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Unity, Divergence and Convergence in the Common Law of Obligations

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The development of the law of obligations across the common law world has been, and continues to be, a complicated story of unity, divergence and convergence. The common law jurisdictions of the United States broke away early and developed their own distinctive version of the common law. In major Commonwealth jurisdictions the common law of obligations for some time remained relatively uniform as a result of a number of different forces, some more formal and direct than others. The law of contract, tort, equity and restitution in these jurisdictions was held together: first, by the view that the common law remained essentially a single body of law; secondly, by the Privy Council acting as the ultimate appellate court for many jurisdictions; thirdly, by courts outside England treating decisions of the House of Lords as binding and, later, with deference. While those formal ties have loosened their grip over time, other less formal factors continue to play a unifying role.

The story of unity, divergence and convergence in the common law, as well as the theoretical underpinnings of that story, are addressed in the essays in this book, particularly in the context of the common law of obligations.

I. Unity

‘Unity’ has various shades of meaning. Two different kinds of ‘unity’ in the common law are referred to in this chapter: first, unity in the sense of a uniform, single body of law and, secondly, unity in the sense of a significant underlying commonality between bodies of law which differ in their particulars. To speak of the ‘unity’ of the common law in the first sense is to speak principally of the period in which the Judicial Committee of the Privy Council was the final appellate court from the countries comprising the British Empire and Commonwealth. By reason of the doctrine of precedent, all these countries were bound to follow the law set out in the ‘advices’ of the Privy Council. As James Goudkamp and John Murphy point out, the then prevailing declaratory theory of law meant that the Council understood its function as being to ensure the unity of the common law as far as was possible.¹ Because

¹ James Goudkamp and John Murphy, ‘Divergent Evolution in the Law of Torts: Jurisdictional Isolation, Jurisprudential Divergence and Explanatory Theories’, ch 13 of this volume.

the Judicial Committee was largely comprised of judges who sat at the same time in the House of Lords, decisions of the House of Lords were also generally regarded as binding on the courts of the territories for which the Privy Council was the final court of appeal. The result was that it was the English version of the common law that defined the uniform common law.

The unity of the common law throughout the Empire and Commonwealth, and the supremacy of the English version of the common law, was subject to four qualifications. First, and most obviously, not all the jurisdictions from which the Privy Council heard appeals were common law jurisdictions. In such cases, the Privy Council had to apply the local law, whether it was civil law or Hindu law or Islamic law. Notwithstanding some use of local judges in such appeals, the Privy Council inevitably applied local law through English eyes, and this could result in local dissatisfaction. In his contribution to this volume, Andrew Burrows points out that, in the past, the House of Lords as the final court of appeal from Scotland (a mixed jurisdiction), has been criticised as promoting ‘an unwarranted Anglicisation of Scots law’, a criticism that has extended to the Scottish Law Lords.² South Africa provides an example of the ‘Anglicisation’ of its law by the Privy Council in a decision in the early 1930s, in which the Privy Council brought the Roman-Dutch common law of South Africa into line with the English law relating to penalties.³ A South African judge later referred to the Privy Council decision as a ‘blemish on our legal system which militates against good faith, trust and business morality’.⁴ The decision was overturned by legislation in 1962.⁵

Secondly, the application of English law was subject to valid local statutory provisions. Paul Finn notes early local dissatisfaction in Australia, Canada and New Zealand with the Privy Council’s record in interpreting local statutes, and cites the example of a special sitting of New Zealand’s Court of Appeal at which the Chief Justice referred to the Privy Council’s record of acting under a ‘misapprehension or an ignorance of our local laws’, adding that the Council ‘knows not our statutes, or our conveyancing terms, or our history’.⁶ Dissatisfaction was particularly acute in cases where the statute involved was, effectively, the territory’s Constitution. This proved a long-running sore in Canada where the Privy Council’s favouring of the powers of the provinces at the expense of the federal government represented a ‘pre-conceived, but ill-informed, notion of the proper form of a federal system’.⁷

Thirdly, however expressed, and whether expressed in relation to judge-made law or statute, effect was only given to English law so far as local circumstances permitted.⁸ Whatever the exact import of this qualification, it is clear, as Goh Yihan points out in respect

² Andrew Burrows, ‘The Influence of Comparative Law on the English Law of Obligations’, ch 2 of this volume.

³ *Pearl Assurance Co v Union Government* 1934 AD 560 (PC).

⁴ *Tobacco Manufacturers Committee v Jacob Green and Sons* 1953 (3) SA 480 (AD) 493 (Van den Heever JA).

⁵ Conventional Penalties Act 1962 (SA).

