

Freeleagus Oration

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"Legal Influences– across centuries and borders"

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Alex Freeleagus was a prominent lawyer and businessman when I commenced practice as a barrister in the mid 1970s. He had a number of important roles in the community through which he sought to foster cross-cultural links. There can be little doubt that he would have appreciated that an exposure to other cultures can be of mutual benefit. It is the importance of our willingness to be open to other approaches and ideas that I wish to discuss today.

It is not uncommon for historians and philosophers to consider that some periods in history were of special importance to the progress of mankind. For the modern philosopher Professor A C Grayling, it is the 17th century¹. This may seem an odd choice because we know that it was a period of great turmoil in Europe. It was a century of endless wars including, but not limited to, the Thirty Years' War. It was barely punctuated by peace. Yet despite all of this so much was achieved, particularly in the sciences and in the development of theories of governance and of the law.

Professor Grayling begins by observing some major changes which occurred in the first half of the 17th century. Macbeth was first staged in 1606. Shakespeare was writing for an audience which could be assumed to regard the killing of a king to be against the natural order of things, so when it takes place in Macbeth Shakespeare creates calamitous events – owls falling upon falcons in mid-air and killing them; horses eating each other. In 1649, the King in England was publicly executed. The sacred nature of the King had been rejected in England in the space of 50 years (France would take somewhat longer). At the beginning of the 17th century astronomers were burned at the stake for advocating the views of Copernicus. Galileo was arrested and put on trial. Fifty years later, numerous publications about the nature of the universe were in circulation. How were fundamental shifts in thinking achieved in such a short space of time?

We may not often have a reason to think about how people communicated four centuries ago. Judged by the standards of the internet it may not have been fast, but it is probably not as slow or as inefficient as we might think. A letter from Paris to London took between seven to ten days to arrive by postal service (not much longer than Australia Post sometimes takes to deliver a parcel to my sister in northern New South Wales).

By the end of the 16th century a number of developments had made regular, and reasonably efficient, communication possible. Inexpensive paper was available and letter writing was flourishing once again. Printed books were widely available. Europe and England were criss-crossed by a network of fully functional postal services ranging from the imperial and royal to local and private. There were people like Mersenne, a friar and polymath, who served as a kind of one man human internet server. His nickname was the mailbox of Europe². He was the recipient of letters from almost all the great intellects of the day, which he copied and disseminated. He made the reputation of many by these means, including Descartes.

We can therefore comprehend that scholars in France, Germany, Italy and England were in communication at this time. We may infer that legal scholars and jurists in England were aware of the writings of their colleagues in Europe and vice versa. On the Continent, scholars such as Hugo Grotius and Samuel Pufendorf were working on a new version of natural law theory, which would prove to be influential not only on modern law but also on notions of the governance of nations. Pufendorf published his treatise in Latin, French, German and English. Lord Mansfield, the Lord Chief Justice of England, who understood and was influenced by natural law theories, probably did not need the English translation.

This is not to say that principles which were being developed in one place about law and governance directly affected the development of the law in another place, in the sense that they were picked up and applied. But it may reasonably be assumed that a knowledge and understanding of these ideas in one country or region would, unless rejected outright, in some way affect the thinking of people in another.

The importation of ideas in the 17th century was hardly a new thing. In the first half of the 5th century BC, a commission in Rome was tasked with drafting a legal code which would clarify Roman law. Ultimately they produced the Ten Tables and later the Twelve Tables. Tradition has it that, in undertaking their task, they sent emissaries to Athens and other Greek cities to study their laws and in particular the Code of Solon.

It does not really matter whether the tale is true or not. In the opinion of one scholar³, the influence of Greek thought and practice on early Roman law cannot be dismissed as negligible. It may be that it was Greek legal practices rather than legal philosophy or principle that were adopted by the Romans, for they considered themselves to be the master of their own laws⁴. Nevertheless it may reasonably be inferred that, in its early ages of development, Roman law was naturally influenced in some way by its contact with Athens and with the Hellenic cultures of southern Italy and Sicily⁵.

The choice of Greek and Roman law as the starting point of a discussion about legal systems and how they may look to one another may also be contestable. There is a theory, albeit somewhat controversial⁶, that there existed in the Ancient Near East, from as early as the third millennium BC to the first, a common legal tradition. The Mesopotamian legal codes comprised a body of jurisprudence which is said to have influenced the early laws of Greece and Rome. The theory is not so much that there was a direct borrowing of these laws but rather of the legal and intellectual skills necessary to create law.

