

CRITIQUE AND COMMENT

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**CHALLENGES TO THE SURVIVAL
OF THE COMMON LAW**

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Modern conditions appear to pose challenges to the future of the common law. The range, volume and complexity of relevant and accessible material with which the common law has to deal have all grown rapidly. Statutory law has undergone corresponding growth, in a context where fundamental issues concerning the interaction between statutory and common law remain unresolved. Recalling the constitutional and democratic function of the courts may help meet these challenges. A court may only decide the case that is before it, and must do so according to law. This justifies regulating and if necessary confining the legal source materials to be accessed and relied upon in arguing and resolving a case. And recognition of the constitutional primacy of statute law is an essential starting point in ensuring cohesion of the body of statutory and common law.

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I INTRODUCTION

In preparation for this lecture I thought it only fitting to delve into the past and look at the early issues of the *Melbourne University Law Review* and its

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predecessor publication, *Res Judicatae*. The journey up one of the perilous ladders that grant access to the upper shelves of the Supreme Court Library was well worth the effort.

The first issue of *Res Judicatae* appeared in September 1935. While it was produced by the Law Students' Society, and revived an earlier journal or magazine, it was a scholarly journal that, as Dr John Waugh's history of the Melbourne Law School recounts, also embraced the school's own goals.¹ He explains that, as the only Australian university law journal at the time and one of very few Australian law journals at all, it rapidly distinguished itself as a forum for serious research. By 1939 Dean Professor Kenneth Bailey was able to report to the University Council that articles had been cited in the Commonwealth Law Reports and in the Victorian Parliament.²

The first issue gives the flavour of what was to come, with articles by a collection of men who overwhelmingly went on to be leaders of the profession or the academy, and several already were. Professor Bailey himself wrote on the Privy Council,³ Professor George Paton on invitees,⁴ future judges Arthur Dean and Alexander Adam wrote on the *Judicature Act 1873* (Imp) 36 & 37 Vict, c 66⁵ and forgeries under the *Transfer of Land Act 1928* (Vic)⁶ respectively. A young Edward Sykes wrote on the rule of law in the modern world.⁷ Other names familiar from various branches of Victoria's later legal development included Norris,⁸ Menhennitt,⁹ Lush,¹⁰ Bradshaw¹¹ and Harper.¹² Later

¹ John Waugh, *First Principles: The Melbourne Law School 1857–2007* (Miegunyah Press, 2007) 132–3.

² K H Bailey, 'Report of the Dean of the Faculty of Law' (CP 1939/175, File No RC 1939/188: Registrar's Correspondence, The University of Melbourne Archives) 2, cited in John Waugh, *Diploma Privilege: Legal Education at the University of Melbourne 1857–1946* (PhD Thesis, The University of Melbourne, 2009) 216 n 33.

³ K H Bailey, 'Appeals to the Privy Council in Constitutional Cases: A Proposal Examined' (1935) 1 *Res Judicatae* 1.

⁴ G W Paton, 'Invitees and Related Problems' (1935) 1 *Res Judicatae* 6.

⁵ Arthur Dean, 'What Did the *Judicature Act* Really Do?' (1935) 1 *Res Judicatae* 13.

⁶ A G Adam, 'The *Transfer of Land Act* and Forgery' (1935) 1 *Res Judicatae* 16.

⁷ Edward I Sykes, 'The "Rule of Law" in the Modern World: W Ivor Jennings, *The Law and the Constitution*' (1935) 1 *Res Judicatae* 57.

⁸ J G Norris, 'The Wife's Position as a Secured Creditor in Her Husband's Bankruptcy' (1935) 1 *Res Judicatae* 20.

⁹ C I Menhennitt, 'Administrative Tribunals in Victoria' (1935) 1 *Res Judicatae* 28.

¹⁰ G H Lush, 'Imprisonment in Civil Cases' (1935) 1 *Res Judicatae* 38.

¹¹ F Maxwell Bradshaw, 'The Liability of Statutory Corporations for Ultra Vires Torts' (1935) 1 *Res Judicatae* 44.

¹² J B H, 'The Imprisonment of John Bunyan' (1935) 1 *Res Judicatae* 47.

in the first volume we find contributions by Chief Justice Latham (on the law student),¹³ Justice Evatt (who gave two addresses to the society in succeeding weeks in 1937 on amending the *Constitution*),¹⁴ and Justice Dixon (on de facto officers).¹⁵

If the subject matter and the authors were scholarly, the Law Students' Society itself was a serious body as well. Its eponymous name reflected the fact that there was only one Victorian law school. Comprised not only of law students but recent graduates, the first issue of *Res Judicatae* records, surprisingly to modern readers, that the society sought as far as possible at its meetings to observe the procedure of the courts.¹⁶ By way of explanation, we are told that the society existed 'to enable members to cultivate the art of forensic speaking, and also to provide for social intercourse'.¹⁷ At least by the 1980s and doubtless long before, those priorities had been somewhat reordered.

