DISPUTES AND DIFFERENCES

Comparisons in Law, Language and History

Derek Roebuck

DISPUTES AND DIFFERENCES

Comparisons in Law, Language and History

DEREK ROEBUCK

HOLO BOOKS
THE ARBITRATION PRESS
OXFORD
2010

First published 2010 by
HOLO Books: The Arbitration Press
Clarendon House
52 Cornmarket
Oxford OX1 3HJ

Email: holobooks@yahoo.co.uk
www.holobooks.co.uk
and www.centralbooks.com

ISBN 978-0-9544056-2-5

10 9 8 7 6 5 4 3 2 1

Designed and produced for HOLO Books: The Arbitration Press by
Chase Publishing Services Ltd, 33 Livonia Road, Sidmouth EX10 9JB
Printed in the European Union

PREFACE

When HOLO Books suggested they would publish a collection of my articles and lectures I thought my job would be easy: I would track them down, sort them out and get them into Word files, making sure there were no inconsistencies in style. But it turned out to be less simple. There was too much material; some of it was outdated or redundant; there were too many repetitions. Even I got irritated by the brilliant insights of JM Keynes and OW Holmes, which had once illuminated my approach so much that I felt obliged to acknowledge them in whatever I wrote. So some selection was needed. The omitted papers are in the Chronological List of Publications. Most are quite accessible and some are available on www.holobooks.co.uk.

What has survived does not include much early work, which was straight legal stuff on contracts, commercial law and the problems of teaching law to non-lawyers, particularly students of business. It excludes work published in books and readily available elsewhere. The remaining papers were easy to group in four sections: law, language, history and interdisciplinary afterwords. To help to make a story of them, there are introductions to all items and endpieces to some.

I have not stuck to the original text for the sake of authenticity. Those texts are all mentioned in the Chronological List of Publications, with citations for anyone who wants to follow them up. In the footnotes, books of which I am an author or editor are cited just by their title. Full citations of all references are in the Bibliography, which is as full as I could make it, except for classics, from Homer to Joyce, for which citations are a distraction. I hope I have not tried to make what I wrote look better by correcting with hindsight the errors of my youth but I have had no qualms in taking out language which I have learned would offend, particularly gender-specific pronouns, which now look as clumsy as they are unpleasant.

This collection represents the work of nearly half a century. My debts to other scholars, older and younger, are too large and diffuse to list. Some are mentioned in the papers but most are not. If they read this they will know how much I owe them and will, I hope, accept my thanks.

I have had many co-authors. Researching and writing with others has been one of the greatest pleasures of my work. Only now, as I come to read the proofs, do I realise the range of jurisdictions and traditions from which they have come: Australia, China, England, France, Hong Kong, Hungary, India,

Indonesia, Japan, Malaysia, New Zealand, Papua New Guinea, Philippines, Singapore, South Korea, Sri Lanka, Taiwan, Thailand. What I have learned from them has soaked into me so that I can no longer separate it into parts appropriate for acknowledgment. But they are all my friends and would expect no more from me.

I am grateful to the libraries and publishers who have agreed to reproduction. My thanks go specially to Gillian Farrell and Pandora Stinton, who prepared Word files for me, as patiently as they were professional. The subscribers, whose support has been invaluable, deserve my warmest gratitude. The world of publishing has recently recognised what I have known for ten years, that my friend, Ray Addicott, of Chase Publishing Services, is the finest producer of books there is. I am so lucky to have his hand and eye on all of this.

For the last thirty years I have shared all my work with my wife, Susanna Hoe, who has inspired and edited everything I have written. So who deserves the credit and who deserves the blame?

Because I have moved about so much, it may be helpful to add here a curriculum vitae:

1935	born in Stalybridge, England
1953–57	Hertford College Oxford
1957–62	articled clerk, then solicitor in general practice in Manchester
1962–68	Victoria University of Wellington lecturer, senior lecturer
1968–78	University of Tasmania senior lecturer 1968–69, professor of law 1969–78
1979–82	Amnesty International head of research
1982–87	University of Papua New Guinea associate professor, professor
1987–97	City Polytechnic (later University) of Hong Kong founding head, professor of law 1987–97
1994–	People's University of China guest professor
1997–2005	solicitor, England, consultant on international commercial transactions, disputes and arbitration
1999–	Institute of Advanced Legal Studies, University of London, senior associate research fellow
2000–	editor *Arbitration*

