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Statutes and The Common Law: The Continuing Story

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Twelve years ago I delivered a paper on what in this country was the unpromising subject of statutes and the common law.¹ There was, it seemed to me at that time, a strange complacency about this subject. We had our canons of construction which were considered to serve us well enough, even if they may on occasion have been difficult to apply.² We had our own creature, the common law, separate and distinct from statute. It buttressed our rights and liberties against untoward statutory encroachment – save in cases where the legislature had spoken with unmistakeable clarity.³ If there was much to be said about the relationship, it did not seem worthy of significant consideration in legal scholarship nor in the curricula of law schools where, in the face of reality, the common law retained primacy of place.

There was something of the Rip van Winkle in this. If it ever was really the case in this country ‘that statute law has not much to do with the ordinary rights and duties between man and man’,⁴ by the last decade of the 20th century statutes had come to dominate the legal landscape. It was to this state of affairs that the common law had to accommodate itself. Hence my original paper.

In an article published in the United States in 1970, two civil lawyers made the obvious but confronting suggestion for civil law and common law systems alike:

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- 1 Paul Finn, ‘Statutes and the Common Law’ (1992) 22 *University of Western Australia Law Review* 7.
 - 2 Cf Chief Justice Murray Gleeson, ‘Judicial Legitimacy’ (2000) 20 *Australian Bar Review* 4, 7.
 - 3 Cf *Plenty v Dillon* (1991) 171 CLR 635.
 - 4 Sir Owen Dixon, *Jesting Pilate and Other Papers and Addresses, Collected by Judge Woinarski* (1965) 13. I leave the matter in this qualified state given the dominant role statute played in this country from the early colonial period: Paul Finn, *Law and Government in Colonial Australia* (1987).

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