A W B SIMPSON'S 'THE COMMON LAW AND LEGAL THEORY'

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Brian Simpson died more than five years ago. It is a pleasure to use this special issue as an occasion to summon up his memory. He was a very real scholar of great versatility. He was a person of immense charm and wit, whether in writing or teaching or play.

Brian Simpson did National Service in West Africa, which left him with a lifelong fascination for the region. He served as a lay magistrate in England for many years. But his career was spent principally at five law schools – Oxford, Ghana, Kent (at Canterbury), Chicago and Michigan.

His earlier writings were orthodox works of legal history. The first was *An Introduction to the History of the Land Law*.[1] In its wit and lucidity, it was an astonishing achievement for a man in his late twenties. The second was a volume entitled *A History of the Common Law of Contract: The Rise of the Action of Assumpsit*.[2] Originally more volumes were contemplated. But unfortunately Volume 1 was the last. His research interests changed. But he never lost an interest in legal history, as revealed, for example, in his editing of and contributions to *A Biographical Dictionary of the Common Law*.

About the time he turned fifty he moved into a novel field. It involved the exposition of leading cases by reference to the conditions of the time and the backgrounds of the people and institutions involved in them. It is common for an academic lawyer now to be a soi-disant follower of this technique. But though these 'followers' have sometimes demonstrated new points about particular cases, none have approached Simpson's freshness and penetration.

A third field of interest developed later in his life. It centred on various aspects of human rights law. The first was detention without trial in wartime. The second was the origins of British accession to the European Convention on Human Rights, which he dealt with in a massive work of scholarship.

His final work, published posthumously, was a study of HLA Hart's *The Concept of Law*[3] against the background of the two mid-century decades in which Hart and Simpson were both members of the Oxford law faculty. It was not strictly speaking unfinished, for what there is of it can certainly stand on its own. No doubt it was unpolished. He was dying. But recollection stimulated vitality. The lack of polish caused the vitality to be more clearly revealed.

That work is a reminder that at all stages throughout his life he had jurisprudential interests. One other book he wrote is worth noting, for it reflected those interests, though it is little known. In 1988 he published *Invitation to Law*.[4] It was directed at readers with no specialised legal background. But in it Simpson, in his familiar good-

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1 (Oxford University Press, 1961).

2 (Oxford University Press, 1975).

3 A W B Simpson, *Reflections on 'The Concept of Law'* (Oxford University Press, 2011).

4 (Wiley-Blackwell).

humoured way, made many fundamental points derived from the various lines of inquiry described above.

Brian Simpson was a master of many styles. He adhered to diverse points of view. They appeared in various mixtures in different places. He said that he was not himself 'a paid up socialist'.[5] Certainly it would be a mistake to regard him as unremittingly left of centre. On the other hand, he was far from being a stern, unbending Tory. Instead he tended to oppose fashion, pomposity and pretension. The word 'virtue-signalling' did not exist in his lifetime, but the thing certainly did, and he abhorred it. His style of mild, amused and charming irreverence, with the occasional Swiftian flash, could make his writing difficult to put down. An example is his reply to R H Coase's indignant and lengthy criticism of his article '*Coase v Pigou* Reexamined'.[6] The substantive part of Simpson's reply began with the words 'I am sorry'. In 21st century Australia, and no doubt in other places as well, it is common for those words to commence an interminable and grovelling speech of extreme self-abasement – often not called for, but offered as the price for peace. That was not quite how Brian Simpson proceeded. He wrote:

> I am sorry that I appear to have made Professor Coase so cross by raising what seemed to me to be some difficulties in his celebrated article, not all of which he addresses in his reply. Having at one time worked in Chicago, I recall colleagues there who commonly, in the Law and Economics Seminar, expressed themselves with some vigor, often indeed on subjects on which they were not desperately well informed. I used to enjoy these occasions very considerably. I am afraid that I cannot accept the notion that it is somehow improper for anyone who does not claim to be an economist (and is quite frank on the matter) to raise some doubts about a famous article, which has been discussed by lawyers, and makes abundant use of legal examples, from the point of view of a lawyer and historian. [7]

