction.

In each of the colonies, including Hong Kong and the Australian colonies before federation, the reception of the common law was subject to adaptation to local conditions. Its post-colonial development in those places led to divergences in doctrine which sometimes reflected divergences over principle not necessarily related to local conditions. Divergence took a long time to come to Australia. In 1942, Sir Owen Dixon, addressing an American audience, said:

We are studious to avoid establishing doctrine which English Courts would disavow. For we believe that no good can come of divergence between the common law as administered in one jurisdiction of the British Commonwealth and as administered in another.<sup>4</sup>

It was, however, Sir Owen Dixon as Chief Justice of Australia in 1963, who led the first explicit departure by the High Court from a decision of the House of Lords on a common law question. In *Parker v The Queen*<sup>5</sup> he refused to follow *Director of Public Prosecutions v Smith*.<sup>6</sup> He said:

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<sup>2</sup> WMC Gummow, ‘The Strengths of the Common Law’ (2014) 44(3) *Hong Kong Law Journal* 773.

<sup>3</sup> Ibid 773.

<sup>4</sup> Sir Owen Dixon, ‘Two Constitutions Compared’ in Woinarski (ed) *Jesting Pilate and Other Papers and Addresses* (Law Book Co, 1965) 104.

<sup>5</sup> (1963) 111 CLR 610.

<sup>6</sup> [1961] AC 290.

Hitherto I have thought that we ought to follow decisions of the House of Lords, at the expense of our own opinions and cases decided here, but having carefully studied *Smith's Case* I think that we cannot adhere to that view or policy. There are propositions laid down in the judgment which I believe to be misconceived and wrong. They are fundamental and they are propositions which I could never bring myself to accept.<sup>7</sup>

Much later in 1987, Sir Anthony Mason reflected on what had become the established Australian position when he said:

There is ... every reason why we should fashion a common law for Australia that is best suited to our conditions and circumstances ... The value of English judgments, like Canadian, New Zealand and for that matter United States judgments, depends on the persuasive force of their reasoning.<sup>8</sup>

Chief Justice Li set out the position for Hong Kong following the 1997 return when he observed in a judgment in 2008 that the CFA was not bound to adhere rigidly to the previous precedents of the Privy Council on appeal from Hong Kong: '[T]he great strength of the common law lies in its capacity to develop to meet the changing needs and circumstances of the society in which it functions.'<sup>9</sup> Lord Millett made the same point succinctly and comprehensively in 2009 when he said:

The jurisdiction to ascertain, declare and develop the common law of Hong Kong formerly exercisable by the Privy Council is now exercisable by this Court. It will continue to respect and have regard to decisions of the English courts, but it will decline to adopt them not only when it considers their reasoning to be unsound or contrary to principle or unsuitable for the circumstances of Hong Kong, but also when it considers that the law of Hong Kong should be developed on different lines.<sup>10</sup>

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<sup>7</sup> (1963) 111 CLR 610, 632 (footnote omitted).

<sup>8</sup> A Mason, 'Future Directions in Australian Law' (1987) 13 *Monash University Law Review* 149, 154. See generally The Hon Paul Finn, 'Common Law Divergences' (2013) 37 *Melbourne University Law Review* 509.

<sup>9</sup> *Solicitor (20/4/07) v The Law Society of Hong Kong* (2008) 11 HKCFAR 117, 130–4.

<sup>10</sup> *China Field Ltd v Appeal Tribunal (Buildings) (No 2)* (2009) 12 HKCFAR 342, 371–3.

Divergences between common law jurisdictions on important questions of principle continue to emerge from time to time. In 2015, two members of the Supreme Court of the United Kingdom described a decision of the High Court of Australia in relation to contractual penalties as ‘a radical departure from the previous understanding of the law’.<sup>11</sup> The High Court remained unmoved.<sup>12</sup> More recently, the High Court declined, as did the Court of Final Appeal in Hong Kong,<sup>13</sup> to follow the decision of the Supreme Court of the United Kingdom in *R v Jogee*<sup>14</sup> in relation to the doctrine of extended joint enterprise in criminal law. The High Court also differed from the United Kingdom on the common law of contract when it declined to imply a term of trust and confidence in employment contracts.<sup>15</sup>

