

EDITORIAL

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The development of the common law over time has been underpinned by a necessary tension between an advertence to history and precedent on the one hand and a search for broad principles and theories on the other. The law develops dynamically without reference to any single principle or theory above all others, and there is a complex interaction between each distinct area of the law.

A significant development in recent years has been the importance placed by the High Court of Australia on ‘coherence’ in the law as the touchstone for the development of legal principles.¹ The precise scope of this concept is yet to be determined (and it may be unhelpful to constrain it with excessive precision), but it marks an important development in the law. It illustrates the importance which the High Court has placed on appreciating the interaction of legal principles and understanding the reasons why the law ought to develop.

In the well-known words of Oliver Wendell Holmes Jr, ‘[t]he life of the law has not been logic: it has been experience.’ Understood in its immediate context, his reference to ‘logic’ was a reference to the idea that ‘[t]he law embodies the story of a nation’s development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics.’ Rather, Holmes stated that

[i]n order to know what it is, we must know what it has been, and what it tends to become. We must alternatively consult history and existing theories of legislation. But the most difficult labor will be to understand the combination of the two into new products at every stage.²

Ultimately, it should always be remembered that ‘[r]eason is the life of the law; nay, the common law itself is nothing else but reason.’³ An appreciation of the practical significance of the principles guiding the development of the law is therefore an exercise in understanding, explaining and justifying change.

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1 See *Sullivan v Moody* (2001) 207 CLR 562; *Harrington v Stephens* (2006) 226 CLR 52; *CAL No 14 Pty Ltd v Motor Accidents Insurance Board* (2009) 239 CLR 390; *Miller v Miller* (2011) 242 CLR 446; *Momcilovic v The Queen* (2011) 245 CLR 1.

2 O W Holmes Jr, *The Common Law* (Macmillan, 1882) 1.

3 Edward Coke, *The First Part of the Institutes of the Laws of England* (J & W T Clark, first published 1628, 1832 ed) 97b. See also *Coggs v Barnard* (1703) 2 Ld Raym 909, 911; 92 ER 107, 109 (Powell J): ‘[l]et us consider the reasons of the case. For nothing is law that is not reason.’

The life of the law, then, as well as its development, has not been formulaic or easily predictable, and it must be understood in the context of all those factors which influence it. It is difficult to speak of the law's development at a broad level of abstraction; what is needed is an appreciation of all the principles and concepts guiding that development in any particular case, and this allows the academic, the practitioner, the judge or even the student to explain the reason behind the law.

For example, that might involve understanding the complex interaction between law and statute, as Justice Mark Leeming's article illustrates, or it might involve appreciating the way in which legal history has been used to justify and explain the development of a principle, as Warren Swain's article explores. The significance of maintaining coherence within a category of the law by employing a proper taxonomy to ensure its correct development in the future is seen in Qiao Liu's article. Finally, it is important to appreciate that the practical importance of these concepts is not limited to legal argument in court; rather, a proper understanding of the law's past and future development is essential to understanding any aspect of the law, including teaching the law, as Paul Babie highlights in his article.

The aim of this thematic issue has been to illustrate the practical importance of the legal theories, principles and concepts which guide the development of the law. Each article has dealt with distinct aspects of the law, and each article has brought a different perspective to the issues in those areas. It is hoped that each of these articles will provoke further thought and discussion among academics, practitioners, judges and students over the years to come into the complex and interesting aspects of the law's development as the High Court's call for an appreciation of coherence within the law is heeded.

My own personal interest in this topic has developed since I have had the opportunity to learn from Professor Keith Mason and Professor Simone Degeling over the course of this year and last year. I am very grateful to both of them for their help and advice regarding my choice of theme for this issue, and I am especially grateful to Keith Mason for his foreword and for his address at the launch of this issue on 28 November 2013 at King & Wood Malletsons in Sydney.

I would also like to take this opportunity to thank our Faculty Advisors Michael Handler and Lyria Bennett Moses, the Dean of the UNSW Faculty of Law David Dixon, the authors of the articles in the thematic issue and in the general issue, the numerous peer reviewers who volunteered their time for the *Journal*, and our formatter who put this issue together despite my chronic inability to keep within deadlines.

Finally, my sincere thanks go out to those students who introduced me to the *Journal*, to those members of the *Journal* who I had the chance to meet and work with last year as a general member, and to all those on the editorial board and on the Executive Committee with me who have created this issue.