Another glimpse into the world of the first issue of *Res Judicatae* tells us what were the recent legal developments of note. The first case notes were about *Woolmington v Director of Public Prosecutions*¹⁸ and the 'golden thread' of the criminal standard of proof¹⁹ and *New South Wales v Bardolph*,²⁰ confirming the executive power of the States to contract without a prior parliamentary appropriation.²¹ The first editors clearly recognised a case of lasting importance when they saw one. As well, there was a review of a major new publication, called *The Australian Digest*.²²

What is especially striking about the first issue of *Res Judicatae* is the length of the articles. Most were around three to five pages in length. There was but a sprinkling of footnotes.

The seriousness of purpose and the quality of the publication continued, despite a wartime hiatus, and in 1957 Dean Zelman Cowen, following the

¹³ Chief Justice John Latham, 'The Law Student' (1937) 1 *Res Judicatae* 253.

¹⁴ Justice H V Evatt, 'Amending the *Constitution*' (1937) 1 *Res Judicatae* 264.

¹⁵ Justice Owen Dixon, 'De Facto Officers' (1938) 1 *Res Judicatae* 285.

¹⁶ F M Bradshaw, 'The Law Students' Society of Victoria' (1935) 1 *Res Judicatae* 80, 80.

¹⁷ *Ibid.*

¹⁸ [1935] AC 462.

¹⁹ Notes and Comments, 'The Burden of Proof in Criminal Cases: *R v Woolmington*' (1935) 1 *Res Judicatae* 59.

²⁰ (1934) 52 CLR 455.

²¹ K H B, 'Contracts with the Crown: *New South Wales v Bardolph* [1935] ALR 22' (1935) 1 *Res Judicatae* 63.

²² C I M, '*The Australian Digest*' (1935) 1 *Res Judicatae* 72.

model of the *Harvard Law Review*, was instrumental in the publication of the first volume of the *Melbourne University Law Review* ('*Review*').²³ Still a student-run scholarly journal, the new entity entered the world without fanfare or even a preface, noting simply 'formerly *Res Judicatae*'. The first article was by Justice Fullagar, entitled 'Legal Terminology'.²⁴ There followed a lengthy exposition by Dean Cowen on the Victorian Constitution²⁵ from 1856 to 1956²⁶ and an article by Dr Coppel on appeals to the Privy Council.²⁷ Early editors and members of the *Review* are listed, as is still the case. Many names, then as later, appear regularly in the Victorian Reports, as judges (J D Phillips, Tadgell, Ormiston, Winneke, Charles, Batt) and eminent counsel (Merralls, McPhee, Pannam), to take only a few examples.

II GROWTH AND COMPLEXITY OF THE COMMON LAW

It is striking, when looking at old *Reviews*, that there was then only one law school in Victoria, comparatively small in size and very male in composition, and that there was a concentration of scholarship in one university law review. Today the number of institutions and publications has of course burgeoned. At the same time, works of erudition and detailed analysis are still being produced, but their length and the specificity of their subject matter has increased. So has the extent of their footnoted references to authorities and other scholarship.

This growth in the scale and complexity of academic writing has been matched by a similar expansion in relation to case law. To take a rough measure, the 1957 volume of the Victorian Reports had 739 pages; the last annual volume, produced in 1999, had 2602. To some extent, each has fed on the other. The *Review* itself has roughly doubled in volume since 1957. It is in this rapid growth of source material that I identify the first of the challenges for the future of the common law that are the subject of this lecture.

For present purposes I am using the expression 'common law' to refer to judge-made law emerging from the deciding of cases, which constitutes, along

²³ Melbourne University Law Review, *History* (16 February 2013) <<http://law.unimelb.edu.au/mulr/about/history>>.

²⁴ Justice Wilfred Fullagar, 'Legal Terminology' (1957) 1 *Melbourne University Law Review* 1.

²⁵ *Victoria Constitution Act 1855* (Imp) 18 & 19 Vict, c 55, sch 1.

²⁶ Zelman Cowen, 'A Historical Survey of the Victorian Constitution, 1856 to 1956' (1957) 1 *Melbourne University Law Review* 9.

²⁷ E G Coppel, 'Appeals to the Judicial Committee — A Reply' (1957) 1 *Melbourne University Law Review* 76.

with statute, a source of law rather than, as in civil systems, merely a collection of instances of the application of law. That definition extends to all judicially pronounced law including in cases in equity and those in relation to the interpretation and application of statutes.