In 1973 Simpson edited *Oxford Essays in Jurisprudence (Second Series).* He assembled distinguished contributors: Honoré, Eekelaar, Finnis, MacCormick, Hacker, Hart, Dworkin, Marshall, Tapper and Raz. His own contribution was 'The Common Law and Legal Theory'.[8] It is more earnest than witty. Indeed its pessimism is striking. It has not been much discussed, though it has at least one supporter.[9] The thesis he propounded was this.

He contended that legal theory had not provided much analysis of the nature of the common law (independently of statute) and what it had provided was not satisfactory. He identified and examined two possible analyses. One was that the common law consists of a system of rules. The other was that the common law was a system of customary law – a body of traditional ideas received within a caste of experts.

The first possible analysis rested on the idea that the common law is positive law – an exhaustive code of rules laid down by the courts acting as Austinian commanders. It may be labelled 'positivist' for short. Simpson criticised this on various grounds. Common law rules lack the precision to which statutes aspire. They were not, or not

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5 A W Brian Simpson, 'An Addendum' (1996) 25 *Journal of Legal Studies* 99, 101.

6 (1996) 25 *Journal of Legal Studies* 1. Coase's reply is 'Law and Economics and A W Brian Simpson' (1996) 25 *Journal of Legal Studies* 103. Simpson's reply begins at page 99.

7 Simpson, above n 5, 99.

8 A W B Simpson (ed), *Oxford Essays in Jurisprudence (Second Series)* (1973), 77-99.

9 F Schauer, 'Is the Common Law Law?' (1989) 77 *California L Rev* 455, 456 ('The tensions discussed here are admirably explored in Simpson…').

generally, enunciated at a particular point in time, unlike a statute. They have no authoritative authentic text. No two legal treatises state the common law in exactly the same terms, which is why practitioners, judges and academic lawyers buy or refer to several works on a subject instead of limiting themselves to one. Common law 'rules' can be debatable, obscure or tentative. All of them are open to rejection and modification from time to time, sometimes without warning. Common law rules do not resemble the commands of an uncommanded commander, even apart from their vulnerability to parliamentary change or to later judicial change.

Simpson then turned to the second possible analysis. He pointed out that Hale divided the law of England into the *lex scripta* and the *lex non scripta*. The *lex scripta* comprised statutes and other enactments. The *lex non scripta* comprised 'general customs', ie 'the common law properly so called', as well as 'particular laws and customs applicable to certain courts and persons'. Simpson quoted the following passage from Hale:

> I therefore style those parts of the law, *leges non scriptae* because their authoritative and original institutions are not set down in writing in that manner, or with that authority that Acts of Parliament are; but they are grown into use, and have acquired their binding power and force of laws by a long and immemorial usage, and by the strength of custom and reception in the Kingdom.[10]

Simpson also pointed out that Blackstone described 'General Customs' as 'the universal rule of the whole kingdom' and as forming 'the common law, in its stricter and more usual signification'.[11] Simpson stated that a custom is a practice having at least two characteristics. One is that people have conformed to the practice because they think it is the normal and proper practice. The second is that 'the past practice of conformity is conceived of as providing at least part of the reason why the practice is thought to be the proper and the right thing to do'.[12] At least the second characteristic is true of the common law. But it is not true of legislation. Legislation is seen as law simply because the legislature has prescribed it. Simpson pointed out, however, that many common law rules do not have the first characteristic. They are not followed because they are seen as the normal and proper practice. They are followed simply because they are said to be the law, for example, the rule against perpetuities or the doctrine of anticipatory breach.

