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JOURNAL INFORMATION

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Special Supplementary Issue:
MacDermott Lectures Through the Years

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Celebrating the 50th Anniversary of the MacDermott Lecture Series at Queen's University Belfast

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This year, 2022, marks the 50th Anniversary of the first MacDermott Lecture, an annual showcase lecture delivered at the School of Law, Queen's University Belfast. The MacDermott Lecture is delivered in honour of the late Lord MacDermott, who was Lord Chief Justice of Northern Ireland from 1951–1971. Lord Carswell, a biographer, who came to the High Court of Northern Ireland after Lord MacDermott's death, describes his lordship in the following way:

> When he accepted the post of lord chief justice of Northern Ireland in 1951, returning to his social and intellectual roots, he became for twenty years the dominant legal figure, the conspicuous leader of the judiciary with unchallengeable authority over every court in which he sat. Those who appeared regularly before him remember vividly how he tested and examined each argument, sometimes to the discomfiture of eminent counsel who had just put it forward.
>
> The standards that he set for himself were Olympian, and he attained them by sustained thought and effort, but he could not always see why lesser mortals fell short of them. He was at times impatient in small matters, which gave him the reputation of formidability, but when it came to more important affairs he would rise above this and look towards a larger horizon. Although his tolerance of any whose efforts he thought insufficient was limited, he was always generous to those who strove to reach the levels that he regarded as proper. When he sat as an additional judge after his retirement in 1971, he displayed a deep understanding of people and great humanity in his handling of cases concerning families and the wardship of children.[1]

Lord MacDermott's preeminent position in the jurisdiction and legal history of Northern Ireland is without question. What may be less well known is that his lordship was also deeply rooted in Queen's University Belfast, the institution where this journal sits. The university was not only his lordship's *alma mater*, but also a place where he worked as a

1 Robert Carswell, 'MacDermott, John Clarke' (Dictionary of Irish Biography October 2009).

Lecturer in Jurisprudence between 1931 and 1935, and later as Pro-Chancellor from 1951–1969.

When the first lecture in the series was delivered, it was by Lord MacDermott himself in 1972, at the then Faculty of Law. The *Northern Ireland Legal Quarterly* has occasionally published contributions to the MacDermott Lecture series. In this supplementary special issue we bring together, for the first time, lectures published in these pages from 1998–2022. Contributions are, fittingly for such a prestigious lecture series, by world-leading and renowned commentators. With just two exceptions, Twining, Professor of Law at University College London, whose lecture was in 1998, and Beloff, King's Counsel, whose lecture was in 2014 (although at the time of speaking – and writing in these pages – he was, of course, Queen's Counsel), most contributors serve(d) as judges (or equivalent). These contributions comprise (in (chronological) order of publication): Goldstone, writing in 1999 as Justice of the Constitutional Court of South Africa; Sedley, writing in 2001 as Lord Justice of Appeal, Judge *ad hoc* of the European Court of Human Rights and a Member *ad hoc* of the Judicial Committee of the Privy Council; McLachlin, writing in 2003 as Chief Justice of Canada; Higgins, writing in 2008 as President of the International Court of Justice; Hogan, writing in 2021 as Advocate General of the European Court of Justice (and who is now Judge of the Supreme Court of Ireland); and O'Leary, writing in 2022 as Vice-President of the European Court of Human Rights (and who is now President of that court).

Beyond the following, we largely let the contributions speak for themselves. Indeed, the range of contributions themselves clearly underscores the MacDermott Lecture series as an immensely valuable and much-needed vehicle for the exchange of often fresh and provocative thinking between leading lights of the judiciary, bar and academy, and a deeply engaged audience at Queen's University Belfast. That audience includes legal academicians, members of the judiciary of Northern Ireland, and representatives from the legal professions and across wider society. We hope that you, the reader, find the individual lectures interesting and original contributions that push forward discourse around the law, as well as providing engaging and enjoyable reads.

Most importantly, we hope you share our view that the contributions are a fitting testament to the life and work of Lord MacDermott, a towering figure in the legal history of Northern Ireland, the island of Ireland, and indeed these islands. We are proud to take the opportunity presented by the 50th Anniversary of the Lecture Series to honour Lord MacDermott's contribution and legacy in the pages of this journal.

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MacDermott Lecture 1998: Mapping law†

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> He is no true town planner, but at best a too simple engineer, who sees only the similarity of cities. (Patrick Geddes)
>
> Only the name of the airport changes. (Italo Calvino)

Returning to Queen's is always a pleasure. It is a special pleasure and a privilege to give this particular lecture. Whilst I was here, Lord MacDermott was a towering figure who seemed at once formidable, courteous and friendly. He took a great interest in the Law Faculty; he respected our autonomy, but he was always a reference point when we had important decisions to make. I was much impressed by his willingness to spare the time to come to Faculty events, not only public lectures and Law Society dinners, but also many less public functions. I particularly remember meetings of the Legal Advisory Committee where Lord MacDermott, Professors Sheridan and Newark, the University's solicitor, and George Cowie, the Secretary to the University, argued learnedly and at length over the details of trust documents as if we were in the House of Lords. I stayed silent, but over time I became an expert in some of the more arcane points of the doctrine of cy pres – a branch of learning which I have not since then had occasion to put to any practical use. I also had time to calculate the number of billable hours of high-powered free legal advice that the University was gaining from these lengthy seminars. It is worth remembering that from 1931–35 John MacDermott taught Jurisprudence at Queen's – an experience which probably contributed to his own legal education as well as to

† First published in NILQ 50(1) (1999) 164–173.

* I am grateful for comments and suggestions by Terry Anderson, Oren Ben Dor, Peter Ingram, Frances Miller, Kim Economides, Avrom Sherr, John Stanton-Ife, Ian Ward and participants in seminars at the University of Miami, the School of Oriental and African Studies, and the University of Capetown. I am especially indebted to Michael Froomkin for introducing me to Calvino's *Invisible Cities*.

that of his students.[1] My subject today is jurisprudential: indeed it is close to the centre of legal theory. What is involved in picturing law in general and in depicting and understanding a single legal order?

This lecture is part of a series of explorations about the implications of globalisation for the discipline of law and for jurisprudence or legal theory as its general part.[2] My project is to explore the idea of, and possible agendas for, a revived general jurisprudence in a world characterised by conflicting tendencies of globalisation and fragmentation; of homogenisation and of emphasis on cultural diversity; of bureaucratic rationalism, on the one hand, and post-modern indeterminacy and other kinds of pluralism on the other.

The central question that I shall address is just one part of that agenda: what is involved in depicting law in the world as a whole, or single legal orders, or specific legal phenomena? This may be interpreted as one way of rephrasing the central question of traditional jurisprudence: what is law? I propose to approach this from the perspective of a rooted cosmopolitan,[3] using the idea of mapping as a theme. I shall speak first of geographical maps, and then figuratively of mental maps and of mapping as a metaphor for one way of depicting – that is interpreting, describing, evoking and explaining – a subject-matter of study. The central thread of my argument will be drawn from Italo Calvino's wonderful fable *Invisible Cities*.[4] This takes the form of an imaginary dialogue between the ageing Emperor Kublai Khan and his ambassador, the young Marco Polo. Kublai feels that he can only recover the ability to rule his empire if he can understand, and thus grasp, its underlying pattern; Marco Polo tries to assist by evoking cities he has visited. His accounts can be interpreted either as depictions of

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1 I have recently had the privilege of reading Lord MacDermott's privately published memoirs *An Enriching Life* (1979) which unfortunately only go up to 1936, before his appointment to the Bench.

2 Earlier essays in the sequence are 'Reading Bentham' (1989) LXXV Proceeding of the British Academy 97, esp 129–138; 'General and particular jurisprudence: three chapters in a story' in *Law in Context: Enlarging a Discipline* (1997) ch 8 (hereafter *LIC*); 'Globalization and legal theory: some local implications' 49 Current Legal Problems, Part 2, 1 (M Freeman (ed), 1996) (hereafter GLT); 'Comparative law and legal theory', Lecture SOAS, November 1997 (forthcoming hereafter CLLT); 'Other people's power the bad man and legal positivism, 1897–97' (1997) 63 Brooklyn Law Review 189 (hereafter OPP).

3 GLT 1–2.

4 Italo Calvino, *Invisible Cities* (W Weaver trans 1974) (hereafter IC).

fifty-five different cities or fifty-five depictions of one city, Venice.[5] Here, I shall lean towards the second interpretation.

The flavour of the work and the possibility of suggestive analogies between depictions of cities and legal orders can be illustrated by Marco Polo's account of Esmeralda:

> In Esmeralda, city of water, a network of canals and a network of streets span and intersect each other. To go from one place to another you have always the choice between land and boat: and since the shortest distance between two points in Esmeralda is not a straight line but a zigzag that ramifies in tortuous optional routes, the ways that open to each passerby are never two, but many, and they increase further for those who alternate a stretch by boat with one on dry land.
>
> And so Esmeralda's inhabitants are spared the boredom of following the same streets every day. And that is not all: the network of routes is not arranged on one level, but follows instead an up- and -down course of steps, landings, cambered bridges, hanging streets. Combining segments of the various routes, elevated or on ground level, each inhabitant can enjoy every day the pleasure of a new itinerary to reach the same places. The most fixed and calm lives in Esmeralda are spent without any repetition.
>
> Secret and adventurous lives, here as elsewhere, are subject to greater restrictions. Esmeralda's cats, thieves, illicit lovers move along higher, discontinuous ways, dropping from a rooftop to a balcony, following gutterings with acrobats' steps. Below, the rats run in the darkness of the sewers, one behind the other's tail, along with conspirators and smugglers: they peep out of manholes and drainpipes, they slip through double bottoms and ditches, from one hiding-place to another they drag crusts of cheese, contraband goods, kegs of gunpowder, crossing the city's compactness pierced by the spokes of underground passages.
>
> A map of Esmeralda should include, marked in different coloured inks, all these routes, solid and liquid, evident and hidden. It is more difficult to fix on the map the routes of swallows, who cut the air over the roofs, dropping long invisible parabolas with their still wings, darting to gulp a mosquito, spiraling upward, grazing a pinnacle, dominating from every point of their airy paths all the points of the city.[6]

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5 There is a third, more plausible, possibility – that Marco Polo was using Venice as an implicit point of reference, almost as an ideal type, against which other cities are compared and contrasted:
'There is still one of which you never speak.'
Marco Polo bowed his head.
'Venice,' the Khan said.
Marco Polo smiled. 'What else do you believe I have been telling you about?'
Later he adds: 'To distinguish other cities' qualities, I must speak of a first city that remains implicit. For me it is Venice.' (*IC* 86).

6 *IC* 88–89.