⁶ Sir Robert Stout, quoted by T Arnold, ‘Update on the Supreme Court’, paper presented at the New Zealand Legal Research Foundation Annual General Meeting on 7 August 2003, available at www.crownlaw.govt.nz/uploads/UpdateSC.pdf. See also KJ Keith, ‘The Unity of the Common Law and the Ending of Appeals to the Privy Council’ (2005) 54 *ICLQ* 197.

⁷ Paul Finn, ‘Unity then Divergence: The Privy Council, the Common Laws of England and the Common Laws of Canada, Australia and New Zealand’, ch 3 of this volume. Sir Owen Dixon thought it important to keep the Privy Council away from decisions relating to federalism on the basis that those who did not live in a federation did not understand it: *O’Sullivan v Noarlunga Meat Ltd (No 2)* (1956) 94 CLR 367, 375.

⁸ See K Roberts-Wray, *Commonwealth and Colonial Law* (London, Stevens & Sons, 1966) 544–57.

of Singapore, that it was not sufficient to provide the basis for the development of a local jurisprudence distinct from English law.⁹

Fourthly, the unity that the Privy Council was able to bring to the common law was a formal one. Not every case went, or was going to go, on appeal to the Privy Council. This meant that local courts could arrive at acceptable solutions applying traditional common law techniques such as reinterpreting English decisions or simply distinguishing them. Writing about the historical development of Australian law, Bruce Kercher has pointed out that it is too simple to assume that the High Court of Australia simply copied the English common law in the first 50 or 60 years of its existence.¹⁰ Moreover, there were bodies of law that may have flourished in local courts at a time at which that law was simply not the subject of a great deal of attention or litigation in England. An example is the development of equity jurisprudence in New South Wales in the course of the twentieth century, made possible by the long delay in introducing the Judicature reforms in that state.¹¹ This helped to foster a particular ‘Australian’ attitude to equity at a time when equity jurisprudence in England was, in Finn’s words ‘petrified, if not forgotten’.¹² It follows that the common law may not in fact have been entirely uniform throughout the British Empire and Commonwealth even during the period in which the Privy Council exercised ultimate control over its development.

Ultimately, the unity of the common law that existed in the period of the Privy Council’s supremacy was overwhelmed by forces that produce divergence. Foremost among those factors was the establishment of local ultimate appellate courts and the abolition of appeals to the Privy Council in several major common law jurisdictions. That development was accompanied by an abandonment of the practice of invariably following decisions of the House of Lords, and a broader decline in the deference and precedential weight accorded to decisions of English courts.

There is not, however, a simple causal link between the breakdown in the unity of the common law and the ending of Privy Council appeals. Finn illustrates this by reference to the experience of the three major common law jurisdictions that form a focus of the discussion in this book, namely, Canada, Australia and New Zealand.¹³ The process of abolishing appeals to the Privy Council was completed in Canada in 1949, yet, for much of the next two decades, the Supreme Court of Canada continued to bear the appearance of an English court applying English law in Canada. In contrast, in Australia, where the process of dismantling appeals to the Privy Council was only completed in 1986, it was clear from about 1975 that the development of the common law in Australia was not constrained by English authority. Again, while the abolition of Privy Council appeals only occurred in New Zealand in 2003, it was clear by the 1980s that a distinct common law of New Zealand was developing.

What this illustrates is that, apart from the abolition of Privy Council control, at least one other ingredient was necessary to the development of distinct common laws in Australia, Canada and New Zealand—the motivation and desire to do so. That came as local

⁹ Goh Yihan, ‘A Conscious Effort to Develop a “Different” Common Law of Obligations: A Possible Endeavour?’, ch 4 of this volume.

¹⁰ B Kercher, *An Unruly Child: A History of Law in Australia* (St Leonards, Allen & Unwin, 1995) 169–71.

¹¹ See M Leeming, ‘Equity, the Judicature Acts and Restitution’ (2011) 5 *Journal of Equity* 199, 216–22.

¹² Finn, above n 7.

¹³ *ibid.*

judges witnessed their own jurisdictions assume their independent identities among the nations of the world as the sun set on the British Empire. It involved a change in mindset. Judges had to free themselves from the shackles of what Kercher has called an ‘internalised imperialism’,¹⁴ so that the English imprimatur on developments in local common laws was no longer seen as necessary. Canadian, Australian and New Zealand experience also shows that the process of the localisation of common law was facilitated by judicial champions, notably, Bora Laskin and Brian Dickson in Canada, Anthony Mason and William Deane in Australia, and Robin Cooke in New Zealand.¹⁵ In contrast, the change of judicial attitude in Singapore seems to have been more of a co-operative programme of the executive government, the legislature and the judiciary, and was manifested in the enactment of the Application of English Law Act in 1991 and a number of complimentary measures.¹⁶

