

Who Moved My Code? Decoding A Jurisprudential Puzzle of Common Law Codification and the Indian Contract Act, 1872

by **Dr Shivprasad Swaminathan**
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Chairperson: Assistant Professor Tan Zhong Xing
NUS Law

16 April 2019 (Tuesday)
12pm to 1pm

Lee Sheridan Conference Room, Eu Tong Sen Building
NUS Law (Bukit Timah Campus)

ABSTRACT

The codification project pioneered by Jeremy Bentham was supposed to infuse the common law with the rationalism that it had traditionally lacked. The principal factor that supposedly stood in the way of rationalism and irked Bentham no end was the infinite malleability of the common law rule. A code with clearly defined rules which could be objectively identified and syllogistically applied to any case that arose was meant to counter this malleability. Nowhere was this grand rationalist vision more rigorously invoked than in the project of Anglo-Indian codification, of which, the Indian Contract Act, 1872 was a prime exemplar. The Act deliberately left out or greatly modified several rules of English contract law that did not fit in with the rationalist blueprint of the 'will theory' borrowed from the Continent. However, when one fast-forwards by a century, one finds that the Indian courts ended up interpreting the Indian Contract Act in such a way that it came to be virtually indistinguishable from English contract law, warts and all. How did the drafters' plan to rationalize end up going awry?

This paper hypothesizes that this may have something to do with certain underlying jurisprudential issues about common law adjudication that the codification project never fully came to grips with. It argues that the process of common law adjudication involves a non-conceptual or spontaneous coping with a given fact situation through a form of 'tacit knowledge' which causes common law judges to apprehend a case, not in terms of first identifying a rule and then applying it to the facts at hand—even where rules may be readily available in the form of a code—but to reach a solution which in their reckoning is likely to pass muster with the legal community. This tacit dimension of common law adjudication, it is argued, imperils the rational arrangement of the common law into a putative code of objective rules which can be applied syllogistically.

ABOUT THE SPEAKER



Shivprasad Swaminathan is Associate Professor at Jindal Global Law School where he has been an award-winning teacher. He took his undergraduate law degree from Indian Law Society, Pune before going on to read for B.C.L at St. Catherine's College, Oxford; and D. Phil in Law (Jurisprudence), at Balliol College, Oxford as a Clarendon Scholar. He works in the areas of legal philosophy and contract law. He has published in Legal Theory, Jurisprudence, Oxford University Commonwealth Law Journal and Asian Journal of Comparative Law, among other journals; and has publications forthcoming in Modern Law Review and Canadian Journal of Law and Jurisprudence.

REGISTRATION

There is no registration fee for this seminar, but seats are limited.
There is selected light lunch provided upon registration.

Closing Date: **Thursday, 11 April 2019**

For enquiries, please contact Chris Chan at asli@nus.edu.sg

To register, go to <https://goo.gl/Jp2mYk>

Or scan the QR code