Of course Roman law, after its rediscovery many centuries after the disintegration of the Roman Empire, had a profound influence on the laws of European countries. It was bound together with customary law and canon law of the time and proved to be a unifying force on the Continent. It was not unknown to English law either. It is generally accepted that Roman law doctrine influenced the intellectual organisation of the early English common law. This is unsurprising since many of its scholars were trained in medieval Roman law. By way of example, the principle of Roman law that no right of action arising out of a bare promise is considered to have been established in English law almost three centuries before the action in *assumpsit* was developed with its theory of consideration⁷.

In the sphere of commercial law, the law merchant existed for some time in parallel with the legal systems of the continent and of England. It developed by reference to customs and best practices in medieval times and was used by merchants throughout England and Europe, at least until these countries developed their own commercial laws. There can be little doubt about its influence on the English common law as much as on civilian law. Lord Mansfield was one of a number of jurists who sought to integrate it into the English common law to achieve a modern commercial law and, to an extent, he succeeded in doing so.

Early notions of consideration in English law were not as we know them today. In the action on *assumpsit*, the consideration which made a promise enforceable by the courts was the subjective motive or reason that a person made the promise. Consideration meant any good reason for making the promise. A promise made for a good reason was legally enforceable because breach of it was morally reprehensible. This reflected the philosophies of the natural law and the canon law.

Natural law theory is ancient in origin. It involves a belief that there are universal moral and ethical principles which inform legal norms. There was a resurgence of interest in it in the 17th and 18th centuries but greater attention was now given to reason. In the *Doctor and Student*, St German identified four kinds of laws. He placed "the law of reason" as second, ahead of "the law of man". This would make legal positivists shudder.

Natural law scholars included Hugo Grotius, whose theories are now regarded as providing the foundations for public international law. Its influences were felt in English law. In 1610 Sir Edward Coke, in *Dr Bonham's Case*⁸, expressed the view that the common law would strike down legislation which was beyond reason. Although this view was regarded as too radical a step, the influences of natural law theory are evident. Its influences are also apparent in statements made by John Locke – that there can be no arbitrary power exercised over the life, liberty or possessions of a person. They can be seen in principles such as freedom of religion and expression and in the principle of legality, by which the common law assumes that the legislature does not intend to overthrow fundamental common law principles or infringe rights unless it expresses itself with irresistible clarity.

Lord Mansfield was a proponent of aspects of natural law. He attempted, unsuccessfully, to retain morality as the basis for the enforcement of promises⁹ as was the case in continental law. In the 19th century legal positivism would turn its face against natural law theories such as these. As a result, they are not as familiar to us because the influence of positivism remains the stronger force. However some interest in natural law theories was revived amongst scholars in both civilian and common law countries after World War II. And every now and again it is accepted that common law doctrines have their source in writings about natural law. The doctrine in our contract law which requires, for a contract to be valid and enforceable, that a party intend to create legal relations falls into this category¹⁰.

Both Frederick the Great and Napoleon are said to have been interested in natural law theory, although it has been doubted¹¹ that Napoleon was interested in its moral and ethical underpinnings. Nevertheless the French Code Civil of 1804, which Napoleon caused to be drafted, is regarded as one of the great natural law codes.

The influences of Roman law remain in the Code Civil and the later German Civil Code of 1900. These codes did not break entirely with the Roman law tradition and remained informed by it. The influence of Roman law therefore extended over many centuries and continues today. Sir Francis Bacon tried, unsuccessfully, in the 17th century to interest others in the codification of English law. It was never to be achieved, despite the efforts, later, of others.

Both the civilian codes and the common law have influenced the laws of other countries. The late Bruce McPherson traced the reception of the common law in countries around the world. So too were the civilian codes exported from their countries of origin. It must be acknowledged that their influence, and that of the common law, was not always a matter of choice for other countries. But the fact is that their influence can be seen in South America, where the Code Civil shaped the laws of Bolivia, Chile, Uruguay and Argentina, at least until interest in the German Civil Code halted its influence. The French influence was also felt in Turkey, Egypt, Lebanon and Syria. And, as an oddity of history, because Louisiana was a French possession purchased by the US government from Napoleon, its laws remain based on the Code Civil.

The German Civil Code helped shape the Japanese Civil Code. It played an important role in the laws adopted in South Korea and has influenced the interpretation of legal sources in Thailand, Brazil and Peru.

The Japanese experience furnishes a good example of "codification by request". In the latter half of the 19th century, when the leaders of Japan decided to trade with the West, they adopted western knowledge and institutions. The common law was taught at the Imperial University in Tokyo from 1874 and Japanese students studied law in France and in Germany. But it was the German Civil Code which proved most influential in Japan. This is not to say that it was applied as it was in Germany. It was adapted to the needs of Japanese society. However, it is said that a continental lawyer would nevertheless recognise many of the legal rules in Japanese law¹².