Simpson propounded the following modified view of the common law as a system of customary law:

> [I]t consists of a body of practices observed and ideas received by a caste of lawyers, these ideas being used by them as providing guidance in what is conceived to be the rational determination of disputes litigated before them, or by them on behalf of clients, and in other contexts. These ideas and practices exist only in the sense that they are accepted and acted upon within the legal profession, just as customary practices may be said to exist within a group in a sense that they are observed, accepted as appropriate forms of behaviour, and transmitted both by example and precept as membership of the group changes. The ideas and practices that comprise the common law are customary in that their status is thought to be dependent on conformity with

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10 Simpson, above n 8, 93

11 Ibid, 91-92.

12 Ibid, 92.

> the past, and they are traditional in the sense that they are transmitted through time as a received body of knowledge and learning.[13]

Simpson considered the rules of common law as being similar to the rules of grammar, 'which both describe linguistic practices and attempt to systematize and order them; such rules serve as guides to proper practice since the proper practice is in part the normal practice; such formulations are inherently corrigible, for it is always possible that they may be improved upon, or require modification as what they describe changes'.[14]

Simpson was struck by the continuity and cohesion of the common law, at least in its pre-modern form.

> Now a customary system of law can function only if it can preserve a considerable measure of continuity and cohesion, and it can do this only if mechanisms exist for the transmission of traditional ideas and the encouragement of orthodoxy. There must exist within the group – particularly amongst its most powerful members – strong pressures against innovation; young members of the group must be thoroughly indoctrinated before they achieve any position of influence, and anything more than the most modest originality of thought treated as heresy. In past centuries in the common law these conditions were almost ideally satisfied. The law was the peculiar possession of a small, tightly organized group comprising those who are concerned in the operation of the Royal courts, and in this group the serjeants and judges were dominant. Orthodox ideas were transmitted largely orally, and even the available literary sources were written in a private language as late as the seventeenth century. A wide variety of institutional arrangements tended to produce cohesion of thought. The organization of the profession was gerontocratic, as indeed it still is, and promotion depended upon approval of the senior members of the profession. The system of education and apprenticeship, the residential arrangements, the organization of dispute and argument – for example the sitting of judges *in banc* and the existence of institutions such as the old informal Exchequer Chamber – all assisted in producing cohesion in orthodoxy and continuity. So too did such beliefs as the belief that the common law was of immemorial antiquity, and the belief that if only the matter was considered long enough and with sufficient care a uniquely correct answer could be distilled for every problem.[15]

Simpson found an explanation for these phenomena in Hale's defence of the practice by which criminal jury trials were mainly presided over by the twelve common law judges sitting either in Westminster Hall or on circuit. Simpson quoted the following passage:

> It keeps both the Rule and Administration of the law of the kingdom uniform; for those men are employed as justices, who as they have had a common education in the study of the law, so they daily in term-time converse and consult with one another; acquaint one another with their judgements, sit near one another in Westminster Hall, whereby their judgements are necessarily communicated to one another, and by this means their judgements and their

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13 Ibid, 94.

14 Ibid.

15 Ibid, 95-96.

> administrations of common justice carry a constancy, congruity and uniformity one to another, whereby both the laws and administrations thereof are preserved from the confusion and disparity that would unavoidably ensue, if the administration was by several uncommunicating hands, or by provincial establishments.[16]

Simpson saw this system as reflecting a considerable measure of fundamental agreement. It was stable but it was not rigid. The rules of law it generated did change. Yet in time both the system and the rules began to break down, and quite radically. These trends had both symptoms and causes.

One symptom identified by Simpson was the rise in interest in the rules of stare decisis and in how the rationes decidendi of cases were to be determined.

> [T]he only function served by rules telling lawyers how to identify correct propositions of law is to secure acceptance of a corpus of ideas as constituting the law. If agreement and consensus actually exist, no such rules are needed, and if it is lacking to any marked degree it seems highly unlikely that such rules, which are basically anti-rational, will be capable of producing it.[17]

As Simpson went on to point out, 'in a world in which all propositions require support from authority, there must be widespread doubt'.[18]

One cause of these trends identified by Simpson was the growth in the size of the senior judiciary.