Doctrinal differences between common law jurisdictions engender academic and professional debate. They should not, however, overshadow the immense area of common ground not only as to content but also as to underlying principle and methodology and understanding of the judicial function. As Professor Arthur Goodhart wrote, the most striking feature of the common law is its public law, it being ‘primarily a method of administering justice’.<sup>16</sup> The strengths of the common law to which Justice Gummow referred in his address in 2014 are far more important than the particular differences between jurisdictions, which necessarily emerge in the decisional development of principle. The shared historical heritage, coupled with a degree of diversity in particulars, means that each common law jurisdiction can look, where appropriate, to others as an intellectual resource.

History and habit may incline us, when we consider the common law jurisdictions to which Hong Kong might refer, to think first of England, Australia, Canada and New Zealand. I want to say something in this address about the United States and the work of the American Law Institute (ALI) particularly in its Restatements of the Law. I want to speak about the ALI for two reasons. The first is the value of its Restatements as a common law resource. The second is that, at a time when there is much negative reporting about American political

<sup>11</sup> *Cavendish Square Holding BV v Makdessi* [2015] 3 WLR 1373, 1396 citing *Andrews v Australia and New Zealand Banking Group Ltd* (2012) 247 CLR 205. The denunciatory formula of ‘radical departure’ has been deployed across common law jurisdictions; see *Uren v John Fairfax & Sons Pty Ltd* (1966) 117 CLR 118, 145 reflecting on *Rookes v Barnard* [1964] AC 1129 and *R v O’Connor* (1980) 146 CLR 64, 86 reflecting on *Director for Public Prosecutions v Majewski* [1977] AC 443.

<sup>12</sup> *Paciocco v Australian and New Zealand Banking Group Ltd* (2016) 90 ALJR 835; 333 ALR 569.

<sup>13</sup> *HKSAR v Chan Kam Shing* (2016) HKCFAR 640.

<sup>14</sup> *Miller v The Queen* (2016) 90 ALJR 918. To follow the Supreme Court would have required the High Court to overrule its own decision in *McAuliffe v The Queen* (1995) 183 CLR 108 which had applied a Privy Council decision in *Chan Wing Siu v The Queen* [1985] AC 168.

<sup>15</sup> *Commonwealth Bank of Australia Ltd v Barker* (2014) 253 CLR 169 not following *Malik v Bank of Credit and Commerce International SA (In Liq)* [1998] AC 20.

<sup>16</sup> A L Goodhart, ‘What is the Common Law?’ (1960) 76 *Law Quarterly Review* 45, 46.

leadership, the ALI is a body which reminds us of an enduring strength of American civil society, it being an institution founded and continued in a spirit of voluntarism and commitment to the public good.

The common law has played an important part in the history of the law of the United States and still does. Despite the War of Independence and hostility to things English, the work of the great English legal scholars was influential in the early United States. *Blackstone's Commentaries on the Law of England*, published in the 18<sup>th</sup> century, sold almost as many copies in the US as they did in England. There is a story that when Abraham Lincoln was still a law student and was trying to get elected to the State Legislature in Illinois, he purchased a partnership interest in a grocery store to try to generate an income. The store was not particularly successful. The partner drank a lot, and Mr Lincoln studied law. Both ate the merchandise. On his own account of it, Lincoln's most useful transaction in the business was his purchase of an old barrel from an immigrant for 50 cents. He found under rubbish at the bottom a complete set of *Blackstone's Commentaries*. A biographer of his early career described the occasion as 'a red-letter day in his life.'<sup>17</sup>

Inspired in part by Blackstone, the United States developed its own great common law texts, the leading examples being those of Chancellor James Kent and Joseph Story. James Kent's *Commentaries on American Law*, which were twice as long as Blackstone's, were used in England, Canada and Australia. He sought to integrate the laws of each of the States of the United States with those of England and drew comparisons with the civil law systems of Europe. The late Bruce McPherson, a former Judge of the Queensland Court of Appeal, in 2006 published a comprehensive text on *The Reception of English Law Abroad*. He explained that one of Kent's underlying purposes was:

[t]o offset the prevailing mood of hostility in the United States to the continued use of the common law as something English, by showing, as he sought to do, that like the common law those other systems were based on natural law and so arrived at similar results in practice.<sup>18</sup>

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<sup>17</sup> F T Hill, *Lincoln the Lawyer* (The Century Co, 1906) 1986 reprint at 50.