Derek Roebuck
Oxford
November 2009

CONTENTS

INTRODUCTION

Chacun à son métier, les vaches seront bien gardées

If we all stuck to our own trade, no doubt the cows would be well looked after but, if our curiosity is to extend beyond cows, we may have to try to understand other people's insights and draw on their experience. No one can be expert in everything but the lines between disciplines are drawn by scholars for their own convenience and it is a dull imagination that sees them as boundaries, let alone fences. I was lucky to be taught classical languages and, when I wrongly thought that they had exhausted my interest, to switch to the study of law. In 1950s Oxford the curriculum was largely legal history, with a good portion of Roman law. So, the comparative approach and inter-disciplinary outlook have come naturally. A lot of the more important parts of the law were scarcely mentioned, including dispute resolution, so I had plenty of opportunity for self-help. It was only when in Papua New Guinea I began practice as a barrister at all levels that I learned some criminal law.

This collection of papers reveals the development of my concern with how people manage their disputes. It begins soon after my first university teaching post gave me the impetus to write. Looking back on it all now, I think I can see a theme or two. The first is the importance of interdisciplinary study, of trespassing in the professional pastures of any expert whose better understanding may help. I find it impossible to comprehend how anyone who wants to understand law can do without the insights of linguistics, history and anthropology for a start. That is subject-matter. Equally important is learning to use other peoples' techniques. The most important bag of tools, the comparative method, is always big enough to accommodate a few more sophisticated ones.

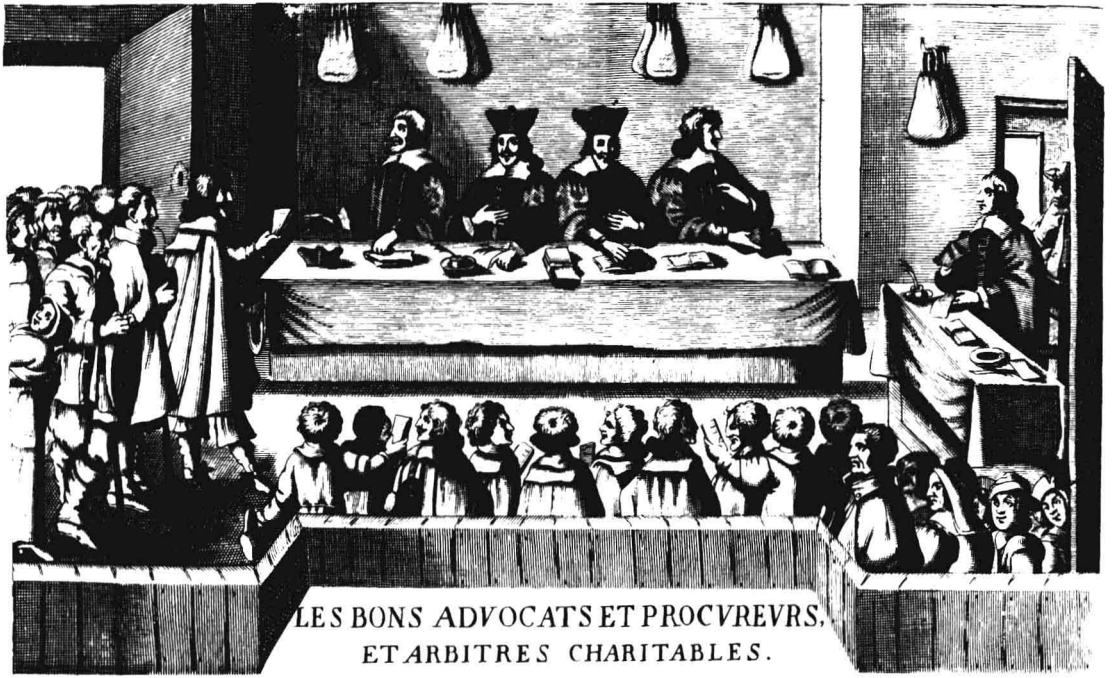
Part 1, on law, moves from a statement of the underlying principles on which I have tried to base my teaching, through my preoccupations with the reform of the law of contract, human rights and peace (particularly the campaign to stop the use of mercenaries), protection of the environment, the relations between customary law and the introduced state law (trying to show the qualities of both and the opportunities to draw from them to build a better legal system) and ending with a typical technical but introductory lecture on a commercial topic.

Part 2 illustrates my obsession with language and conviction that its study, using the methods of comparative linguistics, can illuminate legal problems. It combines historical researches, intended to explode the dangerous myth that the English common law can be transacted only in the English language, with justifications of, reports on and analyses of the creation of a Chinese Digest of the common law in Hong Kong. I hope that the personal enmity, which arose from my attempts to expose corruption, will pass away and will not prevent future generations of scholars and lawyers making use of the work that was done on the Digest when the need for it becomes obvious again.