There are other possible causes which Simpson did not list. Perhaps one cause is the phenomenon – much denied though it may be – of greater diversity on the bench, particularly in social origins and in political opinions. One has to be cautious about this. For one thing, in earlier times, many people ill-favoured by birth found a barrister's robe or a judge's mantle in their knapsacks, but on attaining heights undreamed of in their youth they may have adapted to their new environment quite easily by reason of what Simpson described as 'mechanisms…for the transmission of traditional ideas and the encouragement of orthodoxy'.[19] For another thing, there are worse things than diversity of opinion on the bench. The unanimous acceptance of pernicious opinions is one of them.

Yet another cause for the departure from the old order may lie in a newer view of the judicial role. Of various forms of sport the cliché is often uttered that no one player is ever bigger than the game. Increasingly particular judges seem to think that they are bigger than the law. They see their job as not limited to the administration of the law, but as including a self-conscious process of changing it. Again, it may be dangerous to exaggerate the differences from the past. There is much unnecessary showing off in Holt CJ's judgement in *Coggs v Bernard*,[20] for example. And Sir Edward Coke's entire judicial career betrays that trait. But the modern emulators of these styles seem to have risen in number. It is a trend which is profoundly destructive of continuity and cohesion. 'When every judge seeks in every case to emulate the creative career of Learned Hand there can be no Learned Hands, because little that any of them wrote

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16 Ibid, 96.

17 Ibid, 98.

18 Ibid, 99.

19 Ibid, 95.

20 (1703) 2 Ld Raym 909.

can be expected to control the behavior and decisions of other judges in the future who claim equal wisdom and equal right to the creative role'.[21]

Yet another cause may lie in the rise of university legal education. Until quite recently most legal education was not centred on universities, but was closely linked to professional life – what Simpson called the 'system of education and apprenticeship'. Modern judges in the English superior courts have many virtues to be envied elsewhere, not least those of courtesy, speedy delivery of reasons for judgement and highly literate prose. But one very striking feature of the modern English judiciary is its capitulation to, or at least glowing acceptance of, particular schools of sometimes evanescent university academic thought. Very little legal academic thought emanated from universities in the common law world until the late nineteenth century. Until then legal writing was a task carried on largely by practicing lawyers for practicing lawyers – judges, barristers, solicitors – and for those learning outside the universities to become practicing lawyers. Blackstone said that the 'chief corner stone' of the laws of England was 'general immemorial custom, or common law, from time to time declared in the decisions of the courts of justice; which decisions are preserved among our public records, explained in our reports, and digested for general use in the authoritative writings of the venerable sages of the law'.[22] The 'venerable sages of the law' were generally not employed in universities, leaving aside rare exceptions like Blackstone himself. As Simpson said of professional treatises in another place:

> Many authors were young men who were not prestigious figures when they published their treatises (though some became celebrated later in life, either through success in practice, or through a reputation for learning acquired by means of their writings).[23]

Another possible cause not mentioned by Simpson is a search for tests of legal virtue wider than stare decisis. Many analysts have found virtue in common law rules which favour the interests of plaintiffs suffering personal injuries; a smaller number in common law rules which favour defendants sued by those plaintiffs. Very many analysts have acted in accordance with Hale's resolution: 'if in criminals it be a measuring cast, to incline to mercy and to acquittal'.[24] Some consider that the common law ought to follow whatever trends of policy can be detected in statute law as a means of fillings gaps left by the statutes. Thus Lord Diplock said: 'Where over a period of years there can be discerned a steady trend in legislation which reflects the views of successive Parliaments as to what the public interest demands in a particular field of law, development of the common law in that part of the same field which has been left to it ought to proceed upon a parallel rather than a diverging course'.[25] In short, pursuant to this 'gravitational pull of statutes', the common law is to develop in identical fashion to legislation which has not actually been enacted. Some analysts favour every common law development which weakens the power of the state to control individual conduct. Fewer of them oppose this. But these competing ideals or values or interests are aspirations and desires, not tests of validity. From this point of view Simpson's essay does not deal with the whole problem. Its attacks on the

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21 Paul D Carrington, 'Ceremony and Realism: Demise of Appellate Procedure' (1980) 66 *ABA Journal* 860, 862.

