

Comparative Common Law – Common Law Themes

“[a]fter all, that is the beauty of the common law; it is a maze and not a motorway.” Lord Diplock

Class Summary

The course looks at development of key common law themes as they relate to ownership and possession of land. The question will be raised as to whether it is non-sensical to speak of comparative law within a common law system where the countries under consideration all have their roots within the same legal tradition. The key legal theorists in this area, Gutteridge and Watson argue that it is irrelevant to talk about conducting comparative common law as the root of the law is intrinsically the same. However, despite this the fact that there is a similar root does not mean that there is a consistency of application. This is particularly true of the issue of indigenous land rights. Each of the four countries covered (US, Canada, NZ and Australia) have applied and interpreted the common law principles differently. Gutteridge and Watson are in agreement that

“Where the legal systems are closely related as in certain states in America a comparison of legal rules may be intellectually meaningful, but the minor nature of the differences which may exist may limit the significance of the investigation.”¹

Despite these criticisms of the use/relevance of comparative common law there is still value in the practice in particular when informing law reform.

“For the comparatist, this divergence of views from analogous jurisdictions raises important questions of policy in a contentious area and enables discussion to proceed on better informed paths. .. A further utility possessed by comparative common law lies in its predictive value. Although most legal problems which face common law jurisdictions tend to arise in all of them at one time or another, they do not do so at the same time. Accordingly, the way in which an analogous jurisdiction has coped (or failed to cope) with a potential problem system can be of considerable assistance to judges, legislators and others in one’s own legal system. Quite apart from suggesting, either directly or by implication, solutions in other common law countries may alert one to the possibility of the emergence of the problem itself.”²

The application of comparative common law to assist in law reform is particularly pertinent when we are considering the question of native land title in the United States of America, Canada, Australia and New Zealand. Within each of these four countries the development of native title has taken very different forms.

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¹ Comparative Common Law a justification, Frank Bates, The Comparative and International Law Journal of Southern Africa, Vol 14, No.3 (November 1981), pp. 259-277

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Comparative Common Law a justification, Frank Bates, The Comparative and International Law Journal of Southern Africa, Vol 14, No.3 (November 1981), pp. 259-277

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Required Reading

Please read the articles below by following the associated link and then answer the self-check questions:

1. **The Task of Comparative Law in Common Law Systems**

Self-Check Questions

1. What are the positive merits of comparative common law?
2. How does the use of comparative common law help in analogous jurisdictions?
3. Please explain the predictive value of comparative common law.
4. Why is the comparative philosophy of common law important for modern day developments of the common law?

Further Recommended Reading

1. **The Rule of Law and Reconciliation**

Further Self-Check Questions

1. Please define the concept terra nullius and its relationship with common law.

Definititons/Key Terminology

The following expressions and terms are key concepts which are used when discussing comparative common law and native title. Please make sure that you take the time to familiarise yourself with them.

- Native title
- Terra Nullius
- Principle of legality
- Extinguishment
- Fiduciary duty
- Transplantation
- Pluralistic societies
- Doctrine of continuity