

Soft on Cultures, Big on the Common Law

I am an academic who is fortunate enough to enjoy the best of two worlds; I hold an appointment in the Faculty of Law, University of Windsor, Canada, and a fractional appointment in the Faculty of Law, Auckland University, New Zealand, the latter university being my own alma mater. Each year I have the opportunity to teach in the graduate law programme at Auckland. Auckland's programme has grown in size and success. It is structured to allow both part and full time students, and both domestic and international students to engage with each other. An important component of its success is the ability to bring faculty from overseas, as well as experts from within the country, but not necessarily within the academy, to teach intensive courses. An intensive course can run for as short as one week, requiring full time attendance for five days, often separated by the weekend.

Due to the fact that the New Zealand Government has negotiated a special arrangement for both German and French graduate students to undertake post-graduate study in New Zealand at a fee structure lower than other international students, Auckland's graduate law program has attracted a good number of civilian trained law graduates to its program from these two countries. In the graduate remedies course that I teach at Auckland, I have been fortunate to have an equal mix of civilian international students and common law trained domestic students. In what follows I share some personal impressions of teaching this intensive post-graduate course.

My graduate course is one devoted to the study of remedies. This is a subject that has seen a meteoric growth in academic research and interest. While the subject has generated the development of dedicated courses in North American law schools; it is still the exception in other Commonwealth law faculties where the subject is considered primarily as an integral component of other substantive legal subjects. It is interesting to contrast the ongoing debate in Australia and the United Kingdom about the place of remedies in any taxonomy of the law of obligations. Those who advocate remedies as a principled area of separate study, and who suggest that rights and remedy are inextricably

linked, one influencing the prescriptive content of the other, are often dismissed, sometimes derisively, as dualists practicing discretionary remedialism. Whereas, in North America, the long shadow of the legal realists still influences jurisprudential developments, few doubt that an understanding of remedies is essential to have an appreciation of the way legal rights are conceptualized and fulfil any normative and, or, transformative role in society. Interestingly, I have found my New Zealand students, a good number who are practicing while completing post graduate studies, as well as my civilian international students, many who are taking time off after practicing for a while, readily accept the North American approach; and, perhaps confirming Oliver Wendell Holmes's famous aphorism that; "the life of the law is experience, not logic."

Teaching intensively requires a special approach to the selection of reading materials. Students are expected to have read the materials in advance of the week's classes, but obviously that reading takes place well before the actual classes. I think it unreasonable to expect students to have read the material immediately before the actual class given the volume involved for each day. Because this is a graduate program, I tend to try and choose secondary material that provides a context in which to frame debates on particular subject areas as well as some specific doctrinal primary material. Against this background I tend to structure the programme into two hour components of time, commencing each section with a problem exercise and generating student input as to possible approaches and solutions.

From my experience teaching this course, problem based learning is not the usual approach to instruction for the European students. However, they readily take to it and provide comparative input from their own legal system. Surprisingly, the effective outcome in divergent legal systems is not that different. The areas that generate most debate are whether there is a role for punishment in private civil law, compensation for ephemeral and largely subjective losses through awards of damages for non-pecuniary loss, the expansive role accorded common law courts in creating procedural injunctions – Mareva, Anton Piller, and anti-suit injunctions, the role played by equity as a generator of

substantive rights – trusts and confidences, and the large discretion given judges in common law systems to shape appropriate remedies.

My European students are keenly interested to learn about common law methodology. Part of their reasons for taking my course is to gain an insight into the treatment and protection of private law rights in common law systems. They are surprised at the sheer length of common law judgments and the complexity of factual and legal analysis undertaken therein.

My New Zealand students are fascinated with developments in private law in North America. New Zealand has been blessed, others may say cursed, with an extremely responsive legislature. New Zealanders, with some justification, believe that as a nation they have ‘punched above their weight’ in legislating for social and economic egalitarianism. The first nation to have universal suffrage, the early creation of pensions, a 40 hour work week, and free, compulsory and secular education being primary examples. But as New Zealand’s population grows, as its social homogeneity breaks down, and as its new prosperity is not necessarily equally shared, new tensions have emerged. Relieving these stresses through democratic reforms, i.e. the recent adoption of proportional representation to elect parliament, has been one approach. Another has been increased attention to ‘rights rhetoric’. New Zealand has adopted a Bill of Rights modelled on Canada’s Charter of Rights and Freedoms, and has finally established its own Supreme Court, ending appeals to the English Privy Council. New Zealand lawyers are drawn to understand how ‘rights rhetoric’ will influence and shape private common law.

Thirty years ago lawyers and law students in Canada, Australia and New Zealand would have primarily looked to the courts of the United Kingdom as the primary progenitors of new common law rights. The United States, that other great bastion of common law was as foreign as civilian Europe. Thirty years later, the development of private law in United Kingdom is firmly directed toward Europe, although not exclusively in one direction. Because London has always been a centre for world

shipping, insurance, and finance, the flexibility and dynamic nature of common law still exerts a great influence over these areas. But in other areas, for example, consumer regulation and employment, there is now a plethora of regulations and directives emanating either from Westminster or Strasbourg. For Canada, Australia, and New Zealand, all trading nations, as well as ones that share a similar history concerning settlement, the decline in jurisprudential significance of the United Kingdom has led to both introspection – there is a far greater confidence and maturity in the respective domestic legal systems of these three countries, as well as a renewed interest in learning about each others’ legal system and common law developments. Although I am not suggesting any deliberate or concerted action, nevertheless, the coalescence of ideas from these three nations has created an effective counterweight upon which to evaluate both American and United Kingdom legal developments.

Student evaluation in my course is undertaken by a major paper requirement. Here, there are quite distinctive approaches in writing style between my European and New Zealand trained graduate students. The former are more Cartesian and deductive in writing style, the latter more fluid, willing to engage in underlying rationale for particular positions, and prepared to offer an opinion.

My course is not comparative or trans-national. I teach private law identifying commonalities and differences in common law approaches, but primarily focussing upon New Zealand and Canada. At the first IALS General Assembly in Suzhou, China, I recall one commentator suggesting that it is difficult to teach another country’s law without being fully immersed in that country’s legal culture. While comparative methodology has value, the great fear is that it misses subtlety and nuance that only immersion can bring. I regard myself as occupying a most privileged position to be professionally engaged in two countries, and to be exposed to students drawn from many. I believe, a model built upon fostering cross-appointments between law faculties has much to commend itself as a way to enrich cross cultural understandings of legal cultures.

A personal view by Professor Jeff Berryman

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