Bond Law Review

Volume 12 | Issue 1 Article 9

2000

Commercial Law in the Next Millenium - A Review of the Hamlyn Lectures delivered by Professor Roy Goode

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Abstract
This slim volume consists of four lectures, the forty-ninth series in the Hamlyn Lectures. The lectures are delivered each year under the terms of the Hamlyn Trust which provide for 'the furtherance by lectures or otherwise of the Comparative Jurisprudence and Ethnology of the Chief European countries including the United Kingdom, … to the intent that the Common People of the United Kingdom may realise the privileges which in law and custom they enjoy in comparison with other European peoples'. In identifying the strengths of English commercial law, Professor Goode succeeds brilliantly. In establishing its superiority to the laws of other jurisdictions he fails, admirably, for he eschews a narrow parochialism and identifies the improvements available to English commercial law by borrowing laws, or methods of analysis, from the European and US legal systems.

BOOK REVIEWS

COMMERCIAL LAW IN THE NEXT MILLENIUM - A REVIEW OF THE HAMLYN LECTURES DELIVERED BY PROFESSOR ROY GOODE*

by Ross P Buckley+

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These lectures were delivered in Roy Goode's final year at Oxford before retirement and they serve as an eloquent refutation of mandatory retirement ages.[1] Upon putting down the volume, one is left with two lasting impressions – the extraordinary vitality and adaptability of English commercial law, and the undimmed enthusiasm of the author for it.

Traditionally in law school curricula, Commercial Law is the grab bag subject into which is tossed sales, agency, negotiable instruments and whatever other homeless topic is considered commercially significant. But this is not Goode's definition of the topic. To him 'commercial law represents the totality of the law's response to mercantile disputes. It encompasses all those principles, rules and statutory provisions … which bear on the private law rights and obligations of parties to commercial transactions …'.[2] Thus defined it is a very

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* Goode R, *Commercial Law in the Next Millenium*, Sweet & Maxwell, London (1998).

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1 Though one expects, and hopes, no institution would turn its back on such a resource, and that his essential work of teaching and research will continue unabated.

2 Goode, op cit at 8.

broad and challenging topic; and a topic of which Roy Goode is perhaps the greatest living master.

The four lectures are entitled 'The Shaping of Commercial Law', 'Contracts and Markets: The Challenges Confronting Public and Private Law', 'Property Rights in Commercial Assets: Rethinking Concepts and Policies', and 'Commercial Law in an International Environment: Towards the Next Millennium'. They address a broad canvas of topics – too many to detail here. There are however a number of themes that run throughout. One is the tension between form and substance. Goode contrasts the focus on form of English law and lawyers with the focus on substance and function of their US counterparts. He highlights the similarities between the approach of US lawyers and of accountants everywhere in looking to the economic substance of transactions in classifying them. He also contrasts the English lawyers' preoccupation with legal concepts with the emphasis on legal policy in the US. (In my experience, the way in which U.S. lawyers subordinate form to substance and legal concepts to policy issues remains disorienting for Anglo-Australian lawyers even once the benefits of these approaches are appreciated.)

Indeed, it is in the regard of substance over form, and policy over concept, that the genius of the Uniform Commercial Code lies and it is these very factors which explain why it has not been adopted in England and Australia. On a personal note, I had thought the resistance in Australia to adopting the approach taken by Uniform Commercial Code Article 9 to personal property securities was simply a product of inertia and narrow-mindedness. With the benefit of this volume, I see our resistance as the result of a fundamentally different way of understanding how law works.

These lectures assess English commercial law in a critical light. After many years as a partner in a City law firm and 26 years in academe, Goode would change many things. In contract law, he would make agreements to negotiate enforceable. He would also give the performing party a further option when faced with a default by the other party – the option of suspending performance. Currently if one party defaults the other can either terminate the contract or affirm it and proceed with its performance. What the other party cannot do is suspend its performance until the party in breach indicates it is ready and willing to perform – a remedy the absence of which Goode finds truly astonishing.[3] In cases in which a party expresses a doubt as to its capacity to perform an executory contract, Goode would allow the potentially affected party to request a reasonable assurance of performance – rather than the all-or-nothing response of declaring the party in anticipatory breach. Likewise Goode

3 Ibid at 33-34.

argues for a softer version of the doctrine of frustration – a new doctrine that allows modification of a contract to take account of a change in circumstances rather than the all-or-nothing nature of the present law.

In the law governing financial markets, Professor Goode would do away with self-regulation – believing it to be too much to ask of human nature. Likewise he would abolish limitations on the power of local authorities in their dealings with outsiders and thus solve the *Hazell v Hammersmith and Fulham London Borough Council* problem. He would sweep away all the formalistic distinctions between mortgages, equitable charges, bills of sale, pledges, finance leases, hire-purchase and conditional sales and replace them all 'with a single security interest perfected by a single filing or possession'[4] on the model of Article 9 of the US Uniform Commercial Code. Indeed, he would replace England's entire body of commercial legislation with a US-style commercial code. As he points out, statutes such as the Sale of Goods Act were outstanding for their time – a time before television, computers, modern telecommunications and transport. One cannot expect nineteenth century legislation to serve twenty-first century commerce. His exasperation at the pace, or even the existence, of English legislative reform is quite restrained, in the best of British traditions. However, it does appear to run deep: in Goode's view the English parliament's version of the well-known aphorism is 'if it's broken, don't fix it!'.[5]

Indeed, one of his themes is the contrast between the exceptional quality of the English judiciary and their willingness to change the law, where appropriate, to accommodate changes in mercantile custom and the appalling record of legislative neglect of England's commercial statutes. He also laments the poor record of the United Kingdom in acceding to international treaties concerned with the harmonisation of international commercial law – the most notable of which is the Vienna Sales Convention. He points out that while English lawyers make distinguished contributions to the formulation of these instruments, their country is becoming faintly ridiculous in its reluctance to take them up.

Goode's final plea is for a greater academic commitment to commercial law. In his words, '[w]e need more, many more, academic lawyers in the field than we currently possess'.[6] He could have been writing of Australia. The list of leading Australian commercial lawyers who have left the groves of academe in the past decade is long indeed. It is an understandable trend, but one with distinct adverse consequences for our nation's long-term commercial vitality. Highly trained professionals and highly sophisticated legal systems are part of the

4 Ibid at 64.
5 Ibid at 101.
6 Ibid at 103.

bedrock of the new economy. The crisis in our universities, and it is nothing less than a crisis, imperils both.

No teacher of commercial law could read this volume and not benefit, likewise few teachers of contract law or market regulation could leave the chapter on Contracts and Markets with their perspective not broadened, their understanding not improved. This volume provides the keys to the subject – the eternal policy tensions that survive each change in the law and put into context the difficult questions and cases. Unintentionally this series of lectures provides commercial law teachers with the skeleton of a year-long course onto which needs be grafted only the detail of their local laws. The demanding intellectual work has all been done for a stimulating and deeply educative course in commercial law.

This volume is written with the sure hand and certain perspective borne of long acquaintance and profound understanding. The author's capacity to illumine succinctly that which matters most in commercial law meant I read nearly all of this volume in one sitting. Rare indeed is a law book a page-turner that keeps one up late into the night. In the forty-ninth series of Hamlyn lectures, Roy Goode has produced one.