Part 3 contains the results of the latest and current period of my work, which has been devoted to trying to discover, describe and understand the historical development of methods of managing disputes. It grew out of my long interest in teaching legal history and then the new responsibility I shared with others for the development in Hong Kong of the study of arbitration. It started modestly, as a response to Neil Kaplan's request for a historical introduction to *Hong Kong and China Arbitration*. I thought I might expand those few pages to fill the need for a short introduction to the history of arbitration. But I found working with the patchy secondary sources unsatisfying. So I decided to start at the beginning, with *Ancient Greek Arbitration* and then, thanks to Jan Paulsson's genius in introducing me to Bruno de Loynes de Fumichon, to *Roman Arbitration*. With a digression to Louis XIV's France to preserve and disseminate *The Charitable Arbitrator*, I have since worked on dispute resolution in England. *Early English Arbitration* is the latest product. It brings the story up to AD 1154. I have tried to exclude from this collection material that can be found in those books. I hope further volumes and articles will cover the period up to the Arbitration Act 1697.

Part 4 includes three shorter pieces in which I have dared to make suggestions about the relation of theory to practice. I don't expect I will ever be able to draw any satisfying conclusions but the effort is enjoyable.

1. LAW



IL y en a d'établis en Prouence, ils prennent soin des procés des pauures gratuitement, & les accordent quasi tous à l'amiable, suiuant l'intention & lordonnance d'Henry IV. du 6 Mars 1606. le premier Président, lors, & les gens du Roy dudit Parlement de Prouence, firent promptement executer cette Ordonnance.

Ce bon Prince auoit resolu de la faire executer par toute la France à l'exemple de Venise, la mort l'en empecha.

Les pauures, & les foibles, contiurent nostre Monarque, d'acheuer ce grand dessin de Charité, comme il acheue ces autres grands desseins, de son Ayeul, & en paix, & en guerre.

Sans cela, quelque ferme que l'on fasse, le pauure ne peut esperer de iustice en France, on ne parle point de la rendre gratuitement: Donc il faudra de l'argent, & le pauure n'en a pas.

Mais nostre Monarque, peut d'vne parole, & d'vne seule Ordonnance, (par ces Advocats & Procureurs charitables) bastir au pauure cette forteresse invincible; dont parle l'Escriture, où le foible, la veuue, & l'Orphelin, seront en seureté Ierem. C. 15.

The Good *Avocats* and *Procureurs* and Charitable Arbitrators, from the author's copy of *The Charitable Arbitrator* (1668).

I enjoyed taking responsibility for introducing first year students to the study of law. This is more or less the text of my first lecture to them, which became a chapter in a book, called *The Modern Law* to distinguish it from *The Background of the Common Law*. *The Modern Law* ended up as *An Introduction to the Law in Hong Kong*, which I wrote with Ian Dobinson, now in its second edition but without this chapter. Though this version was written for students in the South Pacific, I have included some such manifesto in the first lecture of all my courses.

STUDYING LAW

I assume that you have not studied law before, that you are reading for a degree in law and that you are at least thinking seriously about becoming a lawyer. I also assume that you live in one of the countries served by the universities of the South Pacific or Papua New Guinea. I can therefore take it for granted that your legal system has been greatly influenced by English law.

Before thinking about law at all, I want you first to think about studying and what it means to be a scholar. That means that I must intrude into your private thoughts. I must ask you some pertinent ethical questions. You may even think they are impertinent. But ethics and law, particularly the practice of law, cannot easily be kept separate. I do not apologise for putting before you three qualities which I believe you have to acquire, develop and apply to all your study.

SCEPTICISM

The first and most important characteristic of the scholar is scepticism. Take nothing for granted! Doubt whatever you are told! Nobody is right all the time. At first, until you find your feet as a scholar, you can be forgiven for accepting – but only for the time being – statements of *fact* by those who lecture or take tutorials or write books. But never from this moment accept any statement of opinion, whatever the source, without putting it through your own mental processes. That procedure has two functions, first to weed out and destroy nonsense (of which there is a great deal in lectures and books) and second to refine your powers of discrimination, to give you a sound technique of thinking. Much of your education so far has been directed, I suspect, to conditioning you to accept rather than to question. This book is intended to make you think.