Does not this look like an account of a users' perspective on a legal system?[7]

I have chosen today's topic for two particular reasons. The first is pure nostalgia. Thirty years ago, when I was at Queen's I toyed with the idea of mapping law in the world, but I was left quite dissatisfied with my efforts. So for me this is unfinished business. Second, it is often said that it is easier to see a legal order as a whole in a small jurisdiction than in a large one. Northern Ireland illustrates very clearly that this is a half-truth. The last thirty years have made all the complexities of human relations and local legal ordering more visible than in most places; this jurisdiction is also a clear example of legal pluralism. No legally interested person – whether law student practitioner, law teacher, judge, law-maker, Vice-Chancellor, or citizen – can understand law in Northern Ireland by focusing only on Northern Ireland municipal law. Multiple legal orders are part of the local legal situation. Like it or not, United Kingdom law, the law of The Republic of Ireland, European Union Law, Public International Law, Human Rights Law, and developments in the common law world all bear directly on interpreting local legal issues. So too do different kinds of 'non-state law', a contested idea which is open to several different interpretations. One consequence of globalisation is a tendency to loosen the association of the ideas of law, state, and nation and so to make more salient the multiplicity of legal orderings.[8]

For the purposes of this lecture, I shall assume rather than argue that law is concerned with relations between agents or persons (human, legal, unincorporated and otherwise) at a variety of levels, not just relations within a single nation state or society. One way of characterising such levels is essentially geographical:

- global (as with some environmental issues, a possible *ius humanitatis*, and, by extension, intergalactic or space law);
- international, (in the classic sense of relations between sovereign states and more broadly relations governed, for example, by human rights or refugee law);
- regional (for example, the European Union, European Convention on Human Rights, and the Organisation of Africa Unity);
- transnational (for example, Islamic, Hindu, Jewish law, Gypsy law, transnational arbitration, a putative lex mercatoria, INTERNET law, and, more controversially, the internal governance of multi-national corporations, the Catholic Church, or institutions of organised crime);

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7 OPP 208–213.

8 This is a central theme of Boaventura de Sousa Santos, *Toward a New Common Sense* (1995); see also, John Griffiths, 'What is legal pluralism?' [1986] Journal of Legal Pluralism 24.

- inter-communal (as in relations between religious communities, or Christian Churches, or different ethnic groups);
- territorial state (including the legal systems of nation states, and sub-national jurisdictions, such as Florida, Greenland, Quebec, and Northern Ireland);
- sub-state (eg subordinate legislation, such as bye-laws of the Borough of Camden) or religious law officially recognized for limited purposes in a plural legal system; and
- non-state (including laws of subordinated peoples, such as native North Americans, or Maoris, or gypsies)[9] or illegal legal orders such as Santos's Pasagarda law, the Southern People's Liberation Army's legal regime in Southern Sudan,[10] and the 'common law movement' of militias in the United States).[11]

I shall not discuss in detail which regimes or orders or traditions one might include in a map of world law,[12] but I shall assume that any conception of law that is restricted to the municipal law of nation states and classical public international law, is extremely narrow and probably misleading. Insofar as the primary role of the institutionalised discipline of law is advancing and disseminating understanding of the phenomena of law, one needs a conception of these phenomena that is reasonably inclusive. This categorisation of levels into global, regional, international, transnational, municipal and local is admittedly crude, but it will serve for present purposes. These different levels of relations with which law has to deal are not neatly nested in a single vertical hierarchy. So even this simple categorisation hints at the complexities of mapping law.

In order to proceed briskly to mapping, let me advance two further sets of assumptions by way of assertion. Both are controversial, but I have made the case for them elsewhere.

First, I consider jurisprudence to be the general part of law as a discipline.[13] Jurisprudence can be viewed as a heritage, an ideology,

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9 Recent studies of Gypsy law have been pioneered by Walter Weyrauch. See especially, Weyrauch and Bell, 'Autonomous lawmaking: the case of the gypsies' (1993) 103 Yale Law Journal 323 and Symposium on Gypsy Law (Romania) (Spring 1997) 45(2) American Journal of Comparative Law .

10 The Southern Peoples' Liberation Army has operated a system of courts dealing with both civil and criminal cases in areas which they occupy in the civil war in the Southern Sudan. Monyluak Alor Kuol, *Administration of Justice in the (SPLA/M) Liberated Areas: Court Cases in War-Torn Southern Sudan* (Oxford, Refugee Studies Programme 1997).

11 Susan Koniak, 'When Law risks madness' (1996) 8 Cardozo Studies in Law and Literature 65, 'The chosen people in our wilderness' (1997) 95 Michigan Law Review 1761.

12 On borderline candidates for the designation 'legal orders' see n 131 below.

13 See especially, William Twining, 'Some jobs for jurisprudence' (1974) 1 British Journal of Law and Society 149; *LIC* 110–14.

and as the activity of theorising, that is posing, reposing, answering and arguing about general questions relating to the subject-matters of law as a discipline. As an activity, within the discipline of law theorising has several functions to perform: synthesising or constructing whole views or total pictures; constructing and refining concepts; developing middle order hypotheses and general working theories for participants; intellectual history; and, perhaps most important, critically examining the underlying assumptions of different kinds of discourse of and about law. Here we are mainly concerned with mapping as part of the synthesising function, but, as we shall see, all of the other tasks are relevant.

In this context, particular jurisprudence focuses on the general aspects of a single legal system or order and its constituent phenomena; general jurisprudence focuses on legal phenomena in more than one jurisdiction – i.e. several, many or all legal systems or orders. Generality is a relative matter; general jurisprudence stretches from the relatively local (two or more orders within one region) to the fairly broad (e.g. the common law world or state legal systems in industrialised societies) to the universality claimed by classical natural law theory, Bentham's universal science of legislation, Kelsen's general theory of law and state, Llewellyn's law jobs theory, or macro-theoretical social theories of law. As these last examples illustrate, general jurisprudence can address empirical, analytical, normative and other questions or combinations of them. This is in short a pluralistic vision of legal theorising which includes a variety of perspectives and a multiplicity of levels of generality.

The second assumption that I shall make is that in an era of globalisation, there is a need for a rethinking of the nature and possible agendas of general jurisprudence.[14] Asking basic questions about laws in general – Bentham's phrase – seems to have gone out of fashion in recent times.[15] It is now commonplace to talk of American, Scandinavian, English or Anglo-American jurisprudence without distinguishing clearly between provenance, audience, focus, sources, perspectives and significance.[16] This is curiously inappropriate at a point in history when talk of 'globalisation' is intensely fashionable in the media, in the world of affairs and in many disciplines. We do not need to enter here into the debates between strong globalisers,

14 *LIC* ch 8.

15 J Bentham, O*f Laws in General*, H L A Hart (ed) (*Collected Works* 1970). For a critique of Herbert Hart's flawed attempt in the Postscript to *The Concept of Law* (1994) to revive the distinction between general and particular jurisprudence as a means of reconciling his position with that of Ronald Dworkin, see *LIC* 169–177.

16 OPP at 215–217

such as Benjamin Barber, Boaventura de Sousa Santos, and Anthony Giddens[17] and sceptics who, like Paul Hirst, claim that 'globalising rhetoric' can be dangerously overblown.[18] We can surely agree that the world is increasingly interdependent, that the significance of national boundaries and of nation states is changing rapidly, and that one cannot understand even local law by adopting a purely parochial perspective. Talk of a single global economy, a global communications system, or the global environment is now established, though contested, but the phrase 'global jurisprudence' still sounds grandiose, naive and dubiously trendy. I think that there are good reasons for being cautious, but if law deals with the ordering of relations at local, national, regional, transnational, international and global levels, understanding law involves considering legal relations at all of these levels. In short, in an era of globalization the time is ripe for a strong revival of general jurisprudence.

MAPPING[19]

A standard geographer's definition of a 'map' is 'A representation, usually on a plane surface, of all or part of the earth or some other body showing a group of features in terms of their relative size or position'.[20] The idea of a map is also applied metaphorically to 'the mental conception of the arrangement of something.'[21] I shall be concerned here with both geographical and mental maps.

In considering physical maps one needs to bear in mind some elementary points: what constitutes a good map depends on its purposes, such as navigation or depicting spatial relations and distributions. Maps can serve ideological functions, as exemplified by Peter's

17 Benjamin R Barber, *Jihad vs McWorld: How the Planet is Both Falling Apart and Coming Together and What This Means for Democracy* (1995); Santos (n 8 above); on the much more complex views on globalisation of Giddens , see David Held and John B Thompson (eds), *Social Theory of Modern Societies: Anthony Giddens and his Critics* (1989).

18 Paul Hirst and Grahame Thompson, *Globalization in Question* (1996), cf 'Globalisation: ten frequently asked questions and some surprising answers' (1996) 4 Soundings 47 (issue on The Public Good).

19 On cartography in general I have found the following particularly helpful: J S Keates, *Understanding Maps* 2nd edn (1996), Norman J W Thrower, *Maps and Civilization* (1996); and Peter Whitfield, *The Image of the World: 20 Centuries of World Maps* (1994). By far the best discussion of legal cartography is Santos' essay 'Law a map of misreading ...' reprinted in Santos (n 8 above) ch 7. Santos is mainly concerned with laws *as* mental maps; I am here concerned with mapping *of* law, both territorially and figuratively. However, Santos produces one chart of law in the world, ibid 275.

20 Thrower (n 19 above) 254.

21 The OED 2nd edn (1989) treats this as a 'nonce use', but the metaphor is almost a cliché in legal discourse.

Projection[22] or the exaggeration of the size of communist countries in some American maps during the Cold War period. Small scale maps depict vast areas using limited information highly selectively; large scale maps, such as local ordinance survey maps, contain more detailed information for smaller areas. Maps cannot be exact representations of reality. Indeed, as Santos puts it, they are 'organised misreadings of territories that create credible illusions of correspondence.'[23] This is illustrated by Borges' parable of the Emperor who futilely demanded an exact life-size map of his domains;[24] similarly, Harry Beck's classic map of the London underground which deliberately involved distortion to help users of the system, but was nonetheless both accurate and reliable for its purposes. Modern technology has greatly increased the sophistication and possibilities of cartography, witness for example animated weather maps on television. But maps also have distinct limitations: space is privileged over time; geographical maps are concerned more with physical than social or other kinds of relations; and there are other, often better means of pictorially presenting complex data. It is widely assumed that law is one of the subjects least amenable to pictorial representation, perhaps because it is concerned with largely invisible ideas and social relations. Algorithms, flow charts, logical trees, videos, Wigmore charts and other devices have found their way into law and legal education, but in a televisual and computer-driven era we can expect huge advances in the pictorial presentation of complex ideas and data. Edmond Tufte has already shown some of the tantalizing possibilities in his books.[25]

It used to be assumed that 'Geography is about maps, but Biography is about chaps.'[26] This is an outdated image. Human geographers in particular tend to treat cartography as a rather primitive aspect of their discipline. In recent years, as Kim Economides has shown, their interests have converged with those of socio-legal scholars.[27] However,

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22 In 1973 Arno Peters 'reinvented' a form of cylindrical projection to counterbalance Eurocentric projections of Third World countries. For a critique see Thrower (n 19 above) 224.