Of course, there remain aspects of the inherited law in which common law jurisdictions have maintained commonality, whether in doctrine, taxonomy, underlying approaches, philosophies, principles or policies. As Goh’s empirical study shows, that commonality is manifest in the principal reason for the citation of foreign (especially English) cases in Singapore courts, including in the law of obligations, namely, the acknowledgment of the origin of the rule or principle in question. It also explains the reason why Singaporean cases themselves are most cited by courts that share Singapore’s common legal heritage, namely, the courts in Australia, England and Hong Kong.¹⁷

Even where the common law of obligations has not remained entirely uniform at the level of doctrines and rules, an underlying unity may nevertheless be identified. One example of this is the fundamental commitment to party autonomy, which shapes numerous doctrines in the common law of contract, explored in Chapter 14 by Sarah Worthington.¹⁸ Worthington argues that it is only in very limited circumstances that the common law’s commitment to party autonomy is trumped by the need to give effect to other social values. She argues that the penalties jurisdiction constitutes an unjustified interference with party autonomy, but in this regard stands alone in the common law of contract, where autonomy otherwise reigns supreme. This argument will no doubt find favour in jurisdictions like Hong Kong (a financial centre) and Singapore (a potential centre of international commercial dispute resolution), which are anxious to develop reputations as jurisdictions that, like England, are strong supporters of party autonomy. On the other hand, the recent expansion of the penalties jurisdiction in Australia appears to throw a strict view of party autonomy open to question.¹⁹ Referring to a pattern of remedial legislation in Australia dealing with unconscionable conduct, unfair terms and unjust transactions, the High Court suggested that there was a ‘need for caution in dealing with the unwritten law as if *laissez faire* notions of an untrammelled freedom of contract provide a universal legal value.’²⁰ At the same time, the Court appeared to endorse one of its own recent decisions²¹ in which it had recognised that the penalties jurisdiction was exceptional because of its interference with freedom of contract.²²

¹⁴ Kercher, above n 10, 163.

¹⁵ Finn, above n 7.

¹⁶ Goh, above n 9.

¹⁷ *ibid.*

¹⁸ Sarah Worthington, ‘Common Law Values: The Role of Party Autonomy in Private Law’, ch 14 of this volume.

¹⁹ *Andrews v Australia and New Zealand Banking Group Ltd* [2012] HCA 30, (2102) 247 CLR 205.

²⁰ *ibid* [5].

²¹ *ibid* [15].

²² *Ringrow Pty Ltd v BP Australia Pty Ltd* [2005] HCA 71, (2005) 224 CLR 656 [31]–[32].

II. Divergence

The forces causing divergence between common law jurisdictions are revealed in the reasons that led to local dissatisfaction with the Privy Council as the final court of appeal for common law jurisdictions. The central force was the conviction that the House of Lords or the Privy Council had, in a number of cases on appeal from overseas jurisdictions, simply gotten the (local) law wrong. There is nothing unusual about this. Appellate courts operating independently of one another will sometimes simply adopt different views as to what justice or policy requires in particular circumstances, particularly in relation to questions that are finely balanced. Inevitably, issue will be taken with the articulation of doctrine and the results in particular cases, particularly where the approach does not accord with views taken in other appellate courts, especially if a majority view is challenged in dissenting judgments. Disagreement and dissent of this nature are an essential part of the development of the common law. They do not result in a change in the hierarchy of courts. Local dissatisfaction with the unified common law model did. This was because its central theme came to be that the Privy Council got local law wrong because it had applied English law.

As Finn points out, the problem was that the English version of the common law was parochial, one that was inappropriate (for whatever reason) in local circumstances or offended local values.²³ In the context of the law of obligations, Finn argues that inappropriateness centred on an unduly formal approach to traditional doctrines that were productive of injustice, and on the failure to exact appropriate standards of conduct in relationships and dealings. The response, at least in Australia, Canada and New Zealand, was to move away from legal formalism, requiring transparent reasoning and rational reasons; and to develop what were seen as appropriate standards of conduct, informed by community standards. Although there are differences between the three jurisdictions, the results of this response include the unconscionable dealings doctrine; the emergence of equitable estoppel; the expansion of fiduciary law beyond the protection of economic interests; the acceptance of the remedial constructive trust; the development of the remedy of equitable compensation; and the uncoupling of compensation and liability. A commonality running through these cases in the three jurisdictions is a concern with 'equity' and 'justice', sometimes expressed in the language of 'unconscionability' or 'fairness'.