<sup>18</sup> B H McPherson, *The Reception of English Law Abroad* (Supreme Court of Queensland Library, 2006) 490.

Propositions from Kent's Commentaries were adopted in English decisions involving such disparate matters as bills of exchange, the effects of intoxication on contract and contractual liability and the sale of goods or bailment.<sup>19</sup>

Joseph Story's texts also found their way across the Atlantic to England and Australia. Within a year of their publication, his *Commentaries on the Conflicts of Laws* were praised in the Court of Common Pleas in England on account of the 'learning, acuteness and accuracy' of the author.<sup>20</sup> As McPherson has written:

Between them, Kent and Story not only naturalised English law and consolidated its place in the United States, they also rationalized the use, understanding and teaching of it in the place of its origin. It would not be the last occasion when the words of disciples of the common law from beyond the seas would be read in England.<sup>21</sup>

Kent and Story are still cited in Australian judicial decisions.<sup>22</sup>

The United States is not just an historical but also a contemporary source of common law. The common law there is to be found for the most part not in one national corpus but in the common law of each of the States. The way in which that diversity arises in the American Federation is illustrated by the contrast between the location of final appellate jurisdiction in Australia and in the United States. Section 73 of the Constitution of the Commonwealth of Australia confers on the High Court jurisdiction to hear and determine appeals from all judgments, decrees, orders and sentences of any federal court or court exercising federal jurisdiction or of the Supreme Court of any State. This means in effect that the High Court is the final court of appeal from all jurisdictions, State or federal, in Australia. It is on that basis that, in 1997 a unanimous High Court declared unequivocally that '[t]here is but one common law in Australia which is declared by this Court as the final court of

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<sup>19</sup> Ibid 491, fn 126.

<sup>20</sup> *Huber v Steiner* (1935) 2 Bing NC 203, 211 (Tindal CJ), cited in McPherson, above n 18, 493.

<sup>21</sup> McPherson, above n 18, 493.

<sup>22</sup> *Clay v Clay* (2001) 202 CLR 410, 428-29 [37]-[38] (Gleeson CJ, McHugh, Gummow and Callinan JJ), *Roxborough v Rothmans of Pall Mall Australia Ltd* (2001) 208 CLR 516, 552-3 [94] (Gummow J), *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199, 242-3 [93] (Gummow and Hayne JJ), *Burke v LFOT Pty Ltd* (2002) 209 CLR 282, 316 [87] and 318 [94] (Kirby J), *Austin v Commonwealth* (2003) 215 CLR 185, 262 [159], *Tanwar Enterprises Pty Ltd v Cauchi* (2003) 217 CLR 315, 324 [21] (Gleeson CJ, McHugh, Gummow, Hayne and Heydon JJ), *Thomas v Mowbray* (2007) 233 CLR 307, 357 n 199 (Gummow and Crennan JJ), *ICM Agricultural Pty Ltd v Commonwealth* (2009) 240 CLR 140, *Friend v Booker* (2009) 239 CLR 129, 148 [38] (French CJ, Gummow, Hayne and Bell JJ).

appeal.<sup>23</sup> By way of contrast, Article III of the Constitution of the United States limits the cases in which the Supreme Court and federal courts may exercise the judicial appellate power of the United States. Outside those limits, the Supreme Courts of the States are the ultimate appellate courts from their jurisdictions. Each State therefore has its own body of common law.

It is against that background that I come to the history and work of the ALI and, in particular, the Restatements that seek to identify common positions of principle based upon the common law of the various States.<sup>24</sup>

The ALI originated in the early 1920s when a group of senior judges, legal practitioners and academics set up a Committee on the Establishment of a Permanent Organization for the Improvement of the Law. The Committee was chaired by Elihu Root, a leading US attorney and former Secretary of State. The Vice Chairman was the then Attorney-General of the United States. Other members included Harlan Stone, later to become Chief Justice, as well as Benjamin Cardozo and Judge Learned Hand. Academic members included Samuel Williston and Roscoe Pound of Harvard and Joseph Wigmore of Chicago. The Secretary of the Committee was William Draper Lewis of the University of Pennsylvania, later to become the first Director of the ALI.