23 Santos (n 8 above) 458

24 Jorge Luis Borges, *Obras Completas* (1974).

25 E Tufte, *The Visual Display of Quantitative Information (1983), Envisioning Information* (1990), and Visual Explanations (1997).

26 Edmund Clerihew Bentley, *Biography for Beginners* (1905).

27 Kim Economides. 'Law and geography: new frontiers' in Philip Thomas (ed), *Legal Frontiers* (Dartmouth 1996); cf Chand Wije, 'Applied law and applied geography' (1990) 8 The Operational Geographer 27; Nicholas K Blomley and Gordon L Clark, 'Law, theory and geography' (1990) 11 Urban Geography 433, Nicholas Blomley, *Law, Space and the Geographies of Power* (1994); Paul Wiles, 'A research agenda for analysing crime in cities'(1997) 31 Comparative and Law Review 23.

in this lecture I shall resist the temptation to chase such enticing hares as geojurisprudence or virtual reality constructions of law. Rather I want to explore some rather old-fashioned concerns about why even elementary mapping of law in the world is difficult. I shall concentrate mainly on the theoretical complexities that underlie constructing quite simple overviews of law in large geographical areas through either physical or mental maps.

GEOGRAPHICAL MAPS: KHARTOUM, 1958–61

In my first year of teaching, I was responsible for a course called 'Introduction to Law' in the University of Khartoum. Ignorant of earlier precedents, and inspired by Karl Llewellyn's precept 'see it whole', I decided to begin by setting the Sudan legal system in the context of a picture of law in the world.[28] Instinctively I chose a map as the means of depiction. I was quite conscious of history, but in this context space was privileged over time. I obtained a blank map of the whole world and used a palette of coloured chalks to characterise the legal systems of different countries. The map marked the borders of countries, that is nation-states and various forms of dependency. I do not recall the exact details, but I might have used blue chalk for the common law (deliberately avoiding imperial pink), brown for civilian or Romanist systems, red for Socialist countries, yellow for Islamic Law, and green for customary or traditional law. Countries with 'plural' or mixed national legal systems were clumsily depicted by stripes in different colours.

This first attempt, though consciously crude, helped to make some useful points. First, there were discernible patterns – some countries had relatively pure common law or civilian systems, some were mixed or plural, including countries in the Soviet bloc. Second, these patterns were intimately linked to colonisation and colonialism. Japan, Turkey and Ethiopia were held up as relatively exceptional instances of 'voluntary' receptions.[29] Third, Sudan at the time was a clear example of a plural national legal system that conformed to British colonial patterns even though it had officially been a condominium until independence: imported or imposed 'common law' in the form of off-the-peg statutes and 'codes', English precedents, a handful of reported local cases, and a catch-all reception clause. Both Mohammedan Law

28 On the use of 'total pictures' as one form of context see William Twining, 'Talk about realism' (1985) 60 New York University Law Review 329, at 372–378; *LIC* at 57, 298–299.

29 At the time I treated as exceptional Liberia, Siam and parts of the United States and I did not challenge the idea of a 'voluntary' reception. See, for example, Robert Kidder in Barbara Harrell-Bond and Sandra Burman (eds), *The Imposition of Law* (1979) ch 6.

and customary law were recognised in limited spheres subject to various provisos.[30] Fourthly, the map communicated some simple patterns and yet hinted at some puzzling complexities, such as the relationship between official state law and 'living law' in most of the country, especially in rural areas.[31]

At the time I felt that this map served my immediate purposes. It gave first year students some sense of a wider world and of Sudan's place within it. It set an agenda both for studying Sudanese law as a 'plural' system and for discussing issues about future 'legal development' in a newly independent country. I continued to use it during my three years in Khartoum, but I was vaguely puzzled and dissatisfied. My first ground for dissatisfaction was quite mundane: how could I improve the colour scheme so as to incorporate Public International Law, different constitutional patterns, and a more refined picture of legal pluralism? Such questions are not trivial, but they only scratched the surface. In time I learned that many others had made similar attempts.

Later I discovered that John Henry Wigmore had devised a neat solution to my problem about colours. By using a quite simple mixture of letters and numbers he was able both to depict mixed systems and to give an indication of the Age and Duration of legal systems.[32] But Wigmore's 'solution' compounded my doubts, for his presentation seemed naive and simplistic. Wigmore was a committed populariser and his three volume *Panorama of the World's Legal Systems*[33] and his *Kaleidoscope of Justice* were both overtly directed at general

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30 Civil Justice Ordinance, section 5: 'Where in any suit or other proceeding in a Civil Court any question arises regarding succession, inheritance, legacies, gifts, marriage, family relations or the constitution of wakfs, the rule of decision shall be:
a any custom applicable to the parties concerned, which is not contrary to justice, equity and good conscience and has not been by this or any other enactment altered or abolished and has not been declared void by a decision of a competent court;
b the Mohammedan Law, in cases where the parties are Mohammedans, except in so far as that law has been modified as is above referred to.'
On the difficulties experienced by the courts in interpreting 'custom' during the condominium period, see C d'O Farran, *Matrimonial Laws of the Sudan* (1963) 88–91. A useful overview of the official legal system in the period is Zaki Mustafa, 'Sudan' in Anthony Allott, *Judicial and Legal Systems of Africa* 1st edn (1962), 2nd edn (1970); cf Egon Guttmann, 'A survey of the Sudan legal system' (1956) Sudan Law Journal Reports 6; Akolda Tier, 'The legal system of the Sudan' in K Redden (ed), 6 *Modern Legal Systems Cyclopedia: Africa* (1985) ch 12.

31 On the unrealities of teaching English Law in the Sudan, see *LIC* ch 2, 'The camel in the zoo'.

32 J H Wigmore, *A Panorama of the World's Legal Systems* 3 vols (1928), 2nd edn, 1 vol (1936).

33 Ibid.

audiences.[34] These two works are fairly characteristic of Wigmore's strange mixture of the folksy and the methodical: on the one hand he had an insatiable curiosity and fascination with the variety of things; but Wigmore was known as 'the Colonel' and his simple military mind required that all phenomena, however complex, should be reduced to order and paraded in neat, simple patterns.[35] In *Invisible Cities* 'Kublai Kahn had noticed that Marco Polo's cities resembled one another, as if the passage from one to another involved not a journey but a change of elements'.[36] Wigmore compared the legal cultures of the world to a kaleidoscope: 'When the Basic Pattern revolves, the Prisms Cause Variant Patterns in Different Communities; But the Latent Elements Remain the Same Throughout.' He illustrated this cryptic statement with an incomprehensible picture without any serious attempt at explanation.[37]

I was not alone in feeling uneasy about Wigmore's efforts. Indeed, he had been the butt of such mocking criticism by Plucknett and Goodhart in the *Harvard Law Review* and the *Yale Law Journal* that he had instructed his publishers, Little, Brown, not to submit any of his future publications for review in these journals.[38] In the eyes of some, armchair legal tourism in the style of The *National Geographic* was not academically respectable. This is just one example of a more general tendency to dismiss attempts to give a picture of law in the world as inevitably superficial.[39] My concern is to challenge this view.

A second puzzlement about my map was more theoretical: in a reception what is received and who were the main agents of reception?

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34 J H Wigmore, *A Kaleidoscope of Justice* (1941).

35 William Twining, *Theories of Evidence: Bentham and Wigmore* (1985) 110–111.

36 *IC* 43.

37 *Kaleidoscope*, Frontispiece. While Wigmore's *Kaleidoscope* and *Panorama* each contains some useful tid-bits of information and occasional insights, they are in many respects naive, prejudiced and inaccurate. It would be rather like flogging a dead horse to subject them to detailed theoretical or scholarly criticism. They are probably best treated as curious period pieces.

38 Wigmore also had his defenders, including W Holdsworth and B A Wortley. For accounts of the episode see William R Roalfe, *John Henry Wigmore: Scholar and Reformer* (1977) 259–262, 331 and Twining (n 35 above) 218–219, n 3 (based in part on Wigmore's papers at Northwestern).

39 It is no coincidence that Wigmore's chief critics were based in England. For the first half of the twentieth century was a period in which the intellectual climate was generally hostile to grand theory, historical jurisprudence was marginalised, and the first Professor of Comparative Law at Oxford, Harry Lawson, could say in his inaugural lecture: 'nowadays to be universal, is to be superficial'. (F H Lawson, 'The field of comparative law' (1950) 61 Juridical Review 16). In the United Kingdom micro-comparative studies have almost invariably been preferred to the *Grands Systèmes* approach.

My first venture into print as an academic was an attempt to answer such questions. Drawing on Weber and Llewellyn, I concluded that rules are not the only, nor even the main, phenomena that are transplanted; that the reception of 'lawyers' law' and legal techniques is less problematic than matters that are closely related to local *mores* or political issues of the day; and that the main agents of reception of law as technology are the legal *honoratiores*, Weber's ironic term for the dominant legal elite.[40] This might be interpreted today as an early and moderate version of Alan Watson's famous transplants thesis.[41]

This may have been passable as a first effort, but it did not advance the topic very far either analytically or empirically. In retrospect, I think that I missed an opportunity. I might have developed the ideas much further if I had made issues raised by mapping and reception the focus of a research programme or as part of a final year course in Jurisprudence. The latter would almost certainly have provided a better basis for a theoretical understanding of law in the Sudan than rehearsing the ideas of a somewhat random selection of Western jurists. However, at this stage rather than pursue the matter further, I concentrated on the more 'practical' task of developing local law reporting and thereby missed out on a career in legal cartography.[42]

COMPARATIVE COMMON LAW: BELFAST 1967–72

I was left vaguely puzzled by this youthful effort, but during the next five years my attention was directed elsewhere. However, shortly after I moved to Belfast in 1966, I revived the idea as part of our LLM course in Comparative Common Law. A number of factors stimulated this enterprise apart from my African background: first, teaching in Northern Ireland made one acutely conscious that we were continuously involved in making more or less explicit comparisons with England and Wales, the Republic of Ireland, and more broadly with American and Commonwealth sources and literature. This presented a challenge to Harold Gutteridge's dismissal of the idea of comparative common

40 William Twining, 'Some aspects of reception' (1957) Sudan Law Journal and Reports 229.

41 Alan Watson, *Legal Transplants* (1974), 2nd edn (1993). This has occasioned a great deal of controversy; for a balanced appraisal, see William Ewald, 'The logic of legal transplants: comparative jurisprudence part II', (1995) 43 American Journal of Comparative Law 489, Gunther Teubner, 'Legal irritants: good faith in British law or how unifying law ends up in new divergences' (1998) 61 Modern Law Review 11.