The fact that common law, as so defined, involves the creation of law is not, however, the whole story. John Selden in 1610 described the common law as the ‘English Janus’²⁸ — referring to the Roman god associated with gates and doorways who had two faces with which to look backward and forwards at the same time, and who therefore gave his name to the first month of each year. Creation of law is the forward-looking element of the English Janus, while the backward-facing part is the very method of the common law, and it is just as important as the nature of its output. Lord Goff’s classic exposition of the common law method bears repeating:

the historical fact that common lawyers have been reared on a diet of case law has had a profound effect on our judicial method. Common lawyers tend to proceed by analogy, moving gradually from case to case. We tend to avoid large, abstract, generalisations, preferring limited, temporary, formulations, the principles gradually emerging from concrete cases as they are decided. In other words, we tend to reason *upwards* from the facts of the cases before us, whereas our continental colleagues tend to reason *downwards* from abstract principles embodied in a code. The result is that we tend to think of each case as having a relatively limited effect, a base for future operations as the law develops forwards from case to case ... This method of working can be epitomised in the statement that common lawyers worship at the shrine of the working hypothesis.²⁹

The fact that the common law works in this way, drawing on all that has gone before, means that the multiplying of available sources has real practical implications. In all its aspects the common law has, especially since the latter part of the 20th century, been subject to increasing scale and complexity. It is worth pausing to reflect on how and why this has happened.

First, the materials with which the common law has had to work have themselves expanded in volume, both in number and individually. This is not merely because the population is so much greater, with all the attendant

²⁸ John Selden, ‘*Jani Anglorum Facies Altera*’ (Impens TD, first published 1610, 1681 ed). See also Gerald J Postema, ‘Classical Common Law Jurisprudence’ (Pt I) (2002) 2 *Oxford University Commonwealth Law Journal* 155, 155.

²⁹ Lord Goff, ‘The Future of the Common Law’ (1997) 46 *International and Comparative Law Quarterly* 745, 753 (emphasis in original).

commerce, personal interaction, government and eventually litigation which that entails. Those natural developments have meant more cases, and therefore more decisions and more precedents, with which to deal. But the law itself has played a major part in the growing weight of the burden.

So, there are more potential sources of binding authority, partly as a result of the identification of a single common law for all of Australia. One effect of a single common law is that it multiplies the number of courts that are administering that common law. In *Lange v Australian Broadcasting Corporation* the High Court said that the common law throughout Australia is not to be fragmented into different systems with different content and different authoritative interpretations.³⁰ While in theory conducive to consistency (eventually), this has meant that the decisions of intermediate courts of appeal in other jurisdictions are for practical purposes binding on first instance courts, and must only be departed from, even by other intermediate appellate courts, where they are plainly wrong.³¹ When one factors in the growing prevalence of uniform national laws, the decisions of courts outside the immediate jurisdiction are of heightened relevance.

There are also more potential sources of persuasive authority. No longer are the English Court of Appeal and the House of Lords the only overseas courts whose decisions fit within that category. Human rights law is one example where local laws have similarities to those of multiple foreign jurisdictions, and the decisions of the courts of those jurisdictions have potential relevance accordingly.

Secondly, the decisions of local, Australian and overseas courts are accessible as never before. The internet means that courts and practitioners work with decisions available within minutes or hours of being handed down. Dusty binders full of unreported decisions, the relevant ones found by chance as often as by design, have given way to an electronic world where all such decisions are ordered and accessed by sophisticated search engines. This opens up a vast array of legal materials that might be drawn upon in a given case. In the course of that ease of access, the distinction between reported and unreported decisions, let alone that between authorised and unauthorised reports, risks breaking down altogether.

³⁰ (1997) 189 CLR 520, 563 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ).

³¹ See *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89, 151–2 [135] (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ).

At the same time, computer technology also enables the production of much more elaborate written documents, whether by way of written submissions or judgments. One writer has referred to this as breeding a

cut-and-paste mentality, where it becomes all too easy to replicate quickly whole tracts of unedited text, whether hoovered up from the law reports or legal databases, from textbooks and articles, or even from the verbatim evidence itself.³²

This points to a risk facing all practitioners in litigation.

Thirdly, courts now have regular recourse to extrinsic materials when construing statutes, but there is also a virtually boundless world of secondary materials available to help decide common law questions. Much of this material can potentially be highly valuable to the courts. I refer here of course to the academic literature, now to be found in journals and reviews too numerous to mention. Doubtless it will not be long before blogs and websites of assorted kinds will also start to regularly perform this function. The Melbourne Law School's new High Court blog³³ already has a substantial, and well-deserved, following.

Finally, the combination of all these forces has led to both legal submissions in court and judgments themselves being longer and more complex. As submissions become more elaborate, so too do judgments.

The sheer weight of all this material stands in marked contrast to the situation in former times. The judge is today expected to master, and show a mastery of, a vast array of legal sources. It is hard to recognise the traditional common law judge who was to a large extent applying a working knowledge of the law to reason to a decision that was, in the state of that knowledge, intuitively the right one. Again quoting Lord Goff:

when a judge approaches a particular case before him, he tends to have an instinctive feel for the result in that case. This is not mere hunch; it is the fruit of an amalgam — an amalgam of his knowledge of legal principle, his experience as a lawyer, his understanding of the subtle restraints with which all judges should work, his developed sense of justice and his innate sense of humanity, and his common sense. It is a simple fact of life that a combination of these fac-

³² Roderick Munday, 'Judicial Footnotes: A Footnote (with Footnotes)' (2006) 170 *Justice of the Peace* 864, 866.