The Committee prepared a report which identified a problem of uncertainty in the law due to lack of agreement about the fundamental principles of the common law, conflicting and badly drawn statutes, and lack of precision in the use of legal terms. The ignorance of judges and lawyers and nature of novel legal cases were also factors.

As a result of the Committee's report a meeting of several hundred judges, attorneys and law academics was convened in Washington in 1923 and adopted a Charter for an American Law Institute. Its purpose as described in the Charter is:

to promote the clarification and simplification of the law and its better adaptation to social needs, to secure the better administration of justice, and to encourage and carry on scholarly and scientific legal work.

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<sup>23</sup> *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 563.

<sup>24</sup> The early history of the ALI for present purposes is taken from H F Goodrich, 'The Story of the American Law Institute' (1951) *Washington University Law Quarterly* 283.

The incorporators of the ALI included Chief Justice and former President, William H Taft and a former Chief Justice, Charles Evans Hughes.

The membership of the ALI today is elected by the Institute on the basis of a confidential and refereed nomination process. The number of elected members is limited to 3,000. They comprise judges, lawyers and legal academics within the United States and a number of members from other countries. All are selected on the basis of their professional achievements and demonstrated interest in improving the law. Australian members, who are also non-permanent judges of the CFA, are Justice Gummow and myself. Other Australian members include Professor Jane Stapleton, who is a member of the Executive Council of the ALI, Justices Gageler, Keane and Edelman of the High Court of Australia, Professor Michael Crommelin, former Dean of Melbourne University Law School and Professor David Partlett of Emory Law School in Atlanta.

The first and arguably most significant class of projects which the ALI decided to undertake upon its formation was the preparation of Restatements of the Law in various areas to dispel uncertainty about what the law was. The process for that undertaking is essentially the same as when the ALI was established and is applied not only to Restatements but to other classes of project which I will mention shortly. It involves the following steps:

1. Approval for a project by the officers and Council of the ALI.
2. Selection of an appropriate expert as the Reporter who is to draft the document with the aid of research assistants.
3. Review of the initial draft by a small group of specialist advisers, judges, legal practitioners and legal academics and by a larger Members Consultative Group.
4. Further analysis and consideration by the ALI Council.
5. Presentation of a Tentative Draft to the Annual Meeting of the members of the ALI; and
6. An iterative process involving the presentation of a series of Tentative Drafts culminating in a Final Draft adopted for approval.

The ALI recognised from the outset that the cost of its Restatements would be considerable. Reporters and their assistants would have to be compensated and printing and



distribution costs met. A request was made to the Carnegie Foundation, which provided funding of about US\$2.4 million. That seems a lot of money even today. It was a lot more in the early 1920s.

The work of producing the first Restatements was carried on from 1923 to 1944. They covered the Law of Contract, Property, Security, Torts, Trusts, Judgments, Agency and Conflict of Laws. The first 20 years produced 22 volumes, comprising over 16,000 pages of text. In 1952, the ALI began what was called the *Restatement (Second)*. That comprised updates and revisions of the first Restatements and the introduction of new Restatements on topics not covered in the first round. A third series was commenced in 1987. The topics covered now extend to the Foreign Relations Law of the United States, the Law Governing Lawyers, Suretyship and Guaranty and Unfair Competition.

The purpose of the Restatements is described on the current ALI website:

They aim at clear formulations of common law and its statutory elements or variations and reflect the law as it presently stands or might appropriately be stated by a court.

The Restatements do not offer a static snapshot view of the common law. As explained at the beginning of the text of each Restatement the process of their formulation involves four principal elements:

1. Ascertain the nature of the majority rule.
2. Ascertain trends in the law.
3. Determine what specific rule fits best with the broader body of the law and therefore leads to more coherence in the law.
4. Ascertain the relative desirability of competing rules.

In this context social science evidence and empirical analysis are regarded as helpful.