A code has the virtue that it is, in form and nature, capable of adaptation in the sense mentioned. This is not the case with respect to the body of jurisprudence which makes up the common law. Its virtue, if it be right to call it that, is otherwise. It is internally adaptable, which codes are not. The common law is able to modify itself over time. But it is more difficult for another country to adopt it and adapt it to its social and historical settings. Where the common law has been received in other countries it has been as a part of the transposition of British culture.

The influence of the Continent has more recently been felt by the English common law from European Community laws and the judgments of the European Court of Justice and the European Court of Human Rights. Even before the *Human Rights Act*¹³ came into force in England in 1998, the English courts had already shown a preparedness to adopt some European administrative law principles, such as legitimate expectations and proportionality. Even without rulings from European Community courts with respect to the English domestic law, the courts of the United Kingdom on occasion showed their willingness to align the common law with European Community law principles, even though they were not obliged to do so. Over these years continental and EC influences have shaped some areas of the English common law and have in significant part contributed to a divergence between the English and the Australian

common law. And of course if it shapes the law it must be shaping judicial thinking. It will be interesting to see what direction the courts of the United Kingdom take post-Brexit.

There have been other continental influences on English law in recent times. Like the scholars of the seventeenth century, English academics are aware of civilian laws in their area of speciality. Theories of unjust (or as some continental systems would say, "unjustified") enrichment furnish good examples. Here academic writings have achieved a level of acceptance by the courts of the United Kingdom of these theories and a rejection of those propounded long ago by Lord Mansfield. Some of this academic thinking has been influenced by civilian law. It is well known that the late Professor Peter Birks was familiar with German law and was a convert to the theory expressed in the German Civil Code, which holds that an absence of a legal ground for the retention of property suffices on its own as a basis for liability to make restitution.

It is not just judgments of domestic courts and academic papers which shape legal thinking. Jurists from many countries and different legal systems are now brought together to make up international courts. It is commonplace for lawyers to attend conferences in other countries where topics ranging beyond their own domestic law are discussed and approaches of other systems compared.

We have perhaps been rather slow to engage more deeply in an understanding of the legal systems of countries in our region. That is changing. Dialogues with a number of the courts of countries such as India, Singapore, Hong Kong, Indonesia and Malaysia are developing. Next month a delegation from the High Court will for the first time meet with the President of the Supreme Court of the People's Republic of China and other judges at the invitation of the President.

That is not to say that there are not barriers to the attainment of knowledge and the sharing of ideas. It needs to be acknowledged that some of the fundamental principles of our laws are not shared by other systems. This does not mean that we cannot talk. And an understanding of the influences that other legal systems have had upon the development of laws in a country might assist.

Language is perhaps the greatest barrier of all. Australian citizens have poor language skills by comparison with their English, European and Asian counterparts and by comparison with educated people long ago. Fortunately English is becoming more common and translations of decisions of some civilian courts are becoming more accessible.

The focus of legal education in Australia also limits our knowledge of and our interest in legal thinking elsewhere. Not every university teaches legal history, so law students cannot easily reach back to the past for an explanation of why the law is as it is. Although comparative law had a promising start in Australia – the first comprehensive comparative law courses were offered by the University of Melbourne in 1948 – it has not generally been regarded as a valuable discipline.

The difficulty for most judges, beyond a lack of exposure to other legal systems, arises largely from language. They must necessarily rely only on comparative law texts which are written in English. Instinctively they want to know not just what a foreign law is said to be, but

how it is actually applied and this requires access to the decisions of the courts. Common law judges may find it difficult to accept that all that can be involved in judging in countries whose laws are codified is a rigid application of the Code requirements to a case, that civilian judges have no choices to make, make no law at all and have no interpretive or inventive function when dealing with the shortcomings of Codes or other statutory rules¹⁴. They may be right.

In 1992 Sir Anthony Mason¹⁵ said that the High Court looked to what other systems of law might say about a problem because legal problems are human problems and not unique to one legal system. The statement is perhaps best understood as expressing an ideal: of a Court the members of which are receptive to other ideas. I do not think it can be suggested that the Court's level of interest in the jurisprudence of other, non-common law, courts has ever been high. And on occasions, it must be said, the Court has spoken against even the consideration of foreign ideas. The fact that an approach to legal reasoning has a non-common law source has been erected as a barrier to an understanding of whether that approach may furnish, if not a solution to our legal problems, at least a better understanding of why we approach them in the way that we do.