The inappropriateness of English law to local conditions can sometimes be identified more particularly than this. Goh gives examples from Singapore that are ultimately attributable to Singapore's chronic land shortage:²⁴ first, the extension of the right to support for land to include buildings on the land, notwithstanding *Dalton v Angus*,²⁵ in order to promote careful building practices in view of high density land use throughout Singapore; secondly, the imposition of liability for pure economic loss on property developers for defectively constructed buildings, contrary to *Murphy v Brentwood District Council*,²⁶ in order to protect the investment in high-cost real property which is the single most important investment that a Singaporean is likely to make in his or her lifetime; thirdly, the creation of a tort

²³ Finn, above n 7.

²⁴ Goh, above n 9.

²⁵ (1881) 6 App Cas 740 (HL).

²⁶ [1991] 1 AC 398 (HL).

of harassment to respond to human interaction in an area of high population density. The second of these examples was supported by reference to Commonwealth authority that had already departed from the English view:²⁷ the third itself provoked the development of a like tort in Hong Kong,²⁸ another small jurisdiction with high population density.

It is probably impossible to encapsulate in a meaningful universal formula the general circumstances in which local courts take the view that the English (or any other) version of the common law is inappropriate. In 1967, when the Privy Council accepted that the High Court of Australia could refuse to follow a restatement of English law, it did so on the basis that the area of law in question (the availability of exemplary damages) was a matter ‘considerably ... of domestic or internal significance’, which was well settled in Australia, and which should be settled by local policy, since this was an area of law largely fashioned by judicial opinion.²⁹ This, of course, left open the question how to identify matters of ‘domestic or internal significance’ and, indeed, why the availability of exemplary damages was an example of such a matter. One suspects that the Privy Council may have had sympathy with the High Court of Australia’s stance because the Council was itself less than convinced by the English restatement of the law of exemplary damages, as subsequent developments in English law demonstrate.³⁰

One circumstance in which the English (or any other) version of the common law cannot be applied, and where divergence necessarily exists between common law jurisdictions, is where a local statute applies directly to cover the issue before the court and that statute is at odds with the common law. Statute also has the potential to effect divergence in the common law in another way: where a court takes the view that it must develop its common law by analogy to the statute or by reference to the policy underlying the statute. In his contribution to this volume, Sir Anthony Mason investigates the approach of Australian courts to this issue.³¹ Unlike the New Zealand courts which have tended to view common law and statute as forming one legal order,³² Mason points out that Australian courts have been reluctant to apply statutes by analogy or to hold that their underlying policy must now dictate the development of the common law. Mason’s essay suggests that there are reasons to think that this aspect of the relationship between common law and statute will not be a major source of divergence between common law jurisdictions: first, because there are a number of technical reasons why such development is complex, including the determination of the scope of the statute; its intended relationship to the common law; the effects of statutory amendment; and the influence that a statute of one part of a federation can have on a general common law of the federation; more generally, because it is often difficult to determine the policies that do underpin statute, not least because there may be a lack of authoritative materials to do so. Moreover, there is a risk that the development of

²⁷ See E Peel and J Goudkamp, *Winfield and Jolowicz on Tort* 19th edn (London, Sweet & Maxwell, 2014) [10-053].

²⁸ *Lau Tat Wai v Yip Lai Kuen Joey* [2013] HKCFI 639, [2013] 2 HKLRD 1197.

²⁹ *Australian Consolidated Press Ltd v Uren* [1969] 1 AC 590 (PC) 641, 642–43.

³⁰ These include a rebellion by the English Court of Appeal (see H McGregor, *McGregor on Damages* 19th edn (London, Sweet & Maxwell, 2014) [13-003]), and a revival of support for exemplary damages: *ibid* [13-006]–[13-008].

³¹ Anthony Mason, ‘A Judicial Perspective on the Development of Common Law Doctrine in the Light of Statute Law’, ch 6 of this volume.

³² See Sian Elias, ‘Public Actors and Private Obligations: A Judicial Perspective’, ch 7 of this volume.

common law by reference to statute may freeze the common law at a point in time, or lead to incoherence in the law—and, whatever it means, coherence does present a potential hurdle to reliance on statute as a source of the development of the common law. Underlying the general reluctance to develop the common law by reference to statute is also the courts' desire to avoid straying into the legislative arena. While acknowledging that judges are now more willing to recast the common law than they once were, Mason has reservations about Andrew Burrows' view³³ that it is now an abandonment of judicial responsibility for judges to refuse to develop the common law on the ground that the development under consideration should be left to the legislature. Mason regards this as too absolute where there is unresolved political controversy about changes in the law; where changes in the law require inquiries that courts cannot undertake; and where the legal system of a particular jurisdiction takes a narrow view of judicial power.