42 On law and geography see above n 27.

law.[43] I was also struck by stories about Montrose's introductory lectures in which he had tried to place law in the context of a map of all learning.[44] This typically bold vision had impressed many Queen's graduates, who reported that they had found it both memorable and way above their heads. Here was a recurrence of the mapping metaphor – another attempt to set a broad context at the start of one's legal education.

Thus stimulated, I devised a group exercise for the postgraduates taking the course on 'Comparative Common Law'. I recently discovered the relevant handout among my papers. It is worth quoting from it at some length. Headed 'Taxonomy: "The Common Law World"', the opening paragraphs read as follows:

> Your course takes 'Comparative common law' as its organising concept. Presumably 'common law' in this context is contrasted with 'civil law', 'Hindu Law', 'Islamic Law', African customary law' and so on. Presumably 'common law' is not contrasted with 'equity' or with 'statute law'. To what extent can we give a precise meaning to 'common law' in this usage? To what extent can we make universal generalisations about 'the common law world'? or broad generalisations, admitting of a few exceptions? What jurisdictions comprise 'the common law world'? Are there useful distinctions to made between 'common law jurisdictions?' Are there distinctive features of some or all of the legal systems in 'the common law world' which are not to be found outside it?
>
> You are asked as a group to look into these and related questions. A possible, but not the only, way of approaching the subject would be to try to plan a map of 'the common law world' within the general framework of a map of the world's legal systems. It is suggested that as a preliminary you need to give careful thought to such questions as: Is it possible to construct a working taxonomy of world legal systems? If so, how? If not, why not? Some of the factors that might be considered as possible bases for classification might be: historical factors (The British Empire? The Commonwealth? Voluntary importation of 'common law', of 'civil law'?) linguistic factors (does the common law operate anywhere in a language other than English?) values (does the common law have a necessary or regular association with certain ideals?); personnel (career judiciary? split profession? juries?); procedures (adversary v inquisitorial?); substantive doctrine (the doctrine of precedent? the

43 'No special form of technique seems to be called for if the comparison is, for instance, between Australian and Canadian law or between English law and the law of the United States.' Preface to *Comparative Law* (1946). Gutteridge also doubted the value of comparing legal systems at different stages of development. (justifying his focus on differences between civil and common law systems).

44 Some idea of the style and vision can be obtained from his 'Address to Queen's University Belfast Matriculation Students' published in J L Montrose, *Precedent in English Law and Other Essays* (Hanbury (ed) 1968) ch 2 (see also ibid ch 7); but I am told that his introductory lectures to first year law students were more expansive.

> trust concept? consideration in contracts?); methods… and so on. From detailed consideration of such factors (the above are only a sample) certain patterns may become apparent. Are these patterns sufficiently clear and sufficiently significant for it to be possible to construct a map, or a series of maps, based on a relatively precise taxonomy?

In retrospect, this appears to me to be a rather demanding exercise in applied jurisprudence. Many of the questions are still worth asking. I have not kept the products of the group projects, but I do recall that discussions of these issues extended over several weeks and, at a general level, we did not get much further than some healthy, but essentially elementary, lessons of complexity: that a single 'scientific' classification of legal systems is impossible even if one has a clear purpose and specified units of comparison; that elucidation of concepts, such as 'legal system', 'legal tradition', 'common law', 'reception', and 'lawyers' law', is an essential precondition to mapping;[45] and that generalisation is dangerous even within the common law 'family'.[46] At least it legitimated the claim that 'comparative common law' deserves recognition as a viable form of comparative law, but I was still left with a nagging sense of dissatisfaction, which was not helped by the existing literature.

At Khartoum I had proceeded largely by instinct. For the Queen's seminar I was better prepared. There was a quite extensive literature on the spread of the common law, on receptions, on commonwealth and colonial law; and almost nothing on multi-lingual legal systems. There was some quite useful but uninspired writing about comparative law theory. The most immediately relevant literature concerned the 'legal families' debate in comparative law. Since the latter is the most obvious precedent it is worth commenting on it briefly.

The classification of legal systems or legal orders into 'families' has been one of the main concerns of macro comparative law – exemplified by Rene David's *Grands Systèmes de Droit Contemporains*, Derrett's *An Introduction to Legal Systems*,[47] and Arminjon, Nolde and Wolff, *Traite de Droit Compare*.[48] The debate has rumbled on for almost

45 See below text at nn 24–36.

46 My views at the time are summarised in a review of J D M Derrett (ed), *An Introduction to Legal Systems* (1968) in 14 Journal of African Law 206 (1970).

47 Ibid.

48 P Arminjon, B Nolde and M Wolff, *Droit Compare* 3 vols (1950–51).

a century and continues today.[49] Perhaps the most sophisticated discussion is that of Zweigert and Kotz who frame the issues as follows:

> Can we divide the vast number of legal systems into just a few large groups (legal families)? How can we decide what these groups should be? And, supposing we know what the groups should be, how do we decide whether a particular legal system belongs to one group rather than another?[50]

Comparative lawyers have struggled in vain to produce a neat taxonomy of 'legal families' in response to such questions.[51] Zweigert and Kotz having rejected attempts to use race or geographical location or relations of production or ideology as the main criterion, limited the idea to the predominant *styles of legal thought* of contemporary living legal systems. On this basis, they identify five factors as central to the style of a legal family:

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49 A recent example is Ugo Mattei, 'Three patterns of law: taxonomy and change in the world's legal systems' 45 American Journal of Comparative Law 5 (1997). The debate about classification of legal systems has been taken more seriously in Continental Europe where the *Grands Systèmes* approach to Comparative Law has been quite influential especially in legal education. Most of the debate is rather tedious and repetitive: the main context is discussion of introductory courses on Comparative Law, and there seems to be a general consensus that legal systems are not susceptible to Linnean type scientific classification and any one of several possible schemes may be adequate for this modest purpose.

50 K Zweigert and H Kotz, *An Introduction to Comparative* Law 3rd edn, Tony Weir (trans) (1997) 63–64.

51 Early attempts to classify by race or geography or solely by origin have generally been rejected by modern comparatists in favour of multiple criteria (eg Zweigert and Kotz (n 50 above) ch 5). Arminjon, Nolde and Wolff favoured 'substance', paying due regard to originality, derivation, and common elements. They produced a division into seven legal families, French, German, Scandinavian, Russian, Islamic, and Hindu. Eorsi constructed a Marxist classification in terms of relations of production, the major division being between socialist and capitalist, the latter being sub-divided into systems at different stages of evolution and different outcomes in the struggle between the bourgeoisie and the feudal class. G Eorsi, *Comparative Civil (Private) Law* (1979) criticised by Kotz, RabelsZ 46 (1982); Rene David's revised classification was into late Romano-Germanic, common law, Socialist and 'other systems', which included Jewish, Hindu, Far Eastern and African; cf the subtle analysis of differences between East and West German doctrine before the fall of the Berlin Wall, which doubts (*n 51 continued*) the explanatory value of differences between 'grand ideology', Inga Markovits, 'Hedgehogs or Foxes?' (1986) 34 American Journal of Comparative Law 113.

Other possible bases for classifying legal systems (but not traditions?) would include wealth (rich/poor countries), form of government (democratic/dictatorship/aristocratic etc), language (anglophone, francophone, other), religious/secular, or climatic.

> (1) its historical background and development, (2) its predominant and characteristic mode of thought in legal matters, (3) especially distinctive legal institutions, (4) the kinds of legal sources it acknowledges and the way it handles them, (5) its ideology.[52]

Zweigert and Kotz , like other scholars, emphasise that there is no single right way of classifying systems. For the purpose of introducing 'the great legal systems of the world' their multiple criteria lead to a seven-fold classification: (1) Romanistic family; (2) Germanic family; (3) Nordic family (4) Common Law family, (5) Socialist family, (6) Far Eastern systems; (7) Islamic Systems; and (8) Hindu law.

Given that they acknowledge some of the difficulties and that there are many hybrids (which include the People's Republic of China, Israel, South Africa, Louisiana, and Quebec), this classification probably serves their limited purpose as well as any other. But it is still deeply unsatisfying.[53] For if the enterprise of picturing law in the world is a necessary part of understanding law, it seems that something more intellectually ambitious is required.

BOSTON 1996

Two years ago, at the start of a seminar modestly entitled 'Globalization and Legal Theory', I set the students an exercise. I asked the class first, to draw a map of the main legal orders in the world, next to draw an historical chart of the rise and fall of the main legal cultures in the world, and then to consider the relationship between the two. This was a modification of the Queen's exercise, but it was more explicitly linked to contemporary legal theory. At our second meeting the students asked for an extension. I granted this, subject to the proviso that their maps or pictures should include classical Roman Law and Islamic Law. At the next meeting, I granted a further extension, but added in the

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52 At 69–75.

53 One obvious point is that the items on the list are not species of a single genus: (1)–(5) could refer to national state legal systems – so could (6), but that raises questions about the reason for choosing this as a category; however, there is no single state whose legal system is today based mainly on Hindu Law. Similarly, Islamic Law has a much wider ambit than the few Islamic states. During the Cold War period it made sense to treat the Eastern bloc as a group, based on ideology and Soviet power, but mixed in with a strong civil law tradition. Since the collapse of the Soviet bloc the situation is more complex. 'Far Eastern systems' refers to a geographical grouping of states which seems rather diverse in respect of style. 'Common law' can refer to historical origin, or a legal culture (ideas and practices and possibly institutions), or tradition, or factors to do with colonialism on the one hand and the growth in importance of English as a world language on the other. Civil law, partly because of its perceived greater translatability, was received in a wider variety of historical situations. But there it is now widely acknowledged that in some respects there may be more important differences within 'the civil law family' than between that family and 'the common law'.

lex mercatoria, *ius humanitatis*, and Pasagarda Law – that is the legal order of illegal squatter settlements in Brazil as depicted by Santos. Each time they asked for an extension, I added further candidates for inclusion. Around about the sixth week they gave up and we discussed why the exercise was problematic.

Rather than reconstruct our discussions, let me state my own position on the reasons why earlier attempts have been flawed, my own as well as those of Wigmore and the *Grands Systèmes* comparatists.