³³ Melbourne Law School, *Opinions on High* <<http://blogs.unimelb.edu.au/opinionsonhigh/>>.

tors provides experienced judges with a strong instinct for the appropriate legal result in any particular case.³⁴

Lord Goff would go further, saying that this intuitive feeling, as much as any reasoning from precedents, persuaded appellate judges whether they should simply apply a precedent, qualify it, remould it or depart from it. He therefore called the judicial process an 'educated reflex to facts'.³⁵ There is a strong element of idealism in this account of the common law judicial process but, on any view, it highlights the need for judges, and therefore all lawyers, to absorb and assimilate the raw materials of the common law in order to decide how it will apply to any given case.

It is true that we no longer take particular comfort in the idea that judges discover and then declare, rather than make, the law. But there remains more than a grain of truth in the old fiction. For, whether declaring the law or creating new law, the judge is, in the traditional common law method, still basing that law on what is to be drawn from the existing law. The harder that existing law is to isolate and comprehend, the greater the difficulty in performing the essential task of the common law judge.

III STATUTES AND THE COMMON LAW

Let me move then to the second challenge. It is now a commonplace to speak of the age of statutes.³⁶ The phrase is apt to mislead, because it may be thought to suggest that there is merely an era in which statutes predominate as sources of the law. It is hard to see that changing. The growth of statutes is in part itself a response to the developing complexity of the common law, but the statutes themselves have of course multiplied in size and complexity as well. In 1999, Justice Hayne observed that there were 488 pages of Commonwealth statutes enacted in 1901 and 7521 pages in 1997.³⁷ Publishing changes have made it harder to count pages now, but that trend has plainly not stopped.

This does not mean that the common law is squeezed out (or, to adopt the metaphor used by Lord Scarman in 1980, that the common law is being

³⁴ Lord Goff, above n 29, 754.

³⁵ Ibid.

³⁶ See, eg, Guido Calabresi, *A Common Law for the Age of Statutes* (Harvard University Press, 1982); Paul Finn, 'Statutes and the Common Law' (1992) *University of Western Australia Law Review* 7, 10.

³⁷ Justice K M Hayne, 'Australian Law in the Twentieth Century' (Speech delivered at the Judicial Conference of Australia Colloquium, Melbourne, 13 November 1999) <http://www.hcourt.gov.au/assets/publications/speeches/current-justices/haynej/haynej_judicial.htm>.

subjected to some kind of ‘predator’³⁸). Statute law still needs judges to decide cases that involve their application, and increasingly statutes are a major source of judge-made law. But it does mean that the scope for the development of legal principle by judges is reduced as that function is increasingly undertaken by legislatures. Statutes have long applied to aspects of criminal law, tort and contract, as well as property law. But they now govern areas such as consumer law,³⁹ chattel securities,⁴⁰ workplace safety⁴¹ and sentencing⁴² (for example) in a level of detail that would not have been imagined when the *Review* was first published.

There are good reasons why legislatures are often best placed to reform the law, and they have been articulated often enough by the courts themselves, feeling reluctant or ill-equipped to make the policy decisions that might be called for in a particular uncertain area of the law. As Mason J once put it, ‘[t]he court is neither a legislature nor a law reform agency’.⁴³ The legal rules we call common law emerge, after all, as a by-product of decisions in individual cases rather than after any wider inquiry or consultation process examining the merits of competing proposals from the point of view of the community as a whole. Even though some judicial developments of the law amount to a major departure from established principles, or a realignment of principles within a given branch of the law,⁴⁴ the common law insists that this be done in a principled, rationally justifiable and transparent way.⁴⁵

The relationship between the common law and the law of statutes presents the second of the challenges I want to discuss. Much has been written about the need for the common law and statute to work together as part of a ‘coherent’ system of law, instead of what Professor Beatson termed the ‘oil and water’ approach, which kept the common law apart from its neighbouring,

³⁸ Lord Scarman, ‘The Common Law Judge and the Twentieth Century — Happy Marriage or Irretrievable Breakdown?’ (1980) 7 *Monash University Law Review* 1, 3.

³⁹ *Competition and Consumer Act 2010* (Cth) sch 2 (‘*Australian Consumer Law*’).

⁴⁰ *Personal Property Securities Act 2009* (Cth).

⁴¹ See, eg, *Workplace Injury, Rehabilitation and Compensation Act 2013* (Vic).

⁴² See, eg, *Crimes Act 1914* (Cth) pt IB; *Sentencing Act 1991* (Vic).

⁴³ *State Government Insurance Commission (SA) v Trigwell* (1979) 142 CLR 617, 633; see generally at 633–4. See also *Commonwealth Bank of Australia v Barker* (2014) 312 ALR 356, 370 [40] (French CJ, Bell and Keane JJ).