Statutes (and treaties) that create regional arrangements which have consequences for the law of participating common law jurisdictions are, potentially, an obvious source of divergence between the laws of common law jurisdictions. In Chapter 5, Paula Giliker considers the effect of European law on English law, in particular, its potential to control and shape tort law and policy.³⁴ She points to the fact that a European law of strict liability has replaced negligence in product liability claims in England, and to the creation of state liability for breach of EU law. At the same time Giliker points out that there are factors that minimise the impact of European law on tort law. One is the nature of the intervention of European law in England: European law can be passed off as local initiative, and the European Court of Justice leaves to local courts a large degree of control over the development of the law. Another is the view that the English judges have of themselves: they are common law (or global) judges, not European judges. The shared legal heritage of the common law ensures that UK judges prefer to engage with material from other common law jurisdictions, illustrating the point made by some comparative lawyers that a bias for the familiar is more common than a search for the best solution. The empirical studies in this volume support this point. Burrows' study leads him to conclude that it is a 'myth' to assume that the comparative interest of English law has shifted from common law to civil law jurisdictions in the law of obligations;³⁵ while Goh's study shows that, in the years covered by his survey, Singapore courts made reference only to cases from other common law jurisdictions, at least in cases concerned with the law of obligations.³⁶ Giliker draws attention to what she sees as dangers in the current English comparative approach: its limitation to a select 'old Commonwealth club' and a potential failure to engage with materials from other jurisdictions on issues where it is imperative to do so.

A closely related topic is the potential of human rights law to create divergence between common law jurisdictions. In the United Kingdom this arises through the courts' engagement with the European Convention on Fundamental Rights and Freedoms via the Human Rights Act 1998 (UK), and, in other Commonwealth jurisdictions, through constitutional

³³ See A Burrows, 'The Relationship between Common Law and Statute in the Law of Obligations' (2012) 128 *LQR* 232.

³⁴ Paula Giliker, 'A Common Law of Tort: Is there a European Rift in the Common Law Family?', ch 5 of this volume.

³⁵ Burrows, above n 2.

³⁶ Goh, above n 9.

or statutory instruments. In the context of the law of obligations, the impact of this influence is likely to be felt most acutely in tort law. Giliker points out, however, that the UK courts generally retain their control over the development of tort law and policy by drawing a clear separation between claims in tort law and under the Human Rights Act,³⁷ as attested by the recent decision of the Supreme Court in *Michael v Chief Constable of South Wales Police*.³⁸ The development of privacy law is an exception to this. Here the law has clearly been developed in the United Kingdom under the influence of the Human Rights Act. In their contribution to this volume, James Goudkamp and John Murphy expand on this by drawing attention to the differences that now exist in the law of privacy between various Commonwealth jurisdictions.³⁹

III. Convergence

We have seen that a number of factors, linked in time particularly to the decline of British power and influence in the world, have resulted, and continue to result, in once formally uniform common law jurisdictions around the world asserting their legal independence. These factors have resulted in divergences in the laws of common law jurisdictions. Goudkamp and Murphy⁴⁰ argue that this jurisdictional isolation and divergence is ‘self-sustaining’ and a ‘runaway phenomenon’, meaning that the laws of the various jurisdictions will grow ever further apart, each being less relevant to the others in the development of their respective common laws. The early separation of the United States from the United Kingdom is testimony to this. For Goudkamp and Murphy one result of this will be to diminish the likelihood of discovering a universal theory of tort law, which is already proving difficult enough.

It is clear, however, that this has not yet happened. It is undoubtedly true that with jurisdictional isolation comes a concentration on, even a pride in, and perhaps a flowering of, local jurisprudence. Goh’s empirical study shows how the Singapore courts increasingly cited their own decisions once their legal independence was clearly established.⁴¹ This enabled the imported law to ‘be cultivated with an acute awareness of the soil into which it had been transplanted’⁴²—with all that implied. The words quoted in the last sentence are those of Justice Andrew Phang. But the same judge was later to say, in the Singapore Court of Appeal, that, in today’s interconnected world, ‘local courts ought to eschew parochialism’ in the development of the law.⁴³

This points to the fact that, just as there are, and have been, factors driving divergence, so there are factors that promote convergence. Internationalisation or globalisation is an obvious one, especially in the area of commercial law, widely defined.⁴⁴ Indeed, the same

³⁷ Giliker, above n 34.

³⁸ *Michael v Chief Constable of South Wales Police* [2015] UKSC 2, [2015] 2 WLR 343 [123]–[128], [130] (Lord Toulson), cf [196] (Lady Hale).

³⁹ Goudkamp and Murphy, above n 1.

⁴⁰ *ibid.*

⁴¹ Goh, above n 9.

⁴² *Tang Kin Hwa v Traditional Chinese Medicine Practitioners Board* [2005] 4 SLR(R) 604 (SGHC) [27].