Each Restatement comprises a number of black-letter propositions, Reporter's Comment and Reporter's Notes. The Discussion Draft of a *Restatement on Consumer Contracts*, considered at the meeting of the ALI in Washington in May 2017, illustrates the

format. Proposition 2 in the Discussion Draft deals with the adoption of standard contract terms. It begins:

A standard contract term is adopted as part of a consumer contract if after receiving reasonable notice of the standard contract term and a reasonable opportunity to review it, the consumer signifies assent to the transaction.

The black-letter proposition continues covering other circumstances. It is sufficient for present purposes to refer to the first sentence as illustrative of the style. After each black-letter statement there is a ‘Comment’ which is an elaboration and explanation by the Reporter of the black-letter proposition coupled with illustrations of its application in particular cases. Following the Comment, is a section entitled ‘Reporter’s Notes’. Here there can be found a detailed justification for the black-letter proposition by reference to case law and principle.

The impact of the Restatements in the United States was immediate and long-lasting. A recent Guide to Law Students, published by the Harvard Law School Library, informs them that:

Restatements are highly regarded distillations of common law. They are prepared by the American Law Institute (ALI), a prestigious organization comprising judges, professors, and lawyers. The ALI’s aim is to distill the ‘black letter law’ from cases to indicate trends in common law, and occasionally to recommend what a rule should be. In essence, they restate existing common law into a series of principles or rules.

A measure of the influence of the Restatements since they were first published is the extent to which they have been and continue to be cited in the courts of the United States.<sup>25</sup>

The Restatements have informed the development of the law in other common law jurisdictions. In a history of the ALI published in the *Washington University Law Review* in 1951, Judge Herbert Goodrich referred to an address given by Lord Denning to English law teachers in which he said that the greatest works done by the universities in the United States

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<sup>25</sup> For a recent discussion of use of Restatements in the US Supreme Court see R L Revesz, ‘The Director’s Letter: The American Law Institute and the United States Supreme Court at [www.ali.org/news](http://www.ali.org/news).

were the Restatements. Denning spoke of a case in which he had appeared as counsel. He had lost at first instance and before the Court of Appeal. However he was confident, on the basis of the *Restatement of Restitution*, that he was right. He took the case to the House of Lords for no fee and succeeded. The Lord Chancellor quoted the Restatement. The client was so delighted that he paid Denning an honorarium notwithstanding the no-fee arrangement.<sup>26</sup>

In the last ten years or so there have been about 70 cases in which Australian courts have referred to Restatements in their judgments. The most frequent references have been made in Commonwealth and New South Wales courts (about 20 each) followed by Western Australia and Victoria (about 10 each) with a few references in South Australia, Queensland, Tasmania and the Australian Capital Territory. Judicial research assistants at the CFA have identified six judgments of the Supreme Court of Canada and six of the Supreme Court of New Zealand in which Restatements have been cited in the past ten years. There are only two decisions which they have been able to identify in Hong Kong, both in the Court of Appeal where references were made to United Kingdom judgments referring to the Restatements.

The Restatements can be used in various ways. Let me give a couple of examples from my own use of them. In a 2012 joint judgment on restitution for payments made as loans which were irrecoverable for illegality,<sup>27</sup> Justices Crennan, Kiefel and myself quoted a proposition in the *Restatement (Third) on Restitution and Unjust Enrichment*. The proposition was that restitution will be allowed as necessary to prevent unjust enrichment if the allowance of the restitution will not defeat or frustrate the policy of the underlying prohibition.<sup>28</sup> We also quoted a qualifying proposition that:

[d]ifferent rules govern the availability of restitution in connection with agreements that are merely ‘unenforceable’ ... and agreements that are unenforceable because they are ‘illegal’.<sup>29</sup>

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<sup>26</sup> H F Goodrich, ‘The Story of the American Law Institute’ (1951) *Washington University Law Quarterly* 283.

<sup>27</sup> *Equuscorp Pty Ltd v Haxton* (2012) 246 CLR 498.

<sup>28</sup> *Ibid* 520 [38].

<sup>29</sup> *Ibid*.

The Restatement conveniently formulated a distinction that was relevant to our reasoning in the case. We could, I suppose, have drawn that distinction without its assistance. However, the status and clarity of the Restatement propositions meant that they were useful in the explanation, provided by our reasons, for the end result we reached. That result was that the payments which were loans made in connection with a collective investment scheme that did not comply with statutory prospectus requirements, were not recoverable under a claim in restitution.