⁴⁴ See *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 AC 349, 378 (Lord Goff), quoted in Lord Robert Walker, ‘Developing the Common Law: How Far Is Too Far?’ (2013) 37 *Melbourne University Law Review* 232, 233.

⁴⁵ See *Fairchild v Glenhaven Funeral Services Ltd* [2003] 1 AC 32, 68 [36] (Lord Nicholls), quoted in Lord Walker, above n 44, 246.

but inferior and faintly distasteful, relation, the statute.⁴⁶ The High Court has described coherence in the law as a central policy consideration, for example in deciding the consequences for the law of negligence of the fact that a plaintiff and defendant had together stolen the motor car in which the plaintiff was injured by the careless driving of the defendant.⁴⁷

Coherence describes the policy consideration, but it remains the case that no satisfying overarching principle has been identified to explain the relationship between statute and common law, and I am not going to make that attempt. It is more helpful to refer instead to some issues that arise in the relationship. There are three I wish to mention.

One aspect of the problem can be put this way: when and how does the common law draw upon a statute that does *not* apply to the case at hand to inform a question of principle or policy? This takes the case a step beyond an example such as the significance of the local law of theft of the car in *Miller v Miller*.⁴⁸ Instead, by definition, the legislature has said nothing and left the matter to the courts — yet the policy of the legislature, as shown either by its choice to be silent or by what it has said in another context, might legitimately still influence the direction of the common law, at least in some cases. If it could not, ‘coherence’ may have little meaning.

This question is made harder because we now have a single common law administered in six State and two Territory jurisdictions,⁴⁹ to say nothing of the myriad possibilities that federal jurisdiction presents. It is difficult enough if a local statute does not apply to the case at hand (perhaps because of a gap in its operation) and significance is sought to be attached, one way or the other, to that circumstance in developing the common law. How much more difficult if there are statutes in other jurisdictions that would, had the events in question happened there, have covered the case? The single common law appears to suggest or demand a single common law answer, which will be the same irrespective of the court within the system that provides it. Yet the statutory law is not uniform. It may be doubted whether there can be a general principle fashioned to identify when and how a State statute that does

⁴⁶ Jack Beatson, ‘Has the Common Law a Future?’ (1997) 56 *Cambridge Law Journal* 291, 308.

⁴⁷ *Miller v Miller* (2011) 242 CLR 446, 454–5 [15]–[16], 473 [74] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ). See also *Brodie v Singleton Shire Council* (2001) 206 CLR 512, 532 [31] (Gleeson CJ); *Commonwealth Bank of Australia v Barker* (2014) 312 ALR 356, 387 [118] (Gageler J); Justice Mark Leeming, ‘Theories and Principles Underlying the Development of the Common Law — The Statutory Elephant in the Room’ (2013) 36 *University of New South Wales Law Journal* 1002, 1019–20.

⁴⁸ (2011) 242 CLR 446.

⁴⁹ See above n 30 and accompanying text.

not apply to the case at hand may usefully be used to guide a court of another State to develop the single Australian common law.

Secondly, no general rule can be stated, either, about when the use of a legal expression in a statute carries with it common law principles and notions associated with that term. All that can be said is that the question is always a matter of statutory construction. So, in *Wik Peoples v Queensland*, the statutory term 'lease' in the *Land Act 1910* (Qld) and the *Land Act 1962* (Qld) was held not to bear its common law meaning.⁵⁰ In *Palgo Holdings Pty Ltd v Gowans*, the *Pawnbrokers and Second-Hand Dealers Act 1996* (NSW) contained no definition of the central words 'pawn' and 'pawned goods'.⁵¹ The High Court held that the legislature had used one of the 'known building blocks of the law of property' and declined to give the words a wider meaning than they had at common law.⁵² Both were cases of statutory construction, starting as always with the words of the statute, but they demonstrate, not surprisingly, that there is no one-size-fits-all approach.

A third aspect of the relationship concerns the readiness, or otherwise, with which the courts accept that Parliament has altered the common law. This is another question of statutory construction and it is, again, at the heart of the relationship.

While the so-called 'principle of legality' is now well-established as an important aid to deciding between constructional choices in the course of statutory interpretation,⁵³ its articulation does not descend to identifying what are the common law rights or the elements of the 'general system' of the law which are assumed to be preserved in the absence of statutory language of irresistible clearness.⁵⁴ The difficulty of predicting its operation is exemplified by the contrasting decisions recently reached in bare majority decisions of the High Court in *X7 v Australian Crime Commission*⁵⁵ and *Lee v New South Wales Crime Commission*.⁵⁶ These cases show that, even where the relevant right or aspect of the legal system to be protected has been agreed upon,

⁵⁰ (1996) 187 CLR 1, 119–22 (Toohey J), 149–55 (Gaudron J), 195–204 (Gummow J), 242–51 (Kirby J).

⁵¹ (2005) 221 CLR 249.

⁵² *Ibid* 261 [25] (McHugh, Gummow, Hayne and Heydon JJ).

⁵³ See, eg, *A-G (NT) v Emmerson* (2014) 307 ALR 174, 196 [86] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).