⁴³ *Man Financial (S) (Pte) Ltd v Wong Bark Chaun David* [2008] 1 SLR(R) 663 (SGCA) [132].

⁴⁴ Consider Goh’s empirical study, above n 9.

factors that promote divergence may also promote convergence. The EU law that potentially creates divergences between the English common law and the common law of other jurisdictions may also potentially result in convergence between English law and the civil laws of the European Union. And, just as common laws may diverge where it is inappropriate for whatever reason that the common law of one common law jurisdiction should be the same as that in another, so there may be situations in which it is appropriate that one common law jurisdiction should borrow from another. Hong Kong's adoption of Singapore's harassment tort, which has already been mentioned,⁴⁵ is an example of this.

It should also be noted that *some* convergence between common law jurisdictions may be achieved in the recognition of the need to develop the common law judicially, notwithstanding differences in the details of that development. Goudkamp and Murphy draw attention to two developments in the common law that illustrate this: defences in defamation and privacy.⁴⁶ The demand for law reform in these areas arose in the jurisdictions concerned at around the same time. Although, as Goudkamp and Murphy point out, there were, inevitably, a variety of responses from the jurisdictions concerned taking into account their constitutional structures or statutory laws, all the jurisdictions achieved a convergence in the need to develop the common law in these two areas for the purposes of providing a 'responsible journalism' defence in defamation in order to accommodate modern understandings of freedom of expression; and of responding to demands for greater protection of individual privacy than was possible in existing torts. The independent recognition by common law courts in various jurisdictions of the need for the judicial development of the law in these areas is, no doubt, attributable to the strength of the underlying unity of the common law.

Dame Sian Elias draws our attention to how this underlying unity (including the structure, values and methodology of the common law) can, potentially, promote not only convergence between common law jurisdictions but also between bodies of law that are traditionally recognized as distinct.⁴⁷ In her chapter in this volume, she addresses the responses of common law jurisdictions to the understanding of the relationship between private and public law that has arisen, and continues to develop, since the emergence of modern administrative law. Having regard to the nature and responsibilities of government and public bodies, Elias regards that relationship as requiring recognition by private law of what is 'public' *and* of the importance of enforcing 'private rights'—both in such a way that 'the law of obligations should not cede the ground to public law'. In disputes in the law of obligations, this means that the courts must have regard to the fact, where relevant, that one of the parties is a public actor, while at the same time recognising 'the private interests that are involved in correction of wrongs or the fulfilment of promises or the redress of what is unfair or unreasonable and unconscionable'. This is reinforced at the level of remedies: remedies in private law are available as of course (whereas those in judicial review proceedings are discretionary) and are generally unconstrained by separation of powers deference (again, unlike in judicial review proceedings). Elias investigates the implications of her approach in a number of areas of the law of obligations at the interface of private and public law, including: the extent to which implication of contractual terms of fairness, reasonableness and good faith should be informed by public law principles; the

⁴⁵ Above n 28.

⁴⁶ Goudkamp and Murphy, above n 1.

⁴⁷ Elias, above n 32.

reach of fiduciary obligations; and the extent to which compensation for breach of certain torts should overlap with, or be informed by the principles that govern, the assessment of compensation for breach of a corresponding right in applicable human rights law. While the underlying values of the common law in these and other areas may seem to point generally in the direction of convergence, the search for the best solution to particular disputes in individual common law jurisdictions will inevitably be affected by local values. These values may be found in local legislation, and their application may result in divergences with other common law jurisdictions. For example, New Zealand conditions, including the force of New Zealand statute law, justified the refusal of the New Zealand courts to follow the decision of the House of Lords in *Murphy v Brentwood District Council*,⁴⁸ preferring to maintain the liability of local authorities to purchasers of a defectively constructed building for pure economic loss resulting from the local authority's negligence in exercising its statutory functions of approval or inspection.⁴⁹

Of course, in searching for the best solution in controversial cases such as this, common law courts are now able to draw on the decisions of all other common law jurisdictions. What Burrows⁵⁰ and Goh⁵¹ demonstrate in their empirical studies is that, beyond the United States, the courts of jurisdictionally independent common law countries are frequently consulting each other—and to a greater extent than they did in the period of the formal unity of the common law. Leaving aside situations in which the purpose of citation is simply to acknowledge the origin of a rule or principle in the common law or to embellish a judgment with further authority, common law courts cite one another, and analyse each others' judgments, to provide a basis for the development of their own common laws, which may, of course, involve a rejection of developments elsewhere. Burrows points out that it is hardly surprising that this should happen in the English courts. In the past, the Privy Council has been a court that had to engage in comparative jurisprudence. It continues to do so. What has changed since the period of formal unity of the common law came to an end is that the Privy Council and the Supreme Court are now involved in a dialogue of equals with the common laws of the jurisdictions that they formerly controlled. This means, among other things, that English law may follow developments in other common law jurisdictions in preference to existing English law. A good example is the recent decision in *FHR European Ventures LLP v Cedar Capital Properties LLC*,⁵² where the Supreme Court followed the courts in other common law jurisdictions in deciding that, contrary to the English authorities, a bribe or secret commission received by an agent is held on constructive trust for the principal.

