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INTRODUCTION

On the road (again)

That the common law is a work in progress seems beyond serious dispute. Its history is a tale of judicial innovation in the name of a better fit between law and social justice. Always travelling but never arriving, the common law is in the never-ending process of change. Any honest assessment of the common law's history, therefore, cannot fail to acknowledge that law changes over time. As such, change can be recognised as one of the few indisputable and constant facts of both life and law. As the great and Celtic Robbie Burns put it, 'Look abroad through nature's range. / Nature's mighty law is change'.

Yet, when it comes to the common law, a formidable challenge is to explain the dynamics of that change. In a world in which the common law has a relatively privileged place in channelling political power and regulating people's lives, it has to be asked and answered whether the common law is merely changing or making progress. Indeed, much of the common law's legitimacy and prestige is seen to rest upon the fact that it is not merely changing, but that it is actually improving upon itself. Once understood as a continuing work in progress, the pressing conundrum for lawyers and legal commentators becomes how to explain the tension between the need for both stability and change in the common law – what method, if any, can judges rely upon to negotiate the pushes and pulls of

tradition and transformation? And to do so in a way that makes law into a better, not worse, mode of social discipline or organisation?

Despite robust disputes over the appropriate balance of these forces, there seems to exist a shared commitment to the idea that there is some elusive but enduring means or method by which to locate a workable proportion between stability and change. It is largely recognized that the past does and should matter, but there is widespread disagreement over why and how it matters – how is it possible to balance stability and continuity against flexibility and change such that it results in a state of affairs that is neither only a case of stunted development nor a case of 'anything goes'?

Eschewing any preference for revolution or stasis, most judges and jurists insist that law evolves in a measured fashion. It neither leaps forward convulsively nor stagnates idly, but advances at a slow and steady pace; it not only moves onwards, but also upwards. There is a crafty congruence posited between evolution and progress. For example, in an otherwise unexceptional judgment on personal injury damages, the future Chief Justice of Canada Beverley McLachlin gave expression to the received wisdom on how the common law evolves and progresses:

> Over time, the law in any given area may change; but the process of change is a slow and incremental one based on the mechanism of extending an existing principle to new circumstances. There are sound reasons supporting this judicial reluctance to dramatically recast established rules of law. The court has before it a single case; major changes in the law should be predicated on a wider view of how the rule will operate in the broad generality of cases. Where the matter is one of a small extension of existing rules to meet the exigencies of a new case and the consequences of the change are readily assessable, judges can and should vary existing principles. But where the revision is major and its ramifications complex, the courts must proceed with great caution.

In its relatively short span, Beverly McLachlin's judgment encapsulates and highlights all the motifs of the traditional understanding of how the common law does and should work

both as a general evolutionary process and as a particular resource in individual cases – incremental growth, principled extension, institutional deference, professional competence, political neutrality, cautious revision and, most importantly, progressive development. While she is attuned to the competing demands of tradition and transformation, she is convinced that some satisfactory, principled and long-term trade-off between stability and change is possible and recommended. On this view, the common law is a firmly grounded, finely balanced, ethically defensible, institutionally justified, politically legitimate and self-improving enterprise.

Yet, the occurrence of great cases and their importance in the common law process seems to defy and actually contradict this general assertion. These orienting landmarks on the common law landscape suggest that the belief in such a balancing method is more wishful thinking than anything else. The centrality of great cases to the common law strongly belies its traditional characterisation as a rational enterprise that largely has an existence of its own, is propelled forward in large part by dint of its own intellectual and moral integrity, and is always slowly fashioning itself into a better and more just body of norms. As evidenced by the importance of great cases (i.e., those cases around which legal doctrine swings and is grounded), the common law's development cannot be presented as an evolutionary stairway to juridical heaven in which the judge's role is to adopt an appropriate frame of mind, locate the first step and then confidently follow the flight secure in the expectation that it will lead somewhere good.

Instead, the common law is better understood as a rutted and rough road that has innumerable twists and turns. Crucially, it appears to have no particular final destination; any particular route taken has been chosen from among the countless and constantly proliferating possibilities for change. Efforts to provide maps or timetables for future development are unconvincing. Consequently, any comfort that traditionalists draw from the idea of evolution is cold and, therefore, misleading – there is no idea of progress that is inevitable or ingrained in the common law. Like nature, law is simply

moving on largely in response to the demands and opportunities of its changing environmental situation. Neither always getting better (or worse) nor advancing in any particular direction, it is simply changing. As the science writer Carl Zimmer put it, 'evolution is change, nothing more or less'. What counts as 'progress' is as local, historical and fleeting as any other idea. Like life and law, progress itself turns out to be a work in progress.