⁵⁴ See *Potter v Minahan* (1908) 7 CLR 277, 304 (O'Connor J).

⁵⁵ (2013) 248 CLR 92.

⁵⁶ (2013) 251 CLR 196.

minds readily differ as to whether the legislature has manifested the clarity required to displace it.

In all these ways, the relationship between common law and statute is still being worked out, and on a case by case basis.⁵⁷ In the meantime, the corpus of legislation continues to grow and the areas into which the legislature reaches is ever increasing. A recent example is the *Jury Directions Act 2013* (Vic), which makes a start in providing for the directions that trial judges are required to give to juries in certain circumstances in criminal trials — a logical extension in many ways of the uniform *Evidence Acts* which themselves codified much of the common law of evidence. In each case Parliament has sought to reduce to statutory form vast bodies of law previously created by and found principally or solely in the decisions of the common law.

IV CONSTITUTIONAL CONSIDERATIONS

The twin challenges I have identified — the sheer volume of relevant material with which the common law has to deal and the ever uncertain interaction between common law principles and the burgeoning statute book — both have wider, constitutional, implications. In relation to statutes, French CJ said in *International Finance Trust Co Ltd v New South Wales Crime Commission* that

those who are required to apply or administer the law, those who are to be bound by it and those who advise upon it are generally entitled to rely upon the ordinary sense of the words that Parliament has chosen. To the extent that a statutory provision has to be read subject to a counterintuitive judicial gloss, the accessibility of the law to the public and the accountability of Parliament to the electorate are diminished.⁵⁸

⁵⁷ This has been described as a symbiotic relationship, with both common law and statute as applied by the courts being the subject of the same inherently dynamic legal process: Justice Leeming, above n 47, 1021–6, quoting Stephen Gageler, ‘Common Law Statutes and Judicial Legislation: Statutory Interpretation as a Common Law Process’ (2011) 37(1) *Monash University Law Review* 1, 1–2.

⁵⁸ (2009) 240 CLR 319, 349 [42] (citations omitted). See also *NAAV v Minister for Immigration and Multicultural and Indigenous Affairs* (2002) 123 FCR 298, 410 [430] (French J); *Kabushiki Kaisha Sony Computer Entertainment v Stevens* (2003) 132 FCR 31, 41 [23] (French J) ([t]hose who are subject to the law and those who apply it are entitled to expect that it means what it says’); David Hume, ‘The Rule of Law in Reading Down: Good Law for the “Bad Man”’ (2014) 37 *Melbourne University Law Review* 620, 639–40; *Corporate Affairs Commission (NSW) v Yuill* (1991) 172 CLR 319, 340 (Gaudron J); *R v Momcilovic* (2010) 25 VR 436, 463–4 [98] (Maxwell P, Ashley and Neave JJA).

This is a fundamental constitutional and democratic concern — the accountability of the Parliament to the electors whom it represents is enhanced if its statutes are clearly expressed and well able to be interpreted and understood. It is diminished as the interpretation of statutes becomes progressively more arcane and the materials necessary for the task become increasingly voluminous and distant from the case at hand.

The High Court has described the function of the courts in relation to statutes in these terms:

judicial findings as to legislative intention are an expression of the constitutional relationship between the arms of government with respect to the making, interpretation and application of laws. ... [T]he preferred construction by the court of the statute in question is reached by the application of rules of interpretation accepted by all arms of government in the system of representative democracy.⁵⁹

This suggests that when considering the future of the common law we should start by reminding ourselves what is the constitutional and democratic function of the courts. While it is, as I suggested earlier, now generally accepted that judges in a common law system ‘make’ law, or to put it more neutrally, their decisions have the force of law in future cases, that is a by-product — albeit a critically important one — of the constitutional function of exercising judicial power; in other words, deciding individual cases according to law.⁶⁰

There are two essential elements of that function, both important for present purposes. First, the case at hand is decided. The immediate effect of the case is confined to the order of the court and, generally, the parties whose rights and obligations are identified as a result of the quelling of the controversy between them.

Secondly, the case is decided ‘according to law’, as the judicial oath solemnly provides. This reflects the essential constitutional and democratic responsibility of the courts to uphold the rule of law. Of course, the search for coherence in the law may require changes in the law from time to time, just as it

⁵⁹ *Zheng v Cai* (2009) 239 CLR 446, 455–6 [28] (French CJ, Gummow, Crennan, Kiefel and Bell JJ). This statement has been cited often since: see, eg, *Dickson v The Queen* (2010) 241 CLR 491, 507 [32] (French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ); *Lacey v A-G (Qld)* (2011) 242 CLR 573, 592 [43] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ); *Momicilovic v The Queen* (2011) 245 CLR 1, 44 [38] (French CJ), 84 [146(iii)] (Gummow J).