GEOGRAPHICAL MAPPING: A POST-MORTEM

I have now reported a sense of dissatisfaction with several previous attempts to present an overview of law in the world through maps. What are the main sources of this dissatisfaction? Can anything constructive be rescued from such exercises? Or is legal cartography as an enterprise doomed to failure? Each of the examples considered involves illuminating errors.

To start with my first effort in Khartoum. Aside from my conscious puzzlements, at the time I did not question a number of assumptions that I would now reject. Three in particular are significant:

First, I just assumed that what was to be mapped was the national legal systems of 'countries' and that the starting-point for classification was national and state borders. My map included colonies, and subordinate jurisdictions, such as Canadian provinces, but did not provide for Public International Law or even for Islamic Law, except as a subordinate part of the law of secular states. It completely omitted candidates for the appellation 'legal orders' at the global, regional, transnational, communal and local or sub-state levels. Most legal maps that I have come across make the same dubious assumption.[54]

Second, I unconsciously privileged common law and civil law by depicting almost all national legal systems as belonging to one or other of these two 'parent families'. Indeed, I used this to emphasise the importance of colonialism in the spread of law. This same assumption still dominates the study of comparative law today. From an historical perspective the idea of 'parent' legal systems has some justification, even if it is patronising.[55] But the concept is past its sell-by date. For example, in 1998 who is the 'parent' in matters legal as between Scotland and England, or the United States and the United Kingdom? Or between the international community and nation states in respect of bills of rights? If Alan Watson is even half-right in suggesting that imitation is the main engine of legal change, the interaction between

54 Santos (n 8 above) is a notable exception.

55 Another standard justification is one of economy. The argument goes that 'parent systems' can conveniently be treated as representative of their respective 'families'. However, this argument too is becoming increasingly questionable.

legal systems today can hardly be characterised as being like that between parent and child.[56]

Thirdly, in Khartoum I had glossed over the problem of taxonomy of legal systems. By the time I revived the idea in Belfast, I was familiar with debates among comparatists about legal families and they featured in our discussions about comparative common law. In raising questions about how far one can generalise across the common law world, we went beyond state legal systems to include the more elusive ideas of 'culture' and 'tradition' and we had a stab at exploring the relationship between law and language in multi-lingual societies – still a seriously neglected topic.[57] All of this was an advance, but the focus was still on state law; for example 'legal pluralism' was still conceived in the weak sense of pluralism within official legal systems rather than in the strong sense of a multiplicity of overlapping orders co-existing within the same territorial or social space.[58]

We recognised that all the standard taxonomies, such as those of Rene David, or Arminjon, Nolde, and Wolff were unsatisfactory, but we did not get to the root of why this might be so. What is wrong with them? A satisfactory taxonomy needs to have a clearly defined purpose or purposes; clear units of comparison; precise and definite differentiae; and, ideally, non-overlapping species that exhaust their genus.[59] Within the legal families debate these conditions are generally not satisfied.

First, *purpose*. The most common use has been to introduce law in general or a particular legal system to beginning law students or as an introduction to comparative law or to a non-specialist readership. Most of the *Grands Systèmes* debate has taken place in the context of introductions to elementary courses on comparative law. Such *introductory mapping* can serve a very useful function in providing a general context for particular studies. My own modest effort to set the Sudan legal system in the context of a picture of law in the world had a similar aim. The tendency of comparatists is to move fairly smartly from macro- to micro- comparison, very sensibly given the difficulties. For such modest purposes a relatively crude overview is probably

56 Watson (n 41 above).

57 In many countries only a minority of the population speak the official language(s) of their state legal system. This is a neglected issue which is quite different from the much more discussed topic of the comprehensibility of legal language to ordinary speakers of that language. On the politics of official languages, see David Crystal, *English as a Global Language* (1997) and references there. The most extended account of language policy in relation to law is L J Mark Cooray, *Changing the Language of the Law: The Sri Lanka Experience* (1985).

58 Griffiths (n 8 above), Teubner (n 41 above).

59 Max Black, *Critical Thinking* 2nd edn (1952). However, Black observes of the last requirement that 'in practice this ideal is seldom attained' (at 224).

adequate; it can take many forms, and the relative merits of different taxonomies hardly deserve serious theoretical attention.

However, for the purposes of developing a modern general jurisprudence the approach to constructing total pictures of law in the world needs to be more systematic and rigorous. The more intellectually ambitious enterprises of a Leibniz or Blackstone or Austin are designed to provide a conceptual basis for systematic enquiry.[60] Such *foundational mapping* is a more serious matter: for example, Duncan Kennedy in his critique of the structure of Blackstone's *Commentaries* argues that what purports to be a systematic presentation of an internally coherent system is really a justificatory apologia that masks the inherent contradictions of the common law.[61] The general part of Austin's ideas, especially his agenda for jurisprudence and his command theory of law, have attracted the most criticism. His defenders may argue that these can be interpreted as little more than general prolegomena to the detailed analyses which represent his most worthwhile contribution. My own view is that some such prolegomena are not best treated as mere prefatory grace notes. In legal theory, as in political and social theory, elucidation of abstract concepts is a critically important task. It is particularly difficult to identify or construct concepts that transcend different cultures and, for this reason, the decline of general analytical jurisprudence – at least in the English-speaking world – is a matter for regret.

Second, *levels of comparison*. If one's list of candidates for mapping includes various kinds of non-state law as well as national and sub-national state systems, then it is difficult if not impossible to find a single basis for classifying them: Scots law, common law, New York law, Islamic law, Pasagarda law, and European Union Law are not species of a single genus. Many of the candidates for inclusion in a reasonably comprehensive map of world law do not respect national boundaries: Islamic Law, *lex mercatoria*, canon law, or Roman law for example; other candidates, such as European Union Law and Public International Law transcend state boundaries but are intimately related to sovereign states; some, such as Mississippi law

60 See text to n 79 below.

61 Duncan Kennedy, 'The structure of Blackstone's commentaries' (1979) 28 Buffalo Law Review 205.

or Dinka or Maori law, are confined within national boundaries.[62] To depict legal orders dealing with global, international, transnational, regional, and local relations, as well as national, requires some differentiation of levels of classification. Each level will require its own differentiae. Most standard taxonomies are confined to one level, that of municipal law.[63]

Third, even assuming that the focus is on state law, it is unclear whether the units of comparison, what is being compared, is systems, orders, cultures or traditions. Sometimes these are run together so that the classification does not consist of species of a single genus. In other words it is by no means clear what legal families are families of.[64]

The most common is 'legal system'. Most comparatists either explicitly or implicitly treat 'legal systems' as the unit of comparison.[65] but this is used ambiguously: German law, Islamic law and African law are 'legal systems' in quite different senses.[66] For example, Zweigert and Kotz divided legal families into eight groups: Romanistic, Germanic, Nordic, Common Law, Socialist, Far Eastern Systems, Islamic Systems, and Hindu Law. Some schemes include African Law and Chinese Law. Whilst some of these categories could be interpreted as families of

62 In the case of the Dinka, their traditional law has in practice had a much wider scope than that recognised by the state: indeed, the scope of Dinka law depends upon one's standpoint: it has a very limited scope in the national legal system of the Republic of the Sudan, a very wide scope in the life of the Dinka people, and an intermediate position in the areas occupied by the Sudan People's Liberation Army. See further the discussions of administration of justice in the Southern Sudan and the 'common law movement' in the United States (above nns 10 and 11). For a sceptical interpretation of the notion of 'customary law' in colonial settings, see Martin Chanock, *Law, Custom and Social Order* (1985).

63 But see, for example, R Dehousse, 'Comparing national EU law: the problem of level of analysis' (1994) 42 American Journal of Comparative Law 761; a more sceptical view is being developed by Ian Ward, eg, 'The limits of comparativism: lessons from UK-EC integration' (1995) 2 Maastricht Journal of European and Comparative Law 23. See further below PAGES 30-31.

64 See, for example, Pierre Legrand, 'Comparative legal studies and commitment to theory' (1995) 58 Modern Law Review 262, 267.

65 Eg Ake Malmstrom, 'The system of legal systems' (1969) 13 Scandinavian Studies in Law 129; Arminjon et al (n 48 above). Rene David, *Grands Systèmes de Droit Contemporains* (1970), Zweigert and Kotz (n 50 above) ch 5, Peter de Cruz, *Comparative Law in a Changing World* (1995), entitles his ch 2 'The classification of legal systems into families'.

66 If 'legal system' is used in a precise sense, for example the state legal systems of all members of the United Nations or, more broadly, those legal orders that satisfy some recognisable juristic criteria for the existence of a legal system, such as those of Hart or Kelsen, then it is not possible to accommodate some of the standard candidates such as Islamic, Hindu, or African law. If one substitutes 'tradition' or 'culture', the terms are so vague as to raise serious doubts of their being used for any precise or useful system of classification. See the discussions in David Nelken (ed), *Comparing Legal Cultures* (1997) esp chs 1–4.

municipal or state legal systems, this is not the case with Islamic, Hindu or African law. Hindu law can be interpreted as a system of concepts and principles, but not as a state legal system anywhere; while there are a few officially Islamic states, Islamic Law is surely not confined to them.[67] Similar considerations apply to other bodies of 'religious law' such as Jewish or Bhuddist law or stateless cultures or traditions such as 'Gypsy Law'. Socialist law or socialist legal systems refers to national legal orders strongly influenced by a particular political ideology at a particular phase in history. Even before the 'collapse of socialism' this was an uneasy category. The term 'African Law' was originally coined to refer to traditional or customary law of African peoples; it is hardly ever used to refer to the national legal systems of modern sovereign states in Africa.[68]

Fourth: Part of the legal families debate has centred on the differentiae of classification. There are almost as many ways of classifying legal systems or orders as there are for cities and countries. Race, language, stage of economic development, ideology, historical origin, substantive concepts and 'institutions' and even climate are among the factors that have been suggested.[69] The more sophisticated attempts at constructing a taxonomy of legal families have insisted on multiple criteria of classification – for example, Zweigert and Kotz, in respect of styles.

While the emphasis on history and factors in addition to substantive doctrine is welcome there is a danger of reductionism in this approach. For example, the idea that there is a single characteristic or predominant[70] mode of thought in the English legal profession

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67 One can view Islamic law from a variety of perspectives: for example, as a system of norms, or as a body of ideas, or as a culture involving practices and interpretive styles as well as ideas, or as a tradition which involves change or development over time in respect of all of these – even in a system decreed by God. If one looks at Islamic law in Saudi Arabia or Sudan or Iraq or England, in order to understand it one will need to consider local history, institutions, personnel, and practices as well as norms and ideas and culture.

68 While there is a body of legal theory providing criteria for identifying the legal systems of sovereign states or parts thereof, the same is not true for the vaguer 'legal traditions' and 'legal cultures'. For the legal systems of nation states there are identifiable units, one can count the members of the United Nations or the number of legal orders that satisfy Hart's or Kelsen's or some other mainstream jurist's criteria for the existence of a legal system. There will of course be a few borderline cases.

