# FOREWORD

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The principal focus of contemporary comparative law is the convergence of common law and civil law systems. This Thematic Issue, concentrating as it does on the common law, also manifests the significance of this comparative law focus.

The particular strength of the common law approach was never better stated than by Oliver Wendell Holmes, who said:

> It is the merit of the common law that it decides the case first and determines the principle afterwards … It is only after a series of determinations on the same subject matter, that it becomes necessary to 'reconcile the cases', as it is called, that is, by a true induction to state the principle which has until then been obscurely felt. And this statement is often modified more than once by new decisions before the abstracted general rule takes its final shape. A well settled legal doctrine embodies the work of many minds, and has been tested in form as well as substance by trained critics whose practical interest is to resist it at every step.[1]

The formulation of codes or the enactment of legislation is not always tested in this rigorous manner. Nevertheless, statutes occupy more and more areas hitherto the subject of case law including, in the last year or so in Australia, significant aspects of the law of torts. Some areas have been, in effect, codified, eg New South Wales, Tasmania and the Commonwealth level in the *Evidence Act.*

On the part of the civil law, the process of codification includes the tendency to adopt adversarial, in substitution for investigatorial, procedures.

The multifaceted process known as globalisation, reinforced by the speed of contemporary communications, both physical and electronic, will inevitably accentuate these trends. As Chief Justice Gleeson has pointed out:

> Our law is increasingly aware of, and responsive to, the guidance we can receive from civil law countries. … The forces of globalisation tend to standardise the questions to which a legal system must respond. It is only to be expected that there will be an increasing standardisation of the answers.[2]

Notwithstanding the process of convergence, there remains a fundamental distinction between a system which recognises judicial decision making as an authoritative source of law and a system which does not. Without a formal

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1 Oliver Wendell Holmes, 'Codes and the Arrangement of Law' (1870) reprinted in Sheldon M Novick (ed) *The Collected Works of Justice Holmes*, (1995) vol I, 212–13 (references omitted).

2 A M Gleeson AC, 'Global Influences on the Australian Judiciary' (2002) 22 *Australian Bar Review* 184, 188.

doctrine of precedent and *stare decisis*, judges in civil law countries purport always to be implementing the will of the legislature. In some nations, such as France, judgments are expressed, in my limited experience of them, as if the result were somehow automatic. In other civil law nations, such as Germany, the judges seem to have dropped this pretence and canvass the choices open to them in interpreting the law, in a manner which acknowledges the inevitability of a judicial role in interpretation.

No code or statute can make detailed provision for the range of situations that will inevitably arise. The Benthamite illusion of precision and comprehensiveness of legislation has long since been exploded as a myth. Whenever a legislature uses words of general application in a statute, the application of such words inevitably involves a creative process on the part of judges. That does not mean that choice exists in all cases, because in many situations the application was perfectly clear.

I assume, though I have not investigated the subject, that in civil law countries, the publication of reasons for judgment, and informal means of communication amongst judges, result in a judgment influencing how subsequent cases are decided. If this were not the case, then the values of predictability and consistency, which are essential characteristics of the rule of law, could not be attained. Even if case law is not a formal source of law, it must have force which is almost the equivalent. Now that higher courts in common law jurisdictions no longer regard themselves as bound by their own decisions, there is, probably, a process of convergence in this regard also.

Even in the application of a statute or of a code, the traditional common law method to which Oliver Wendell Holmes referred has much to commend it. It is true that the process can at any stage be attenuated by legislative intervention, perhaps by way of overriding a course of judicial decision-making. Nevertheless, the high technique of the common law remains applicable and has, over a very long history, proven that it works.

The course of that history indicates two abiding characteristics of the common law, which are reflected in the articles published in this Issue. First, the capacity of the common law to adapt to new challenges and changing conditions of society and technology. Secondly, however, the limitations on that capacity, particularly in terms of speed of adaptation.

The principles developed in case law are never finally established as universally applicable propositions. They are as Cardozo reminded us 'working hypotheses'.[3] However, as Dame Sian Elias, the Chief Justice of New Zealand has recently observed:

3 Benjamin Cardozo, *The Growth of the Law* (1924), 43.

> It should be recognised that the method of the working hypothesis is a method of change. And it is in that principle of change that the vitality of the common law is to be found. If it is to be successful, the method of the working hypothesis requires close attention to reasons for the articulation of the principles which, applied directly or by analogy, underlie the determination of the courts. The future of the common law depends upon the ability of our legal system successfully to operate by this method.[4]

The contributions to this Issue manifest the proposition that the working hypothesis continues to operate in significant areas of the law in Australia.

There is much wisdom deeply imbedded in the pragmatic philosophy of the development of the law by judicial decision-making. The alternative approach of deduction from abstract ideas is, of course, a real alternative, with strengths of its own. It is not, however, our mechanism. As Lord Goff has stated, the pragmatism of the common law is 'inbred into our very being'.[5]

I suspect that rules enunciated in codes or statutes, in language of a high level of generality, develop in a manner closely resembling the working hypothesis model. As Lord Bingham has put it:

> [T]he accurate and faithful interpretation of a statute … is not a simple mechanical task below the notice of a judge. It calls for qualities of judgment and insight scarcely less demanding than the application or development of common law principle.[6]

His Lordship went on to note:

> Perhaps, in part at least, because of its mongrel origins, the common law has proved an avid importer and a vigorous exporter.[7]

Such jurisprudential exchange proceeds apace, as this Issue testifies. Globalisation, particularly from the perspective of the Antipodes, is not a new phenomenon.

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4 Dame Sian Elias, 'The Usages of Society and the Fashions of the Times', (Paper presented at the 13th Commonwealth Law Conference, Melbourne, April 2003) [14].

5 Lord Goff of Chieveley, 'The Future of the Common Law' (1997) 46 *International and Comparative Law Quarterly* 745, 760.

6 Lord Bingham, 'The Future of the Common Law' in Tom Bingham, *The Business of Judging* (2000), 382.

7 Ibid 383.