22 Blackstone, *Commentaries on the Laws of England* (vol 1, 1765), 73.

23 'The Rise and Fall of the Legal Treatise: Legal Principles in the Forms of Legal Literature' (1981) 48 *University of Chicago Law Review* 632, 667-668.

24 Qtd in Nicholas Hasluck, 'Judicial Activism's Threat to the Rule of Law' (2016) 60 *Quadrant* 52, 53.

25 *Erven Warnink BV v J Townend & Sons (Hall) Ltd* [1979] AC 731, 743.

positivist explanation for the nature of the common law rest on its claim that the common law was a body of traditional ideas received within a caste of experts. But the article does not seem to explain how these traditional received ideas were fashioned, what they actually were, or what fundamental intellectual forces – moral and social values, and policy goals – generated them.

That is scarcely a criticism. A single essay cannot deal with every issue that it provokes. The task just described would be an enormous one. What is more open to criticism may be the possibility that Simpson drew too sharp a distinction between the common law and statue law. He said that in England and places where English law had been received, the 'characteristic type of law is common law, common law is contrasted with statute law'.[26] On the one hand this underrates the extent of legislation in and since the Middle Ages – though what Lord Bingham of Cornhill unflatteringly called the 'legislative hyperactivity'[27] of the modern scene is a development that intensified greatly after Simpson's article was written. On the other hand, there is a sense in which the legislature has sometimes fought a losing battle with the courts. The inevitable vagueness of language has enabled the courts, rightly or wrongly, to mould statutes to their desires. As Bishop Hoadley said in his sermon of 31 March 1717 addressed to the uncomprehending King George I: 'Whoever has an absolute authority to interpret any written or spoken laws, it is he who is truly the law giver, to all intents and purposes, and not the person who first wrote or spoke them.' A statute means what the courts say it means. The courts do not consider that there is a 'true construction' which exists in a form unmediated by the courts who have decided on a different one. As Simpson said, 'even in the case of law of statutory origin common law judges shrink from identifying the law with the text of the statue, which they rapidly encrust with interpretation'.[28] Further, the courts have a natural but illegitimate tendency to assume that the statute will correspond with the common law unless its words point clearly away from that view. More legitimately, or at least more commonly these days, the courts apply a 'principle of legality' pursuant to which they will not interpret legislation as abrogating or contracting fundamental rights or freedoms in the absence of clear words. The principle of legality in the hands of some judges has proved to be rather an over-mighty, even imperialist, principle. That is because there is sometimes the tendency to invent, or exaggerate, the supposedly fundamental quality of some rights or freedoms in order to bring the principle of legality into play and thereby achieve a construction of the legislation which is more pleasing to the judges than to the legislature. Further, the judicial approach to statutory controversies where the language was uncertain had similarities – not complete, but real – with the approach of the courts to common law controversies – namely, debate among a 'small tightly organized group' including a 'gerontocratic' profession wedded to cohesion and continuity. And though the written constitution – that archetype of linguistic uncertainty in a written source of law – came at a relatively late stage in the development of the common law in the United States and Australia, for example, since that time similar characteristics can be observed in constitutional law, making due allowance for the fact that stare decisis operates less strictly and for the fact that individual judges are more readily excused from returning to the constitutional words in preference to the authorities on them.