The *Restatement (Third) on Torts: Liability for Physical and Emotional Harm* proved relevant to a consideration of the extent to which statistical correlation between environmental exposures to toxic products and subsequent disease would support an inference of causal connection between the exposure and the disease. The question arose in a case about causal connections between mesothelioma in the plaintiff and each of a number of temporally distinct exposures to asbestos fibre under his employment by different companies. There was evidence in the case of a causal hypothesis implicating each of a series of distinct exposures.<sup>30</sup>

A list of criteria relevant to the inference of causation from statistical correlation had been set out in 1965 in a much quoted paper delivered by Sir Austin Bradford Hill to the Royal Society of Medicine.<sup>31</sup> The *Restatement (Third) on Torts* contained a useful discussion of the application of what were called the ‘Bradford Hill criteria’ and the evaluative character of the inferential process about causation.

One of the virtues of the Restatements is that they offer an authoritative overview of the common law in the United States based upon, and therefore avoid the need for, intensive research of each State jurisdiction’s decisions and of federal courts which have had to deal with common law questions arising in federal jurisdiction.

The ways in which the Restatements can be used in this and other common law jurisdictions are obvious enough:

1. First, as an exercise in comparative law to ascertain the state of the law across the United States and then to invoke it, if it be persuasive, to support an enunciation or development or application of common law principle.

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<sup>30</sup> *AMAC Pty Ltd v Booth* (2011) 246 CLR 36.

<sup>31</sup> A Bradford Hill, ‘The Environment and Disease: Association or Causation’ (1965) 58 *Proceedings of the Royal Society of Medicine* 295.

2. To demonstrate consideration of the United States' position, albeit it may not be accepted or may be distinguished as inapplicable to a particular case or set of local conditions.
3. Sometimes simply in judicial reasoning as a felicitous formulation of a proposition of principle.

The process of the production of Restatements can be contentious where there are different opinions on the content of, and trends in, the common law. Contention emerged early in the life of the ALI over its first Conflict of Laws Restatement. Judge Goodrich in his early history of the ALI said that in its first two decades:

the project occasioned a great many disputes. The men engaged in it were strong men with pretty definite notions. At one time the differences between Professor Joseph H Beale, Reporter for Conflict of Laws, and Vice President Byrne produced such violent controversy that the whole material on Conflict of Laws was held for two years' additional time and re-examined by the Institute's Executive Committee.<sup>32</sup>

It is not unusual for debates about proposed Draft Restatements at Ordinary Meetings of the ALI to include arguments that a proposition in the Restatement goes too far beyond what is supported by the body of authority in the courts. There are appeals then to the true purposes of the Restatements and warnings that if the ALI goes too far in the direction of what the Reporter thinks the law should be as distinct from what it is, they will lose their persuasive authority in the United States courts.

External criticisms of the work of the ALI along similar lines tend to reflect the philosophical and perhaps ideological differences which inform a lot of public discourse about the law. As the author of one extensive discussion of this topic observed:

Criticism of the American Law Institute and the Restatement movement is a common phenomenon and comes from two sides. The critique from one side is that the Restatements are too activist, stating the law as the Institute believes it should be, rather than the law as it is. The critique from the other side is that the Institute is

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<sup>32</sup> Goodrich, above n 26, 288.

too conservative—frozen in time in the late 1800s or early 1900s—and fails to incorporate the best contemporary practices in the study of law.<sup>33</sup>

Critical comments in the conservative camp echo and quote the typically blunt rhetoric of the late Justice Scalia who in one of his dissenting judgments in 2015 wrote:

The object of the original Restatements was ‘to present an orderly statement of the general common law’. ... Over time, the Restatements’ authors have abandoned the mission of describing the law, and have chosen instead to set forth their aspirations for what the law ought to be ... Restatement sections such as that should be given no weight whatever as to the current state of the law, and no more weight regarding what the law ought to be than the recommendations of any respected lawyer or scholar.<sup>34</sup>