⁶⁰ See, eg, *Fencott v Muller* (1983) 152 CLR 570, 608 (Mason, Murphy, Brennan and Deane JJ).

will guide the application of existing principles to like cases or the taking of usually incremental steps to decide cases without clear precedent. But all this is the traditional work and special skill of the common law courts as part of deciding cases according to law.

When we reflect on the case-deciding function of the courts and their sworn fidelity to the rule of law, the challenges I have referred to are seen in a different perspective. The fact that the court is principally deciding a case and only incidentally stating the law for the future is significant because it both defines and confines the court's task to the case at hand and thereby makes it susceptible to being managed using the resources traditionally available to judges. To be sure, the search for principle is still essential (at the shrine of the 'working hypothesis'⁶¹), because of the need for coherence and the making of a decision according to law. But the scope of the task, despite its lawmaking aspect, is not that of a legislator. A legislature's characteristic role is different. It is deciding the law for the polity, rather than deciding an outcome for parties to a specific controversy. And it is accountable to the electors of the polity for the manner in which it performs its task.

This means, for example, that courts can take steps themselves to enable only the more pertinent legal source materials to be accessed and relied upon, in relation to legal materials just as it has long happened in relation to facts. This used to be achieved virtually automatically, largely as a result of the limited number of cases that were reported and the relative difficulty of accessing case law and bringing it before the judge. Now a similar end is able to be achieved, albeit with greater difficulty, through active case management, such as page limits on written submissions and, as happens in some instances, practice directions limiting reliance on unreported cases.⁶² In relation to decisions and legal materials of other jurisdictions, the temptation to excess is especially great. The High Court has emphasised the need for such materials

⁶¹ See above n 29 and accompanying text.

⁶² See, eg, Supreme Court of Queensland, *Practice Direction No 16 of 2013 — Citation of Authority* [2013] 2 Qd R 542, 542 [5]. See also Supreme Court of Victoria, *Practice Note No 4 of 1986 — Citation of Unreported Judgments* [1986] VR 742 (which required that leave be obtained before relying upon unreported decisions — now revoked); Supreme Court of Victoria, *Practice Note No 1 of 2006 — Citation of Unreported Judgments* (2006) 14 VR 529, 529 [3] (which revoked the previously mentioned practice note and relaxed the rule requiring leave — also now revoked); Supreme Court of Victoria, *Practice Note No 8 of 2011 — Decisions Marked 'No Point of Principle' Not to Be Cited without Leave* (2011) 32 VR 716 (concerning criminal appeals).

only to be used ‘with discrimination and care’.⁶³ Restraint by both practitioners and judges in citations of unnecessary authority, such as that commonly introduced by phrases such as ‘see also’ or ‘see generally’, contributes further to case manageability.

Heydon J made a similar point, rather more colourfully, in a case decided in 2012. His Honour said:

On the appeal, [the appellant’s] arguments were detailed. The arguments were supported by a plausible apparatus of scholarship involving numerous footnotes, some lengthy. In this, the appellant aped a modern judicial fashion which has not grown up without criticism.⁶⁴

The last sentence was footnoted, perhaps with deliberate irony, by reference to two articles devoted to lamenting the phenomenon of footnotes in English judgments. It appears that there is a scholarship devoted to this topic and many eminent judges and academics have written about it. For my present purposes, the following extract from one of the articles cited by Heydon J sounds a relevant warning to Australian lawyers generally:

These footnotes, let it be stressed, are not inserted for pure editorial convenience, but already betray early signs of mimicking the footnotes of the academic text. ... [T]his is no longer a judgment primarily addressed to the parties who have an interest in the suit — and, incidentally, to future Judges who one day may be confronted with similar disputes. ... These footnotes indulge a discourse that is directed at a quite different constituency — a constituency that busies itself in historical sources, in the minutiae of a self-regarding scholarship, in display, in the sprawl of background literature, in recondite allusion and in all the other distracting self-indulgences that can gratify a restless intellectual curiosity.⁶⁵

It may be doubted whether this colourful account is true of much, let alone most, academic writing, but the suggestion that judges and practising lawyers risk an overly academic approach is pertinent.

Focussing on the judicial resolution of the case at hand in a way that treats the law-making function of the common law judge as secondary need not be

⁶³ *Momcilovic v The Queen* (2011) 245 CLR 1, 38 [19] (French CJ); see also at 83–4 [146(i)–(iii)], 87–90 [148]–[161] (Gummow J), 123 [280] (Hayne J), 183 [453] (Heydon J).

⁶⁴ *Public Service Association and Professional Officers’ Association Amalgamated (NSW) v Director of Public Employment* (2012) 250 CLR 343, 370 [63].