Avoid the easy roads to decisions and be wary of decision-making formulas! It is very tempting to throw the big burden, the basic thinking, on to a dogma or ideology that you take on trust, without completely understanding it. I am not for a moment suggesting that you should not have a body of belief, a system of ideas that you use as a basis of thought.

But dogmas and ideologies can easily become too comfortable, and be a substitute for thought about any problem you face. The way you tackle a problem should be a *test* of your ideology, which should be made to prove itself continuously or be changed to fit reality.

There is no easy answer. No faith, no natural law, no political dogma, provides a substitute for hard work at collecting evidence and thinking for yourself about what it means. Just as you do not accept anything without thinking about it, do not reject any idea out of hand without a moment's thought. The start of a university career is often the most dramatic moment in your intellectual life just because you then accept responsibility for thinking for yourself. Thinking is often hard work; it can be painful to have to abandon long-cherished prejudices but it can also be exciting. Listening and talking and reading other people's ideas are necessary parts of the scholar's life but you should not let them become substitutes for thought.

SELF-CRITICISM

Scepticism of others' views is not enough. You must be critical of yourself. Scepticism without humility is unbearable. This is a hard precept to follow. For all scholars, and of course that now means for you, the search for truth, through debate or argument or dialectic or whatever word you prefer for the process of testing ideas, is the all-important thing. It should be of little importance who wins the argument. You may object at once that lawyers in practice want to win their clients' cases. They do. But you will be trained and encouraged to become a lawyer with too much integrity to try to persuade a court to accept a legal argument you know to be false. In a university, all that matters is that there has been discussion and that one or more of the participants are the wiser for it. That goes for teachers too and nobody should be a teacher unless their greatest satisfaction comes from being beaten in a good argument by their student.

If there is one function of a university which is paramount it is the preservation of standards of scholarly work. The very nature of the work of a scholar means that these standards have for the most part to be self-imposed. You must come to reject in yourself, as in others, anything that is less than the best possible. A good place to start is in the way you express yourself when making serious communication to another scholar. It is a good idea to accept now the convention that all your written work and oral expression are in that category. This is a matter of pride, not humility, but a proper and even necessary pride for a scholar, the sort that comes from doing a good job.

COMMITMENT

The third requirement is commitment. It is true that in any properly organised world university education would be available to everybody who could benefit from it. But in our world it is not. It is still a privilege and one not

fairly distributed. On you, who have that privilege, falls a heavier burden as a citizen. You are now responsible. You are charged with playing a full part in making the future. Not because you are a member of an elite, which of course you are, but because if you see a duty, you have a duty, whereas those who have not seen it may be excused from performing it. That duty is not discharged by adopting a vague altruism but by being committed to doing – *doing* – what you think ought to be done. What do you want from life? Happiness? Self-fulfilment? Security? Power? The university will help you to get them more fully but ultimately only by showing you how you can take a bigger share of responsibility. You must feel a duty to think and then to act. Not to escape, to evade decisions, to avoid action by hiding in the world of ideas, but to face problems and think out solutions, balancing conflicting interests and taking the moral decision, which you can never delegate, not to a judge, nor priest, nor politician, nor even to your elected representative, nor to the government, nor even to the people. If you do not like things the way they are, you have only yourself to blame if you do nothing about it. The responsibility for the kind of world you and future generations will live in is yours. If you leave the work to others, see what you get! And it will be work – hard and demanding but not unremitting and certainly not unrewarding. The study of law is naturally interesting, being about all kinds of disputes and how they are resolved. I trust this book will not make it artificially dull.

Learning the law is not about learning lists of things or sets of rules. It is not like learning the Highway Code or basic First Aid or the names of the parts of a car engine. It is much more like learning to drive a car and maintain its engine. When you read a law book or a statute or the report of a case, you will not set out to learn the text. You will be looking for the meaning of the words and trying to understand it. By doing that you will be changing your ideas, not only building up your knowledge of your new subject, law, but changing your ideas of other things you know a lot about already: the way the world is run; how power is exercised in your community; how to think about justice and fairness; how people behave as individuals and communities; how they resolve their disputes; and what can be done to change their ways. When we set out to try to understand law, we also need to improve our understanding of many other things.

Education is no good unless it changes us. That does not mean that we have to start to think the way someone else wants us to think. Just the opposite! The more we learn and understand, the more we can have ideas of our own. We become more independent and harder to mislead. Most of what you are going to be reading and thinking about in your legal studies requires you to see something in a new perspective – one which is not a part of everyday thinking – and what you have always assumed up till now will often be challenged.