69 de Cruz (n 65 above) 34; Zweigert and Kotz (n 50 above) 63–69. One could turn to classifications used in other disciplines, such as economics, politics, and geography. Comparatists often use the term 'institutions' to refer to concepts such as contract and trust, rather than in a broader sociological sense.

70 de Cruz (n 65 above) talks of the 'predominance principle' in relation to styles or mentalities, at 33–34.

assumes that the profession is monolithic and that all that English lawyers think about is questions of law.[71]

Similarly, when comparative lawyers contrast the characteristic 'styles' of thought or 'mentalities' of civilians and common lawyers, they seem to make the big assumption that differences between common law and civil styles are more significant than differences within a given legal culture or tradition. But an equally plausible alternative hypothesis is that within most legal cultures there is a constant tension between formal and substantive, literal and purposive, and other more nuanced contrasts that one finds within our own tradition.[72]

This Cook's Tour of some previous attempts to use geographical maps to depict legal phenomena suggests a number of lessons, including the following:

First, if one accepts that there are different levels of legal relations and legal ordering, the phenomena of law are probably too complex to be depicted on a single map or picture. At the very least one would need something more like a historical atlas, with a series of different kinds of maps and charts, using different projections, scales, time frames and "classificatory" categories. Some maps could use countries or nation states as an important unit of analysis, some would be better to ignore national boundaries. In *Invisible Cities*, Kublai Khan in his search for order and patterns has an atlas that depicts continents, sea routes, and particular cities that Marco Polo has visited or heard described. It also reveals possible cities that do not yet have a form or name.[73] 'In the last pages of the atlas there is an outpouring of networks without beginning or end, cities in the shape of Los Angeles, in the shape of Kyoto-Osaka, without shape.'[74]

'I think you recognize the cities better on the atlas than when you visit them in person,' the Emperor says to Marco Polo, snapping the volume shut.

And Polo answers: 'Traveling, you realize that differences are lost: each city takes to resembling all cities, places exchange their form, order, distances, a shapeless dust cloud invades the continents. Your

71 On reductionism in respect of 'the lawyer', 'the legal mind', 'legal method', and 'skills' in the United States see *LIC* ch 16 and 17.

72 Ibid.

73 *IC* 137–139.

74 *IC* 139. It has been pointed out that Kublai Khan's atlas does not produce a single overall order: 'There is no global map, only a sheaf of insets of hypothetical cities in an atlas whose order is either unknown or fanciful.' Albert H Carter III, *Italo Calvino: Metamorphoses of Fantasy* (1987) at 120–121.

atlas preserves differences intact: that assortment of qualities which are like letters in a name.'[75]

A second lesson of my tour has been that geographical maps are just one means of depicting 'mainly spatial' relations. They have their uses; indeed, a reasonably; sophisticated historical atlas of law in the world could be quite illuminating and I know of serious scholars who have contemplated such a project. But maps mainly depict physical relations and distribution and, as such, they have a restricted application to legal phenomena.[76]

After nearly a century of unsatisfactory debates, it is natural to ask two questions: are all attempts at a systematic classification of legal systems or legal families doomed to fail? If so, does it matter?

The *Grands Systèmes* approach of macro-comparison has sometimes been dismissed as superficial or unscholarly or of little or no utility.[77] Such criticism may be valid when applied to poorly executed examples or to very general treatments that never get down to concrete details. However, there are good reasons for taking the enterprise of mapping the phenomena of law in the world quite seriously.

First, setting the local in the context of the global serves the values of any form of contextual study – for example, maintaining a sense of scale and proportion; avoiding the dangers of parochialism; establishing the relationship of the subject of study to others. For example, my attempt to get Sudanese students to see their national legal system as part of a broader world picture had a worthy aim, even if the execution was faulty.

Second, micro-comparison presupposes macro-comparison; they are complementary rather than alternatives. In so far as legal systems or cultures are organic, it is necessary to set even the most detailed object of study, an institution like the ombudsman, or local contract doctrine, or even a single rule, in the context of some larger whole. Even the most narrow formalist wishes to see a particular rule as part of a system of rules or rules-and-principles; seeing whole legal systems in a broader world picture is taking the process one stage further.

Thirdly, if one task of jurisprudence is to construct a coherent 'total picture' of law; one job for general jurisprudence should be to construct such a picture for legal phenomena in the world as a whole. This is not just an exercise in abstract theorising. A skewed vision of law can have all sorts of practical implications – witness, for example, the incredibly

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75 Ibid 137. This passage might give comfort to both convergence and *differance* theorists, on which see Richard Hyland, 'Comparative law' in Dennis Patterson (ed), *A Companion to Legal Philosophy and Legal Theory* (1996) ch 11.

76 See above n 27.

77 Eg Watson (n 41 above) ch 1; cf Basil Markesenis, *Foreign Law and Comparative Methodology* (1997) ch 1.

delayed response of our systems of legal education and training to human rights law and membership of the European Community; the confusion created by *ad hoc* responses to quite predictable aspects of the internationalisation of legal practice; and the naivety of some attempts at harmonisation of laws.

It is interesting that the debate about 'families' and mapping world law has taken place largely within comparative law with almost no help from legal theory. Yet the problems of mapping law are essentially jurisprudential. The difficulties that face anyone trying to construct a map of law in the world are familiar problems of legal theory: what is the subject of our study? On what basis does one decide to draw a line between 'legal' and 'non-legal' phenomena? How can legal phenomena be classified? and so on. The key point is that geographical maps presuppose mental maps. That is to say they are means of presenting pre-existing concepts and data. The main weakness of my own early attempts and those of Wigmore and others,[78] is that they were jurisprudentially naive. The problems underlying the 'legal families' debate are almost entirely conceptual; the debate brings out the point that there are questions and doubts about purposes, levels, units of comparison, differentiae, and over-generalisation that need to be addressed before one can produce a satisfactory overview of law in the world. This seems to me to be a neglected job of analytical jurisprudence. So we need to proceed from geographical to mental mapping.

MENTAL MAPPING

The metaphorical use of 'map' as 'a mental conception of the arrangement of something' is quite common in legal theory. For example, Leibniz talked of a *theatrum legale mundi*;[79] Blackstone[80]

78 See pages 152–156 above.

79 Leibniz, *Nova methodus discendae docendaeque jurisprudentiae (1667); Theatrum legale* (1675); Patrick Riley, *Leibniz' Universal jurisprudence: Justice as the Charity of the Wise* (1996).

80 W Blackstone, *Commentaries on the Law of England* 1st edn (1765) I.1.35. Blackstone's concern was to present English law, especially the common law, in a systematic or scientific fashion by identifying the basic principles that gave it coherence. The most germane passage is worth quoting: '[The academical expounder] should consider his course as a general map of the law, marking out the shape of the country, its connections and boundaries, its greater divisions and principal cities: it is not his business to describe minutely the subordinate limits, or to fix the longitude and latitude of every inconsiderable hamlet.'

and Austin[81] used mapping as a metaphor for providing general overviews of English law. More recently post-modernists, such as Santos and Goodrich, have used the metaphor in more complex ways. Perhaps the most important example is Santos' well-known essay 'Law a Map of Misreading'[82] in which laws themselves are presented as maps that both distort and construct social relations. Mainstream theories of law, such as those of Kelsen, Hart, Llewellyn or even Dworkin, can be interpreted as attempts to construct one kind of mental map of state legal systems.

In an earlier lecture I began to explore how far mainstream theories that have focused on municipal legal systems and that treat societies as enclosed units can be adapted to apply to other levels of legal ordering and deal with the complexities of the phenomena of legal pluralism.[83] There is much more to be said about mainstream legal theory as mental mapping, but here I shall confine myself to some less obvious examples: global statistics; the increasingly fashionable use of rankings at global, national and other levels; and some different ways of profiling a legal system or order. What these have in common is that they are examples of mental maps.

GLOBAL STATISTICS AND RANKINGS

Almanacs, encyclopaedias, and world surveys are a long-established phenomenon. The first edition of the *Encyclopaedia Britannica* was published in 1768–71.[84] In the last twenty years there has been a striking increase in the production of data, mainly but not entirely statistical, presented in standardised forms that provide, or purport to provide, a basis for world-wide comparison. Tabulated information is widely used in fields such as population, economics, health, and education. Well-respected examples include the *Britannica Yearbook*, *The World in Figures* (published by *The Economist*) and reports by United Nations agencies, the World Bank and IMF. Some of the best-

81 J Austin, 'The uses of the study of jurisprudence' in *The Province of Jurisprudence Determined Etc*, Hart (ed) (1954) 379. Austin began his lecture series with this lecture, but it was not published until 1863. Interestingly, like Blackstone, Austin used this not in relation to general jurisprudence, but rather to the need of the student for a map of English law. In order to have an overview of basic concepts and principles as a system or organic whole.

82 'Law: a map of misreading: toward a post-modern conception of law' (1987) 14 Journal of Law and Society 279, now reprinted in *Toward a New Commonsense,* Santos (n 8 above) also presents an interesting chart of laws in the world at ibid 275 .

83 GLT 36–39.

84 *Whitaker's Almanack* dates from the late 1860s, the 1997 edition is 129th Annual volume; the *World Almanac and Book of Facts* (formerly *World*) can be traced back to 1860.

known are very general, but there are, of course, many more specialised publications dealing in greater detail with narrower areas.[85]

Someone might ask: what has this to do with law? A survey of this general literature brings out a number of related points: first, these kinds of data are almost totally absent from the literature of mainstream comparative law;[86] conversely, law is strikingly absent as a significant category from most of the general statistical literature. With one major exception, crime statistics, law as such is hardly treated as a significant category. To take a fairly representative example: The *Britannica Yearbook* uses over 20 categories for organising its presentation of global data, including agriculture and population, language, religion, employment and labour, manufacturing industries, communications, trade, housing and construction, household budgets, health services, and education. The only explicit mention of a legal category is crime, which is one of three sub-categories of social protection and defence services along with welfare and security forces. It takes up less than 2% of the volume for 1997.[87] There are international statistics for crimes,

85 The trend is towards not only greater sophistication and standardisation, but also an increase in the range of producers. While the great majority of such data is based on official statistics, with their own particular criteria for selection and biases, governments do not have a monopoly on the production of global data. Non-governmental organisations, corporations and commercial publishers have contributed to the trend. With the communications revolution the range of producers is proliferating, exemplified by the range of conventionally published reference works now on the market, especially in the United States. Some of these are addressed to the general public, others are aimed at quite specific commercial, educational, and professional audiences. One of the main publishers in this area, Facts on File, explicitly targets secondary schools and public libraries. The variety of such works is illustrated by their titles. Atlases include *The Macmillan World Reference Atlas* (1994); *The State of the World Atlas* (1995) and a great variety of specialised atlases. I have only found one explicitly legal atlas, *The Legal Atlas of the United States* (1996), but I am told that others exist (eg Galgano (ed) *Atlante di diritto comparato* (1992)) – I am grateful to Govanni Sartor for this reference, but I have not had access to a copy. See T*he World Map Directory: A Practical Guide to US and International Maps* (1992–1993).