There is little basis for lawyers' tendency to insist that the common law's evolution is weeding out the ethically bad stuff from the ethically good material. Even if they could agree on such ethical criteria, it is very hard to make a plausible case that the common law is doing this. Whether by smooth transition or jerky steps, the common law is not moving in one agreed or consistent direction. Even the most traditional commentator is prepared to concede that there are spurts and stalls in the law's development and that the supposed destination to be reached is a moving target. This is the message of great cases. Accordingly, if we are looking to locate some regimen or rule to describe and forecast the future development of the common law, then we can do no better than to subscribe to what one of Charles Darwin's colleagues termed nature's evolutionary path: 'the law of higgledy-piggledy'.

Like nature itself, the common law is a thoroughly pragmatic and piecemeal response to changing social conditions over time. It is a historical and, therefore, political endeavour in which 'anything might go'. That 'anything' rarely does 'go' is an indication not of certain natural qualities to law, but of the persistently constructed constraints of the judicial imagination that need examining for relevance and validity. Ironically (for a process that touts the virtue of constancy and predictability), it is the common law's tendency to stability rather than transformation that baffles. The fact that law changes is a given: the fact that it does so selectively and erratically is what should more engage jurists' attention and analysis.

Moreover, in the same way that a breakthrough decision or great case often occurred as a relatively revolutionary

decision, so there will arise a subsequent doctrinal crisis in which what was once thought settled no longer meets contemporary demands or expectations. It is not so much that the developed doctrine will have run into internal difficulties in the sense of being found to possess latent illogicality or incoherence (although it well might). Rather, the doctrine will be seen to have outlived its substantive usefulness and be discarded for a more responsive and well-adapted set of rules and principles. It is less that the doctrine has been found to be professionally wanting from an internal standpoint and more that it has lost its political salience from an external perspective. In short, law and its particular doctrines are seen to be thoroughly political in their rise, elaboration and demise; legal tradition demands political transformation.

However, while it is reasonable to talk about progress within a particular doctrine, it seems entirely wrong-headed to do more. Talk about overall progress in the common law in the sense that a particular doctrine reaches a level of sophistication, complexity or fitness that makes it somehow perfect or even simply better for all time is silly. The history of the common law demonstrates that all such judgments about doctrinal merit and legal fairness are contingent and conditional (Chapter 6). Because law is always on the move, fixing one problem will often produce problems elsewhere, and what was once a good or adaptive solution might soon become, as the social milieu changes, a bad or maladaptive one. Whatever else it is, therefore, the common law is a work in progress that is always on the move. As such, the history of the common law is as much one of discontinuity and contingency as anything else. Like all histories, the 'progress' of the common law is best understood as a way of coping that is more or less successful in direct proportion to its capacity to achieve substantive justice in the contextual and shifting circumstances. Great cases are the best testimony to that (Chapter 4).

Legal feathers are much more ruffled by sudden switches in direction than slow accretions over time: the tortoise is the chosen symbol of the common law's development, not the hare. Yet, such a traditional 'go slowly' account of the

common law (even when its injunctions are actually being heeded) has nothing to say about what is 'the best thing to do', where to go slowly or whether there are any substantive limits on change – it is all about the pace of change, not the direction of its movement. Again, the common law's progress is not channelled by law's own logic, structure or extant values. On the contrary, the common law simply works itself in line with the mediated pressures of its informing social, historical and political situation. As Brian Simpson colourfully put it, 'the point about the common law is not that everything is always in the melting pot, but that you never quite know what will go in next'. Serendipity is as much the driver of the common law as reasoned development.

As with any other human activity, it can be reported that law involves judges and lawyers making plans and acting upon them. After all, law has always been a rational activity in that people reflect upon what is best to do and how that might be achieved; it is not a game of chance or a blatant exercise of arbitrary action. But there is no 'invisible hand' that works to coordinate the scattered efforts of judicial generations. The pragmatic bent of the common law has made lawyers and judges understandably sceptical about such grand undertakings: the tentative probe is preferred to the systemic overhaul. This is largely because there is a recognition that whether a particular solution is viable or valuable will depend on the prevailing social and political milieu that is susceptible to unexpected change (Chapter 5).

Indeed, in contrast to legislation, the common law's traditional appeal is found in its relatively uncoordinated and organic character: the common law's whole is no greater than the sum of the parts, at least not on some consistent or moral basis. Over time, the quality of the common law's doctrines will occasionally move between being less and more than the sum of its parts, but it will usually be the total of its disparate parts. The common law is chaotic and coherent in relatively equal and contingently shifting measures.

Lawyers cannot claim to resolve the future of the common law as though it were only a professional or technical matter.

It involves matters of philosophy, politics, morality, economics, ideology and much more. There is a technical component, but it is more limited than lawyers would have us believe. And even technical matters are much less 'technical' than lawyers claim (Chapter 7). Working within the common law tradition is invariably a political undertaking in the sense that value choices must be made, and controversial ones at that (Chapter 2). No matter how strenuously lawyers strive to finesse these challenges, they underlie and energize all the technical work that they do. There are no easy or final answers to be discovered. More significantly, there is no method or evaluative standard that will rescue judges and lawyers from these heavy responsibilities of choice and commitment.