⁶⁵ Roderick Munday, ‘Fish with Feathers: English Judgments with Footnotes’ (2006) 170 *Justice of the Peace* 444, 448.

as confronting as it may appear, and certainly not counter-intuitive. Magistrates' courts routinely decide cases without recourse to elaborate written reasons, but still in accordance with law. This need not be confined to the lower courts. The High Court gives very limited reasons for refusing special leave in most cases, and rarely gives any reason for granting special leave. Similar restraint applies in the case of many leave applications in the Victorian Court of Appeal.⁶⁶

Concentrating on the case-deciding role of the courts should not, however, and cannot, deny the importance of the court's function, incidental though it may be, of stating and clarifying the law. That function generally increases in significance, obviously enough, as one ascends the judicial pyramid. It is more important in some cases than in others. When a case reaches the High Court, especially having survived the filter of the special leave process, the responsibility of that Court to settle the law for the future might at times appear to be paramount even to the resolution of the particular litigation. But in truth that is never so, because even the High Court will only decide the case that is before it, and lacks power to give advisory opinions where there is no actual controversy between the parties.⁶⁷

The scope for flexibility in how a court regards its function can be illustrated by a mundane example. Until comparatively recently, decisions of the Supreme Court of Victoria to convene meetings of shareholders or creditors to vote on a scheme of arrangement were (at least in my experience) generally made without publication of written reasons. The practice of the New South Wales Supreme Court and later of the Federal Court was to publish full reasons. Except in relatively rare cases, orders to convene scheme meetings are made *ex parte* and objection is taken, if at all, at the stage where the court reconvenes after the relevant meeting and is asked by the plaintiff to approve the scheme in favour of which shareholders or creditors have voted in the meantime. The question arises whether publication of reasons in a case of this kind serves a valuable function or whether, as the former practice of the Victorian Supreme Court implied, there was usually no real purpose in doing

⁶⁶ See *X v DPP (Vic)* [1995] 2 VR 622, 623 (Brooking JA), 626–7 (Callaway JA); *Simjanoski v La Trobe University* [2004] VSCA 125 (23 July 2004) [4] (Callaway JA) (concerning leave to appeal to the Court of Appeal under s 17A(4)(b) of the *Supreme Court Act 1986* (Vic) in relation to interlocutory decisions). But reasons are required if refusal of leave is the first exercise of judicial power in relation to an administrative decision: *Roy Morgan Research Centre Pty Ltd v Commissioner of State Revenue (Vic)* (2001) 207 CLR 72, 83–4 [25]–[26] (Gaudron, Gummow, Hayne and Callinan JJ).

⁶⁷ *Re Judiciary and Navigation Acts* (1921) 29 CLR 257, 265 (Knox CJ, Gavan Duffy, Powers, Rich and Starke JJ).

so. Arguably the two approaches reflect different attitudes to the judicial function. The deciding of the case at hand did not of itself necessitate reasons, but they could provide a useful guide to future courts faced with similar applications.

Concentrating on the nature of the exercise of judicial power, rather than the law-stating aspect of that function, also has implications when we come to statutes. It means that the primacy of statute law, by virtue of its constitutional and democratic source, must be recognised. In *Sons of Gwalia Ltd v Margaretic*, where the Court found that resort to judge-made principles of company law distracted from interpreting the statute in question, Gummow J said:

The apparently seamless continuity in the reception and development of the common law in Australia is apt to distract attention from the supreme importance of statute law. In this vein, the submissions presented on these appeals to varying degrees proceeded from an implicit premise which is false.⁶⁸

This presents itself as a practical framework within which to address the issues of coherence and statutory construction to which I referred earlier. Consistently with this focus, the High Court regularly reminds us that statutory construction is to commence, perhaps also to finish, with the text of the statute rather than any preconceptions, including those of the common law.⁶⁹

At the same time, the role of the courts in upholding the rule of law necessitates that rules such as the principle of legality are clearly and consistently applied — after all, the application of that rule amounts to a judicial insistence that, where common law rights are to be excluded, Parliament says so unequivocally.⁷⁰ That requirement assists in the accountability of the representatives in Parliament to their electors because it seeks to ensure that fundamental rights are not inadvertently reduced and that, when they are, this happens in a transparent way.

In these various ways, the path lies clear for common law courts to continue to perform their vital constitutional and democratic function in a manner that upholds and enhances the rule of law.

⁶⁸ (2007) 231 CLR 160, 186 [35].

⁶⁹ See, eg, *Carr v Western Australia* (2007) 232 CLR 138, 143 [6] (Gleeson CJ).

⁷⁰ See Brendan Lim, 'The Normativity of the Principle of Legality' (2013) 37 *Melbourne University Law Review* 372, 394.

V CONCLUSION

Speaking in 1980, Lord Scarman said:

The 20th century challenge, which the common law has to meet, is the increase in volume of statute law and the growth in importance of public and constitutional law. Statutes are predators in the sense that they can, and some of them do, destroy common law rules and principles. ... To-day's crisis for the common law is to come to terms with statute law so that both may flourish and to enter the public sector, where the help of the judges is being seen as necessary to prevent abuse of power by public authority.⁷¹

I hope I have said enough to suggest that, challenges though there may be, the crisis Lord Scarman identified — if it ever existed — has passed and the common law, reconciled to statute and the *Constitution*, will indeed survive.

⁷¹ Lord Scarman, above n 38, 3.