86 CLLT. Two exceptions are the intelligent use of statistics by Basil Markesenis, *Foreign Law and Comparative Methodology* (1997) ch 20 (on 'litigation mania') and Markovits in her studies of East and West Germany before the transition (eg n 51 above).

87 Other examples include *The Sourcebook of Global Statistics* (1998) which draws on over 200 sources, only about 1–2% of which are explicitly legal, mainly in respect of crime.

police and prisons and a few more items can be extracted from tables of 'social indicators' and the like.[88]

It might be objected that law is a cultural phenomenon of a kind which is less prone to statistical analysis than areas such as economics, health and education. Indeed cultural and legal relativists, including some leading members of the new generation of comparative lawyers, who wish to emphasise *differance*, may argue that most legal statistical data is likely to be unhelpful, misleading or just meaningless.[89] They can point, with some justification, to the unhappy history of attempts to subject legal institutions and processes to allegedly 'scientific' quantitative analysis, from the Johns Hopkins Institute in the 1920s through to the abortive Stanford Studies in Law and Development of the 1970s that tried to produce Legal and Social Indicators for Comparative Study in Latin America and in Mediterranean Europe.[90] I shall not enter here into the debate in comparative law between universalists and difference theorists, that is to say those who emphasise the unique aspects of each legal system and culture.[91] Questions of cultural

88 It might be objected that this downplaying of law is mainly a matter of taxonomy; a great deal of data can be extracted from these sources about legal activities, institutions, processes and personnel. After all, since law is a generally pervasive feature of most aspects of social life many statistics about accidents, divorce, employment, housing, homelessness, immigration, the police and so on are more or less directly 'legally relevant'. However, even international crime statistics are less developed than most of these other fields and fundamental questions about the comparability of legal phenomena across nations and cultures need to be addressed.

89 Cf L Zedner, 'In pursuit of the vernacular: comparing law and order discourse in Britain and Germany' (1995) 4 Social and Legal Studies 517; cf Pierre Legrand's scepticism about the use of economic analysis as a basis for comparative law on the grounds that it excludes or underplays the importance of history and culture, review of Ugo Mattei, *Comparative Law and Economics* (Ann Arbor 1997) in [1997] Cambridge Law Journal 638; Hyland (n 75 above).

90 On the generally sad story of such studies in the United States see J H Schlegel, *American Legal Realism and Empirical Social Science* (1995). A rather striking example in comparative law is J H Merryman, D Clark, and L Friedman, *Law and Social Change in Mediterranean Europe and Latin America: A Handbook of Legal and Social Indicators for Comparative Study* (1979). This was an unsuccessful attempt by distinguished legal scholars at Stanford to break away from the unempirical approaches that had characterised 'Law and Development' studies by providing 'quantitative descriptions of legal systems'. Collections of statistical tables, devoid of any context or commentary and without discussion of issues of comparability and concepts, proved to be singularly unilluminating and the project appears to have been sunk almost without trace. See also, Heinz Schaffer and Attila Racz (eds), *Quantitative Analysis of Law: A Comparative Empirical Study* (1990). This Budapest-based project involves a quantitative comparative analysis of 'sources of law in Eastern and Western Europe', mainly in relation to 'normative acts' of different kinds.

91 Hyland (n 75 above).

relativism of law are central to contemporary jurisprudence.[92] So too are questions about the extent to which legal institutions and practices are susceptible to economic or other kinds of quantitative analysis.

Such questions need to be addressed as preliminaries to the compilation of meaningful global statistics about law. However, these kinds of data are in fact already becoming increasingly important in policy formation and other decision-making at local, regional, international, transnational and global levels. Comparators and standards for assessing the health of aspects of legal systems exist and are being used either explicitly or implicitly for all sorts of purposes. A few well-established standards or comparators do exist in law but they tend to be fragmented: for example, Amnesty International, the International Committee on Human Rights and numerous other bodies assess the human rights record of different nation states and regimes by reference to general human rights norms.[93] The World Bank, the IMF, and donor states and agencies subject potential recipients to notional standards implied by the phrase 'democracy, good governance and human rights'. 'Democratic audit' is becoming a fashionable phrase.[94] Recently, Transparency International (TI) has developed a quite sophisticated methodology for analysing the extent of corruption in a given country and for constructing 'national integrity systems'.[95] At a national level, courts and legal services are becoming increasingly subject to bureaucratic evaluation.[96] Educational institutions, including law schools, are also becoming aware of the uses and misuses to which performance indicators and other external criteria of evaluation can be put – on which more later. Some agencies

92 *LIC* ch 8; Richard A Wilson (ed), *Human Rights, Culture and Context* (1997).

93 For example, Amnesty International, Annual Reports; Freedom House, *Freedom in the World: The Annual Survey of Political Rights and Civil Liberties* (1978–); US Department of State, *Country Reports on Human Rights Practices* (annual) regularly reviewed by Lawyers Committee for Human Rights in Critique (1978–); Charles Humana, *World Human Rights Guide* 3rd edn (1992). For general discussions of this literature see J C McCrudden and G Chambers, *Individual Rights and the Law in Britain* (Oxford 1994) ch 16; Youcef Bouandel, *Human Rights and Comparative Politics* (1997); Franseca Klug, Keir Starmer and Stuart Weir, *Three Pillars of Liberty* (1996).

94 Eg Klug et al (n 93 above), D Beetham, *Auditing Democracy in Britain* (Democratic Audit Paper No 1, 1993).

95 Jeremy Pope, *The TI Source Book* (Berlin 1996), TI annual reports.

96 Probably the most developed in respect of courts is the US National Center for State Courts, *Trial Court Performance Standards* (1990); cf publications of the New South Wales Bureau of Crime, Statistics and Research. In England there has been significant recent work in respect of franchising legal aid, eg Richard Moorehead, Avrom Sherr and Alan Paterson, 'Judging on results? Outcome measures: quality, strategy and the search for objectivity' (1994) 1 International Journal of the Legal Profession 191.

have formulated performance indicators for different sectors of a legal system, not all of which are published.[97] Some of the formulated standards are explicitly qualitative; some are based on carefully constructed statistics; some are artificially or dubiously quantified.[98] Other standards for evaluation are left implicit, which may be even more dangerous. Like it or not, most public institutions are now part of a performance culture. We have to live with such evaluations, whether explicit or implicit. We need to assess their uses, limitations and dangers and to examine critically their intellectual foundations. So far as law is concerned, the underlying jurisprudential assumptions need careful scrutiny.

RANKINGS

A relatively new phenomenon, rankings, has grown up on the back of the increasing standardisation of statistical data. A familiar example is educational 'league tables', such as the notorious *US News* and *World Report* rankings of graduate (mainly professional) schools,[99] the Norrington Table in Oxford and the more recent, and only slightly less controversial, the London *Times Good University Guide*.[100]

Educational rankings are only one small part of the rapidly expanding rankings game. The American passion for statistics linked to the relative easiness of standardising data relating to the 50 states makes the United States the clear leader in the field. For example, the *Gale State Rankings Reporter* for 1994 features over 300 tables comparing the 50 states, with no less than 5200 specific sets of rankings.

Under American leadership the rankings game has spread to largely popular attempts to produce global rankings – with titles like *The New*

97 A general example is Roberto Mosse and Leigh Ellen Sontheimer, *Performance Monitoring Indicators Handbook* (World Bank Technical Paper No 334, 1996)

98 Cf David Braybrooke's 'Scale of scientificity': (1987) *Philosophy of Social Science* 43–46.

99 The *US News and Report* 1998 *Annual Guide* covered Business, Law, Medicine, Health, Education, Engineering and Public Affairs (2 March 1998). This is, of course, only one salient example from a very extensive and controversial literature.

100 John O'Leary (ed), *The Times Good University Guide* (1998) is subtitled *For Students Entering University in 1999*.

Book of World Rankings or *World Facts and Figures*.[101] At present the lack of availability and standardisation of statistics make such tabulations much cruder and less detailed than those confined to the United States, but no doubt that will change over time.

Global legal rankings do exist in a number of fields. There have been a few published league tables in respect of human rights, corruption, and various kinds of democratic audit – for example, those produced by Charles Humana and Freedom House on national human rights performance,[102] TI's Corruption Perception Index,[103] and various organisations' reports on crime trends.[104]

One is tempted to dismiss such rankings as ridiculous and not worth the attention of serious academics. That was my first reaction. But I have changed my mind for three reasons: first, even the cruder ones are not entirely meaningless; second, rankings are becoming increasingly influential in many types of practical decision-making; and third, they are often used or misused for purposes quite other than those for which they were intended.

The first point can be illustrated by an example that is at first sight quite absurd. I recently came across an American book entitled *Where*

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101 Examples include *The New Book of World Rankings* by George Thomas Kurian, now in its third edition, (1991) and Victor Showers, *World Facts and Figures* 3rd edn (1989); cf IBRD, *The Development Data Book: A Guide to Social and Economic Statistics* (World Bank, Washington DC 1995) and UNESCO *Statistical Digests* (annual). An example of compiling international rank orders for scholarly purposes is W Muller (1998) who states: 'One of the three principal purposes for which this compendium has been prepared is the analysis of *international rank orders*. International rank orders are the result of *differences* with regard to national participation in *highly valued scarce goods* such as military strength, national wealth, or human capital. This means that *international rank orders* are much more than theoretical constructions. They constitute *social stratifications* of national societies which are relevant for these societies in terms of their collective fears and aspirations. This stratified nature of the world system has led us to focus the contents of the compendium on research questions of the following kind:
- What is the shape of the stratification pyramid of a given rank order?
- Which are the nations belonging to a given stratum of the international system?
- Are certain strata or groups of nations more mobile than others and what are the reasons for this mobility?' (ibid 15, italics in the original). Note that the basic unit of comparison is assumed to be the nation-state.

102 Humana (n 93 above). Amnesty International and the US Department of State provide some contextual information and avoid some of the cruder pitfalls by not producing 'league tables'; but they nevertheless use implicit comparators with all the problems of comparability and potential bias that these entail.