IV. Theories of Unity, Divergence and Convergence

What, then, are the respective merits and underlying drivers of unity, convergence and divergence? Should divergence in the common law of obligations be viewed with regret,

⁴⁸ *Murphy v Brentwood District Council* [1998] 1 AC 398 (HL).

⁴⁹ *Invercargill City Council v Hamlin* [1996] AC 624 (PC).

⁵⁰ Burrows, above n 2.

⁵¹ Goh, above n 9.

⁵² *FHR European Ventures LLP v Cedar Capital Partners LLC* [2014] UKSC 45, [2015] 1 AC 250.

or viewed positively, as a manifestation of independence as different jurisdictions adapt the common law to local circumstances and make independent choices in relation to hard questions? Is an increasing divergence inevitable, or are there forces that, at a deep level, hold the common law together? This volume provides a range of different responses to, and perspectives on, these normative and predictive questions.

The divergences between the common law of the United States and those of Commonwealth countries are particularly wide. In their landmark study *Form and Substance in Anglo-American Law*, Atiyah and Summers analysed the distinctive type of reasoning employed in the United States, which inclines more towards matters of substance (morality, economics and politics), while English law inclines more towards form (the application of rules without direct regard to considerations of justice or the consequences of particular decisions).⁵³ The divide identified by Atiyah and Summers is borne out by Peter Cane's analysis of the divergence between US, English and Australian law in relation to the influence of sovereign immunity on liability in tort.⁵⁴ Sovereign immunity remains largely intact in the United States, has been abrogated by extensive exceptions in English law, and has effectively been abolished in Australian law. Cane sees the US approach as reflecting a public law model of tort liability, in which tort liability effectively represents just one of a number of tools for controlling and constraining the exercise of public power. In England and Australia, on the other hand, the tort liability of public authorities follows a private law model which is concerned with redressing wrongs, and which serves the same functions as the tort liability of individuals. The reasons for that divergence are of particular interest. Cane notes and rejects the explanation that the US position is based on a historical misunderstanding by US judges of English law, preferring the view that it is based on different understandings of the relationships between, and respective responsibilities of, different arms of government and, more deeply, on different conceptions of law. The public law model reflects an instrumentalist understanding of law, which sees it as a means to various ends, while the private law model reflects a non-consequentialist view, which sees public authority liability as an institutional analogue of interpersonal justice.

Dan Priel analyses the divide between US and Commonwealth common law at an even deeper level.⁵⁵ His analysis not only points to the basis of that particular divergence, but also offers an explanation as to why attitudes to divergence differ so widely, with some resisting divergence and others celebrating it. Priel argues that our attitude to divergence depends on our understanding of the authority of the common law. On its face the common law appears undemocratic, since it is made by unelected judges. Broadly, there are three ways in which the common law can be seen to have legitimate authority in spite of that appearance. The first approach sees the appearance as deceptive and the common law as fundamentally democratic on the basis that, even if it is not all produced directly by elected representatives, the common law is the product of state institutions operating under democratic control. Law made by the judiciary can on this view be seen as akin to delegated legislation. Secondly, it may be thought the authority of the common law is not dependent

⁵³ PS Atiyah and RS Summers, *Form and Substance in Anglo-American Law: A Comparative Study in Legal Reasoning, Legal Theory and Legal Institutions* (Oxford, Clarendon Press, 1987).

⁵⁴ Peter Cane, 'The Tort Liability of Public Authorities: A Comparative Analysis', ch 8 of this volume.

⁵⁵ Dan Priel, 'The Philosophies of the Common Law and their Implications: Common Law Divergences, Public Authority Liability and the Future of a Common Law World', ch 11 of this volume.

on the state, but on the conformity of its content to an external standard of morality or natural law. The third approach denies that democracy is the only legitimate source of authority, and sees the authority of the common law as grounded in tradition rather than in the authority of the state.