Nevertheless the Court has on occasions looked to civilian law in areas such as torts, competition law and choice of law. More recently it has adopted proportionality analysis for constitutional law purposes. The idea of testing for proportionality developed in Europe under the influence of the aforesaid natural law school and the origins of proportionality theory are also thought to be ancient. It involves an appeal to reason and has achieved wide influence in many legal systems.

Proportionality analysis was adopted as a non-exclusive tool for determining the limits of legislative power where a statute restricts a constitutional freedom. In general terms, it requires that a legislative restriction, on say freedom of speech about political matters, go no further than is necessary to achieve a constitutionally legitimate object and that the degree of restriction be in proportion to the importance, from a public interest perspective, of the statutory objective. Other constitutional legal systems do not use proportionality quite in this way. It has been applied in the Australian context in much the same way as foreign laws and ideas have always been adopted and adapted.

The greatest barrier to an understanding of other approaches to legal questions and to ideas about how the law might be improved is ourselves. Of course this assumes that an openness to other ideas is a virtue and that is not a view universally held. Some members of the Supreme Court of the United States, the late Justice Scalia in particular, have considered an isolationist perspective to be something of a badge of honour. That approach may be contrasted with institutions like the American Law Institute which functions on a comparative law model and invites discussion from jurists and academics from other countries.

Professor Grayling's theory of what facilitated the major changes of the 17th century is that change was possible despite the tumults of the times because of the failure of authority. The breakdown of control over ideas allowed change to happen. More importantly, for present purposes, he identifies the key to these changes and advances as lying in the minds of the 17th century intellects (who, he points out, included women)¹⁶. The point to be made is that some of these advances could not have been made if these people's minds were not open to new ideas and they were not prepared to critically and rationally analyse entrenched views.

One may accept that Roman law has been influenced by other thinking and that it, in turn, has influenced the law in many countries over many centuries. Natural law theories have helped shape the way in which law and society is organised and it has helped develop laws to be applied internationally. Whole legal codes have found their way into and been adapted by other legal systems. These influences are only possible because decision makers, scholars and advocates were receptive to other ideas and approaches. This is not possible if we seek solutions only in the law that we have been taught or if we limit our exposure to ideas to the judgments of our own courts.

In the age of the internet we are able to transmit a legal idea across the world in an instant, but it might not enter one legal mind. None of our technologies matter unless we are open to different ideas and approaches. This does not mean that they must be adopted and it does not imply that it is only us who should be looking elsewhere. Nonetheless, a consideration of other approaches promotes a better understanding of our own system of law. It does so largely through the process of comparison. More subtly, that understanding may affect our legal thinking and by that means influence the future shape of the law.

¹ A C Grayling, "The Age of Genius: the 17th Century and the Birth of the Modern Mind" (2016).

² A C Grayling, "The Age of Genius: the 17th Century and the Birth of the Modern Mind" (2016) at 132.

³ Calhoun, "Greek Law and Modern Jurisprudence" (1923) 11 *California Law Review* 295 at 302.

⁴ Barry Nicholas, "An Introduction to Roman Law", 2nd ed (1975) at 1.

⁵ Calhoun, "Greek Law and Modern Jurisprudence" (1923) 11 *California Law Review* 295 at 302.

⁶ See review of Westbrook, *Ex Oriente Lex: Near Eastern Influences on Ancient Greek and Roman Law*, 1st ed (2015) in L Dodd, *Brin Mawr Classical Review*, (2015).

⁷ Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Tradition*, 2nd ed (1996) at 555.

⁸ (1610) 8 Co Rep 113b; 77 ER 646.

⁹ Simpson, "Innovation in Nineteenth Century Contract Law", (1975) 91 *Law Quarterly Review* 247 at 262.

¹⁰ Simpson, "Innovation in Nineteenth Century Contract Law", (1975) 91 *Law Quarterly Review* 247 at 263-264.

¹¹ Lücke, "The European Natural Law Codes: The Age of Reason and the Powers of Government", (2012) 31(1) *University of Queensland Law Journal* 7 at 30-31.

¹² von Mehren, "Some Reflections on Japanese Law", (1957) 71 *Harvard Law Review* 1486 at 1487-1488.

¹³ *Human Rights Act* 1998 (UK).

¹⁴ A point made by Kahn-Freund, "Comparative Law as an Academic Subject", (1966) 82 *Law Quarterly Review* 40 at 50-51.

¹⁵ A Mason, "The Relationship Between International Law and National Law, and its Application in National Courts" (1992) 18 *Commonwealth Law Bulletin* 750 at 753.

¹⁶ A C Grayling, "The Age of Genius: the 17th Century and the Birth of the Modern Mind" (2016) at 17.