Whatever your reason for studying law, whether it is because you want to become a lawyer or not, you have now joined a community which takes delight not only in the exchange and increase of learning but in the battle of wits. It has been going on for a long time. One of the earliest law teachers we know much about was Protagoras, who made his living by teaching law in Greece nearly 2,500 years ago. He agreed to teach one clever young man on the following terms: the student would only have to pay Protagoras's tuition fee if he won his first case. Immediately after the last lesson Protagoras sued the student for his fee.

In 1962 I left practice, after five years' experience (including three years of articles) in Manchester and Stalybridge, for New Zealand and my first tertiary teaching job as a lecturer at the Victoria University of Wellington. I had had only one taste of such work. A couple of years before, Anthony Sedgwick, a young barrister I had sent with a brief to Preston Sessions, was detained there overnight. In the middle of the afternoon, he got a message through to ask me to take his class at the Manchester College of Commerce that night at 7pm: two hours on jurisprudence, one pound eight shillings and sixpence. I assumed it would be a class of aspiring company secretaries or first year accountants. I had a degree in jurisprudence and assumed that in this course it would have the same meaning: general law. I just had time to prepare an outline for two hours of lectures. When I arrived I found three men waiting for me, all quite a bit older than me. They were solicitors keen to add a degree to their professional qualification and were in the last year of a part-time course. One was the Town Clerk of Oldham. They were on section 11 of a 20-part module and that night were expecting to discuss Locke. They were good-humoured and gentle with me.

When I arrived in Wellington the academic year had just ended. I was the first full-time lecturer in law in the faculty of commerce. Understandably none of the part-time lecturers who had taught the courses wanted to rob me of the experience of marking 300 papers in Contract Law, 250 in Company Law and a hundred or so in Bankruptcy, subjects I had never taught.

My first teaching assignment was Contract and I taught it thereafter in most of the next thirty-odd years. It was natural that my earliest research interest was in the law of contract, followed quite quickly by the problems of teaching law to non-lawyers.

I gave this paper at the second annual Law Seminar of the Manawatu District Law Society in Palmerston North, New Zealand on Saturday 30 July 1966. It was my first conference paper and intended not only to show off my ideas on contract but also to manufacture an opportunity to stimulate interest in law reform. There were perhaps 60 solicitors there. I had distributed the paper beforehand and set them some preliminary reading of recent cases. The middle part of my lecture was to be devoted to what I still thought of then as the American case-method. Luckily one or two had read the cases and there were others enough whose lack of preparation in no way inhibited their involvement.

THE PRACTICAL EFFECTS OF SOME RECENT THEORETICAL DEVELOPMENTS IN THE LAW OF CONTRACT

INTRODUCTION

Law reform is now a fashionable topic of discussion by lawyers, and that part of a lawyer's work which is rather inadequately called Commercial Law has belatedly won recognition not only as a source of fees but as a proper subject of scholarly endeavour. One might be forgiven for expecting if not some legislative action at least some fundamental analysis in this field. One would be disappointed. The reason is easily discovered. No such questioning of basic assumptions is considered necessary. If ever there were a statue erected to the spirit of the common lawyer, it ought to depict a man in the characteristic pose of slapping himself heartily on the back. Nearly every week we read in the newspapers the 'statements' of 'spokesmen' of eminence that we have our precious heritage of the common law, with its presumption of innocence until guilt is proved, its reliance upon the common sense of twelve tyros as a suitable machine for weighing evidence and, within the ambit of this paper, the supreme gift of freedom of contract.

The criminal and procedural points are obviously outside this paper's scope. But I cannot forbear to ask you, do you really think the French and Germans presume their suspects guilty and convict them unless they can prove themselves innocent? If there is no presumption either way, are we sure that our system is better? It can never be as important to convict the guilty as to acquit the innocent but Lord Parker can be forgiven for suggesting that to acquit the guilty does no good to public respect for the law or to the well being of society. Just how good then is our boast when we claim superiority for the common law? You may very well suspect that differences between common law and civil law systems are in practice not as great as they are often assumed to be.[1] But however they are minimised, the differences that remain are of interest.

In my chosen subject, there are two important differences between the common law of contract and the civil law of obligations.

The first concerns the basics of contractual liability. The common law enforces contracts not because it is wrong to break a promise seriously made and intended to be binding at law, but because a party who has done or promised something for another, in reliance on the other's promise, can properly expect the other to carry out its part of the transaction. In other words, one may expect the law to ensure that the legitimate expectations

1. For a comparison of the common law and civil law systems and a spirited though measured championship of the common law, see FH Lawson *The Rational Strength of English Law*.