That was a reference to the discussion of the disgorgement remedy in the *Restatement (Third) on Restitution and Unjust Enrichment*. Nevertheless as the ALI Director, Professor Revesz wrote in 2016 concerning the 2013 to 2015 terms of the Supreme Court, Justice Scalia was the most frequent author of opinions citing ALI publications. Professor Revesz also made the point that the Reporters’ views are confined to the Reporter’s Notes which are not published as an official position of the ALI. The black-letter rules and the Comments are the only portions that constitute the ALI’s position and which are adopted by its council and membership.<sup>35</sup> From the perspective of an external common law jurisdiction it may not be so important to decide whether a Restatement goes too far along some allegedly activist spectrum or is frozen in the last century. The focus will tend to be on the persuasive power of the propositions and the comments behind them and their relevance to the application or development of the common law in that jurisdiction.

My own observation of the process of consideration of Drafts at Ordinary Meetings of the ALI is that it is no rubber stamp exercise. There is no way the assembled membership will merely genuflect in the direction of the expert Reporters. When hundreds of members of the ALI gather together in Washington to consider Drafts of Restatements and other ALI project documents, emphatic and forceful opinions are often expressed from the floor. Some

<sup>33</sup> K D Adams, ‘Blaming the Mirror: The Restatements and the Common Law’ (2007) 40 *Indiana Law Review* 206 (footnotes omitted).

<sup>34</sup> *Kansas v Nebraska* 574 US (2015).

<sup>35</sup> Revesz, above n 25.

of them lead to minor adjustments to a Draft. Others may lead to more extensive reconsideration. As a member of the ALI from outside the United States I found the process to be very impressive — a demonstration of American civil society at its best bringing together disparate views and interest-based perspectives in the pursuit of an overarching public interest.

There are two other classes of project undertaken by the ALI. The first involves the examination and analysis of legal topics where it is thought reform is needed. The product of that class of project is a document published as ‘Principles of the Law’. The areas covered by Principles have included corporate governance, aggregated litigation, family dissolution, software contracts, transnational civil procedure, transnational insolvency and transnational intellectual property. Revisions of selected portions of the Federal Judicial Code have also been prepared.

The projects leading to Principles can be as contentious as the Restatements. A Yale academic writing in 1993 in a paper entitled ‘The Transformation of the American Law Institute’, observed that:

Few law reform efforts in this century have been as controversial as the often bitter fourteen-year battle within the American Law Institute ... over its efforts to articulate a set of rules about American corporate law. This epic struggle ended on May 13, 1992, when the ALI formally approved the *Principles of Corporate Governance* at its annual meeting in Washington.<sup>36</sup>

The other class of project comprises Model Statutory Codes including a Model Code of Evidence and a Model Penal Code. The ALI also has an ongoing role in the development and monitoring of the Uniform Commercial Code in conjunction with the Uniform Law Commission.

The current Restatement projects in progress at the ALI are Restatements on the Law of the American Indians, Charitable Non-profit Organisations, Children and the Law, Conflicts of Law, Consumer Contracts, Copyright, the Foreign Relations Law of the United

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<sup>36</sup> J R Macey, ‘The Transformation of the American Law Institute’ (1992-1993) 61 *Geo Washington Law Review* 1212 (footnote omitted).

States, the United States Law of International Commercial Arbitration, Liability Insurance, Property, Intentional Torts to Persons and Liability for Economic Harm.

Current Principles projects include Compliance, Enforcement and Risk Management for Corporate and other Organisations, Data Privacy, Election Administration, Government Ethics and Policing. The Model Penal Code has been under review in relation to sentencing and in relation to sexual assault and related offences.

## **Conclusion**

The American Law Institute is a human institution. It generates robust internal debate and sometimes sharp divisions between perspectives reflecting different sections of American society. It attracts critics from a variety of standpoints. That is hardly to be wondered at in the noisy and sometimes polarised marketplace of ideas in the United States.

Like the works of Kent and Story, to which I referred earlier, the products of the ALI have a significant utility as sources of comparative law in other common law jurisdictions well beyond the United States and including Hong Kong. Like all sources of comparative law, they must be used with care and discrimination, and not applied without consideration of their compatibility with the common law in the domestic jurisdiction and the applicability in local circumstances and conditions. In Hong Kong those conditions and circumstances include the framework provided by the Basic Law and the statute law. That said, they provide a valuable resource worthy of your consideration.