By understanding the common law as an organic process as much as a collection of fixed rules, it becomes possible to appreciate that good judging is about practical usefulness as much as systematic tidiness. Being a work in progress, the judicial job is never done and must console itself by accepting that this is for the best, not the worst. Nevertheless, as a work in progress, the common law dares its judicial participants to run that risk. After all, as both the best of life and law have shown, progress is what people make it. And, when it comes to the common law, what lawyers make it will be both their responsibility and their legacy. Great cases are the best testimony to that.

Because contingency is the order of the day, it has to be grasped that the quirky as much as the quotidian is the measure of development and change; yesterday's peculiar is today's prosaic and tomorrow's passé. In such a world, the common law's fabled injunction of *stare decisis et non quieta movere* (i.e., let the decision stand and do not disturb things that have been settled) seems to be an entirely misplaced and unwarranted guideline for lawyers. By relying too heavily on the past to resolve present disputes, common lawyers are likely destined to get the future wrong.

Treating the common law as a work in progress leads to the appreciation that adjudication is a subtle combination of freedom (i.e., judges can cobble together the broad range of

available doctrinal materials into the artefacts of their choosing) and constraint (i.e., judges are historical creatures whose imagination and craft are bounded by their communal affiliations and personal abilities). In this way, 'anything might go'. John Donne's celebration of change as 'the nursery of music, joy, life and Eternity' better captures the kind of attitude that common lawyers should take (and the very best among them have) to their judicial duties.

Rather than resist or resent change, lawyers (and interested observers) should recognize that the strength of the common law is to be found in its invigorating willingness to keep itself open to change and to adapt as and when the circumstances require. Of course, when it is best to change and in what direction change should occur will be an inevitable matter of normative judgment: there is no manual or guidebook to follow in determining when to change or whether such change will be progressive. However, contrary to the reservations of many judges and jurists, the common law has shown that its capacity to adapt to changing circumstances is a vital feature of its historical struggle for both survival and success. Indeed, the common law seems to have been energized by recognizing the force of the old adage that 'when you are finished changing, you are finished'.

Whether particular innovations work over time will be as much a matter of serendipitous accident as deliberate design. Because the environment *will* change (and the only question is how it will change), law will also have to change in order to adapt to those changes. The search for fixed foundations or constant equations to guarantee the common law's progress is as mistaken as it is unrealisable. The best that can be hoped for is that the common law remains supple, experimental and pragmatic. Of course, in being alive to the possibilities of change, it is important for lawyers to resist the temptation to essentialise or deify change. There is no lasting or greater normative appeal to perpetual change than to perennial inertia: the balance between the two will be local, variable and tentative. As the history of the common law and great cases amply demonstrates, it is often possible for there to be change

without improvement, but it is rarely possible for there to be improvement without change – change might be constant, but progress is contingent.

It is a compliment to the political wit and institutional savvy of common law judges that, whatever they or their apologists might say, they have largely taken a pragmatic approach to their adjudicative responsibilities; they tend not to let abstract considerations get in the way of practical solutions. This is not to suggest that the solutions they choose or the changes they make are always the best or even the better ones; this is a matter for social evaluation and political contestation. While they might mouth certain traditional platitudes about the need for predictability and stability in the common law, the judges tend to act on a quite different basis. As the iconoclastic American politician and Supreme Court justice William Douglas put it, 'the search for static security, in the law and elsewhere, is misguided … [because] the fact is security can only be achieved through constant change, through the wise discarding of old ideas that have outlived their usefulness, and through the adapting of others to current facts'.

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IS KILLING PEOPLE RIGHT?

Law and the end of life

The American politician Benjamin Franklin struck a truthful and lasting chord with his declaration that 'the only certain things in life are death and taxes'. While death is inevitable, its circumstances, timing and details are far from certain or predictable. It can occur at any time and almost by any means. As we manage to live longer and more securely, we have begun to demand greater control over the terms and conditions of our own death and dying; we want to avoid some of the humiliation and pain of a long and debilitating death.

Although it is no longer a criminal offence to commit suicide (even if some do consider it a sin or immoral act), many insist that they should be able to enlist the support of others to bring their life to a dignified and planned close. This, of course, has led to a whole series of moral and legal dilemmas. There is almost no approach or stance that does not receive some substantial support. For every advocate of a liberal policy on physician-assisted euthanasia there is another who condemns such possibilities as demeaning and dehumanising. It is an ethical battlefield of weighty principle and enormous implications that not only matches ethical humanists against religious devotees but also pits those in each camp against each other.

As will come with little surprise to many legal observers and social historians, the courts have been placed front and