Simpson saw the modern common law as 'more like a muddle than a system'. He called the law reports an 'untidy shambles'. He viewed that shambles as 'the product of the common law which was repelled by brevity, lucidity and system.' He perceived the

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26 Simpson, above n 8, 77.

27 'The Rule of Law' [2007] *CLJ* 67, 70.

28 Simpson, above n 8, 99.

old customary system of the common law to be collapsing. He considered that any attempt to systematise the common law by reducing it 'to a code of rules which satisfy accepted tests provided by other rules' as an ideal, not a description of the status quo. He thought that the attractiveness of the customary system as a model was one which grew as reality receded from it. He said that the ideal of a code of rules was 'futile', because 'the only effective technique for reducing the common law to a set of rules is codification, coupled of course with a deliberate reduction in the status of the judiciary and some sort of ban on law reporting'.[29]

For various reasons over the four and a half decades since Simpson wrote much has happened in relation to these three conditions.

Take the judiciary first. There has certainly been a reduction in its status. To some extent that was self-inflicted. To some extent it was deliberately engineered by the executive. To some extent it was inevitable, as judicial numbers rose. It is not just, as Kingsley Amis said in another context, that more means worse. More tends to mean that the senior judiciary is less remote, less exalted, less of a caste.

Then consider codification. That is a task which calls for professionals of very great skill. Even conventional legislative drafting skills have grown weaker with the enormous demands placed on those few who have them, and the spell which the politically correct passions of the legislators who give them instructions have cast over them. Simpson's reference to 'codification, coupled…with a deliberate reduction in the status of the judiciary' is a reference to a Benthamite ideal. Bentham loathed the judiciary, and its seeming power to make laws by construing statutes. One conception of a code which Bentham would have favoured would involve a prohibition on all searches outside the text of the code – not just travaux préparatoires, not just the common law before the code, but even judicial decisions on the code. On that conception of codification, 'cases…may be interesting, persuasive, cogent, but each new case must be referred for decision to the undefiled code text'.[30] That full-blooded regime would bring the common law judiciary to the lowest status in its history – a large statement, in view of its current predicament.

As for Simpson's third condition, law reporting is withering away in the face of universal and totally undiscriminating computer access to the raw and unembellished judgements themselves.

So Simpson's article reveals the tendency of the common law to modify itself slowly over time as circumstances change. It correctly negates the idea that the rules of the common law came into being uno ictu at a single moment in time, unconnected to anything in the past or future. The common law judges, when they engaged in legal reasoning, were not issuing commands. If they sat in equity they were quelling controversies. If they sat at common law, they were settling questions to be put to juries who would quell controversies. The article expounds the institutional structure in which the common law developed. It offers a dismal, even an apocalyptic, vision of the future – 'the collapse of a degenerate system of customary law'.[31] That caste existed at times when its members were few. They were times when legislatures lacked legitimacy by present and even past standards, whether they were the legislatures packed by monarchical placemen, or the legislatures dominated by the post-Stuart Whigs, or even the nineteenth century legislatures, marked by the survival of aristocratic domination until the rise of populist radicals. That to a significant extent the development of the law was in the hands of a caste of lawyers rather than legislatures of that kind was not necessarily an unsatisfactory state of affairs.

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29 Ibid.

30 Grant Gilmore, 'Legal Realism: Its Cause and Cure' (1961) 70 *Yale LJ* 1037, 1043.

31 Simpson, above n 8, 99.

But one source of worry for the future is that the caste of lawyers who made the common law are ceasing to exist. The modern judiciary as a whole is far too large to be described as a caste. The members of the final and intermediate appellate courts, or some groups of them on some issues, can be described as a rather large caste. But they do not share the institutional background of Simpson's caste. Nor do they share its intellectual approach. They have a contempt for modern legislatures (and those who elect their members). They think they understand modern values better than either the people or their elected representatives. If that is the modern lawyerly caste which is to control the administration and development of the law, it is vital that its activities be exposed to intense scrutiny by future Simpsons – if there are to be any.