If, following the first view, we see the common law as fundamentally democratic, then unity across jurisdictions may in some respects be an empirical fact but it is not an ideal for which the law does or should aim. The common law, like statute law, is fundamentally local. This democratic understanding of the authority of the common law has long held sway in the United States, and this is reflected in a number of distinctive features of US law, including the practice of electing judges. If, on the second view, we see the authority of the common law as grounded in morality or natural law then we should see (or aim for) universal convergence, not only within the common law but across all legal systems. On this view the common law, like civil law, is fundamentally universal. If, in accordance with the third view, the authority of the common law is grounded in tradition, then common law jurisdictions should aim to maintain unity with each other, and have no reason to converge with civil law. Priel suggests that that divergence between common law systems will inevitably increase as support for the traditional view of the authority of the common law wanes.

Allan Beever strongly embraces the second model of the common law's authority identified by Dan Priel, and analyses divergence from the point of view of that understanding.⁵⁶ Beever sees divergence in the common law as something that is legitimate and desirable, on the one hand, while being regrettable and something to be avoided on the other. The reason for this is that, for Beever, the law aims at a universal moral truth, but we cannot be sure what that truth is. Divergence is desirable because independent common law jurisdictions can engage in experiments in legal justice which ultimately strengthen the common law. Since all jurisdictions are aiming at the same thing, which is universal moral justice, then when two diverge at least one of them must be wrong. Understood in this light, divergences involve disharmony and manifest error, but may be understood as steps on the path towards the perfection of legal justice.

In Chapter 9, Niamh Connolly studies divergence and convergence in the common law through varying attitudes towards public authority liability.⁵⁷ Like Peter Cane, Connolly observes the convergence between English and Australian law in this area, but Connolly sees the movement in those jurisdictions as part of a broader trend across the common law world towards the acceptance of government liability. From Connolly's broader perspective, the United States can be seen even more clearly as an outlier. The other major common law jurisdictions, though advancing in different ways and moving forward at different times, can all be seen to be on convergent paths towards the abolition of governmental immunity. Connolly attributes this convergence to a shared understanding of private law which is grounded in morality and respect for the individual, and which values freedom and equality very highly. This shared conception of private law is inherently hostile to the idea of immunities, which frustrate interpersonal justice and arbitrarily and unjustifiably subordinate individual interests to collective interests. The dismantling of government immunities reflects a shift in legal culture from the nineteenth to the twentieth century in which there

⁵⁶ Allan Beever, 'How to Have a Common Private Law: The Presuppositions of Legal Conversation', ch 10 of this volume.

⁵⁷ Niamh Connolly, 'We'll Meet Again: Convergence in the Private Law Treatment of Public Law Bodies', ch 9 of this volume.

is an increased concern to do justice in individual cases, and a growing reluctance to apply formal rules which may operate unjustly. Connolly also suggests that the rise of the corporation has brought with it a greater comfort with institutional responsibility and accountability, and an understanding that artificial persons are proper targets for liability. These shifts in private law have gone hand in hand with an increased concern in public law with the control of state power and the protection of individual interests.

TT Arvind argues that common law jurisdictions are converging in another direction altogether, which is the direction of a retreat from the common law of obligations, and a shift in emphasis towards other bodies of law.⁵⁸ Arvind sees this trend in the heightened concern in public authority liability cases about the imposition of private law standards interfering with the functioning of public bodies; in the rise of specific statutory regulatory regimes usurping the role of the common law of obligations; and in statutory provisions undermining or restricting common law causes of action. Arvind sees common law jurisdictions moving together in these respects, but sees the common law of obligations as a whole diverging dramatically from its own past. Arvind's answer to this tendency is that we need to bring the state back into our understanding and analysis of the common law of obligations, recognising its role as a form of governance and the functions it serves.

V. Conclusion

It is clear from the essays in this collection that the relations between the bodies of law of independent common law jurisdictions are far from straightforward. Those relations can only be understood in light of their history, since in some respects their interactions continue to be influenced by reactions to past events. Beyond this, the relations are appropriately described in terms of divergence and convergence. Neither is, however, inevitable. In some cases, local circumstances (including the force of statutory law) may dictate divergent solutions in different jurisdictions. In others, the unifying values and methodology of the common law may argue in favour of convergence. One thing is clear: the courts of common law jurisdictions can learn from one another. Speaking for the UK Supreme Court, Lord Neuberger has recently said:⁵⁹

As overseas countries secede from the jurisdiction of the Privy Council, it is inevitable that inconsistencies in the common law will develop between different jurisdictions. However, it seems to us highly desirable for all those jurisdictions to learn from each other, and at least to lean in favour of harmonising the development of the common law around the world.

⁵⁸ TT Arvind, 'Obligations, Governance and Society: Bringing the State Back In', ch 12 of this volume.

⁵⁹ *FHR European Ventures LLP v Cedar Capital Partners LLC* [2014] UKSC 45, [2015] AC 250 [45].