103 TI's Corruption Perception Index.

104 Eg United Nations, *Trends in Crime and Criminal Justice 1970–85, in the Context of Socio-Economic Change* (1992); *Crime Trends and Criminal Justice Operations at the Regional and International Levels* (1993).

We Stand, the sub-title of which is *Can America Make it in the Global Race for Wealth, Health and Happiness?*[105] The opening words of this bizarre publication are: 'America is as competitive as a Chevrolet.' It produces a series of league tables centred around seven themes: Who is the wealthiest? Who is the smartest, healthiest, busiest, freest? Who are the best lovers? Who has the best home? The bottom line, a combination of all factors into a single index, concludes that the United States is only the sixteenth 'most habitable' country and that 'THE WINNER IS JAPAN'.[106]

At first sight this looks like no more than a piece of enjoyable nonsense. The style is breezy, iconoclastic and tongue in cheek. The book seems to be designed to shock American readers out of a sense of complacency about their society by banging them over the head with figures about gun ownership, murder, oil spills, clean air, teachers' salaries, and over one hundred other matters. Interestingly, and perhaps worryingly, it is actually quite informative: the sources are generally the best available, the rankings are fairly plausible, and some of the findings are quite surprising. The final composite index is blatantly subjective in its weightings of different variables, but at least readers are given the opportunity to give their own weightings to different factors.

Where we Stand is not nearly as silly as it looks. Read with the more sophisticated American books of rankings it suggests what might be achieved if a greater amount of reliable international data were available in relatively standardised form, as has already happened in some fields. With the rapid increase of international and global standardisation we are not far off reaching such a situation.

So let us look briefly at one law-related example. TI is a non-profit non-governmental organisation established in 1993. Its mission is to combat corruption world-wide.[107] TI publishes an annual Corruption Perception Index, based on the perceptions of multi-national firms and institutions.[108] Although this is only a small part of TI's many activities, it is by far the best known, largely through highly condensed

105 Michael Wolff, Where We Stand: Can America Make it in the Global Race for Wealth, Health and Happiness? (1992).

106 Ibid.

107 Its purpose is 'To curb corruption by mobilising a global coalition to promote and strengthen international and national integrity systems'; TI Mission statement 1997. 'Corruption' is broadly defined as 'the misuse of public power for private profit'. Jeremy Pope, *The TI Source Book* (1997) ch 1.

108 The methodology is discussed at length in *The TI Source Book*, ch 6 (n 107 above), which emphasises that this is an index of perceptions based on a poll of polls. The popularity of the index has surprised those responsible who are investigating ways of refining it.

reports in newspapers and other media.[109] On closer examination one finds that TI is a small, but highly professional organisation that concentrates largely on specific issues in particular countries. It uses sophisticated and seemingly effective techniques for analysing a local situation,[110] devising tailor-made strategies for reducing corruption, and mobilising practical support for the effort. The simplistic composite league tables, as reported in the press, mask the professionalism of the organisation.[111] The TI indexes have provoked protests and have had some unintended political consequences. Although vulnerable to many of the standard objections to league tables, these eye-catching publicity 'gimmicks'/devices seem to have served several useful functions in generating public awareness about corruption issues, in raising the profile of the organisation, and in putting pressure, both directly and indirectly, on governments, organisations, and individuals in countries that have fared badly in the ratings. They have also had a number of unintended consequences, such as being used in election campaigns. Publicity, as Jeremy Bentham repeatedly proclaimed, is the most potent tool for controlling the abuse of power. League tables are crude, but they can also be effective attention-getting tools for publicity and shame.[112]

The question arises: would it be possible to produce a theoretically sound source book of global legal statistics or a book of rankings of the health of national legal systems of the world that could be of real value? A short answer is that there is a mass of data already available, but they are patchy and scattered and most are not standardised. Even international criminal statistics are far less sophisticated than in other cognate fields. There are some areas, for example judicial statistics, delay, legal services, levels of compensation for personal injuries, lawyers' earnings, most of which raise difficult questions of

109 In 1996 Nigeria came first (out of 54 countries) on the index as the country perceived to be the most corrupt, and New Zealand came bottom of the league at 54th. Britain at 43rd was rated as being thought to be less corrupt than the United States, Austria, and Germany, but fared worse than Ireland, Austria and the Netherlands. It may come as no surprise that Nigeria or Pakistan or Venezuela fared worse than New Zealand and the Scandinavian countries, but it is difficult to take seriously the idea that within Scandinavia Denmark, Sweden, Finland and Norway can be precisely ranked, and that, in football league terms, only the first three are candidates for relegation from the Premier Corruption League.

110 Part A of The TI Source Book outlines a general analytical framework, which draws heavily on a wide range of sources and, as far as I can tell, is the most sophisticated attempt to establish a method for analysing and constructing a 'national integrity system'.

111 Eg the *Wall Street Journal Europe*, Friday–Saturday 3–4 January 1997 (one of the most substantial press reports).

112 For an excellent account see Philip Schofield, 'Jeremy Bentham on political corruption' 49 Current Legal Problems, Part 2, 295 (M Freeman (ed), 1996).

comparability. But before contemplating such a possibility one would need to address some fundamental theoretical questions, such as: What might be acceptable indicators of the health of a legal system analogous to social or economic indicators? To what extent is it possible to standardise such comparators in a meaningful way? What might be the uses, abuses, limitations and dangers of such indicators? These seem to be significant theoretical questions that need to be addressed by legal theorists and comparative lawyers. It is beyond the scope of this paper to address such questions in detail, but it worth pausing to consider briefly one familiar example which may serve as a cautionary tale.

THE LAW SCHOOL RANKINGS CONTROVERSY[113]

To illustrate the methodological problems let us look at a familiar, reasonably developed and highly controversial area: national law school rankings in the United States.

The first *US News* rankings of law schools were published in 1987, but the present series started in 1990. There is a longer history of educational rankings, but what is relatively new is the phenomenon of national journals publishing rankings that claim to be methodologically sound. A prolonged, often heated, controversy has been stimulated by these league tables in many disciplines.

Among the many objections to *US News and Report* law school league tables, five are particularly significant in the present context.[114]

(i) More emphasis is given to simple data that are easily quantified and standardised – such as Law School Admission Test (LSAT) scores – rather than to more complex or qualitative measures. Hard variables tend push out soft variables.[115] A striking

113 I have been asked about the relevance of this section to the theme of the lecture. The answer is that law school rankings are a familiar example of the problems and dangers of this increasingly common kind of metaphorical mapping.

114 From the extensive literature I have learned most from an unpublished paper by Richard Lempert and a series of short articles in the *National Law Journal*, 1997–98, and various contributions on the Internet, mainly discussing the relative merits of the *US News* and Leiter methods of ranking. On the latter see Brian Leiter, *The Legal Gourmet Report, 1997–8, Ranking of Law School by Educational Quality* on the website of the University of Texas Law School and *Press Release* by Leiter on 'New Educational Quality Ranking of US Law Schools for 1998–99' (bleiter@mail.law.utexas.edu); see also Leiter, 'Why US news makes state law schools angry' 19 National Law Journal, 24 March 1997, A24; David E Rovella, ibid, 19, n 40, 2 June 1007, A1, col 3. A useful survey of five leading sets of US law school rankings is found in American Bar Association Journal, March 1998, at 50.

115 The most influential variable is LSAT scores; opinions of peers and of legal profession are given a place, but weigh less heavily. The biggest single difference between US News and Leiter's rankings is that the latter gives greater weight to assessment of the quality of the faculty and of teaching.

example of an omission is that *US News* does not include quality of teaching as an indicator.

(ii) The choice of indicators and the weighting given to each is arbitrary, so that composite scores are at least biased,[116] at worst meaningless or positively misleading;

(iii) Detailed league rankings involve false precision:[117] to say that Harvard, Stanford, Yale and Chicago are near the top of the Premier League is not news; to say that Yale or Stanford is better than or 'beats' Harvard is newsworthy but almost meaningless. Unfortunately it is just these close calls that may be the most important. For example, in the United Kingdom a potential applicant might be unduly influenced by meaningless small gradations in choosing between the three leading London law schools or between say Sheffield, Warwick and Leicester, three quite different institutions ranked 8th, 9th and 10th by *The Times* in 1998.[118]

(iv) The tables are full of insidious hidden assumptions: for example, that all law schools have identical missions and functions;[119] that full-time first degree students are the only significant beneficiaries of legal education; that the quality of entrants and their immediate employability is more important than the quality of their educational experience or the 'value added' factor, or longer-term benefits or research record.

(v) Perhaps the most important point is the danger that league tables prepared for one purpose are used or misused for other quite different purposes. *US News* justifies its rankings – as does *The Times Good University Guide* – on the grounds that they are meeting a genuine need in providing a guide to

116 *US News* is said to be biased in favour of small, private schools and those oriented to success in bar examinations. See Leiter (n 114 above).

117 Lempert (n 114 above).

118 The *Times Good University Guide* (1998) at 42. In the same table Queen's is sandwiched between the Law Department at SOAS, Queen's and East Anglia – an even more motley trio.

119 Professor Martin Harris, Chairman of the Committee of Vice-Chancellors and Principals, commented as follows: 'Naturally these students demand more information about the range of universities in this country and what they can offer. The Times Good University Guide goes some way towards meeting this demand. But vice-chancellors believe that single 'super' league tables, attempting to cram all universities into one mould, cannot do justice to the needs of such a wide variety of students, and to what we can justifiably boast is one of the world's most diverse higher education providers.' (*The Times* 11 May 1998). On the plurality and multi-functionalism of law schools, see W Twining, *Blackstone's Tower* (1994) ch 3 and 'Thinking about law schools: Rutland Reviewed' (1998) 25 Journal of Law and Society 1.

> potential applicants in making important choices.[120] But the League Tables are said to have a disproportionate influence on alumni, university administrators, employers, fund-raisers, donors, and even faculty. Rankings can affect policies on such matters as admissions, library, curriculum, preparation for bar examinations and activities that do not count for the purpose of ranking, such as postgraduate work, continuing legal education, or contributions to the local community.[121]

US News, it is said, conscientiously tries to listen to criticism and improve its methodology; but it is caught in two dilemmas: as its methodology changes the validity of comparisons over time is undermined; and, more important, *US News* is a business and its rankings issue is one of its best-sellers. There is an apparently insatiable demand for simplistic, composite rankings that are the modern substitute for the mixed metaphor.[122] The weakest aspect, the composite table, is the most popular.

There is a need to explore further possible analogies between law school rankings and other legal rankings such as those produced by Freedom House[123] and TI.[124] The debate on law school rankings deserves attention because of its detail and relative sophistication. Here, I shall confine myself to two points:

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120 Clearly applicants need guidance and rounded works like the *Times Good University Guide* are helpful, if imperfect. In a recent Times survey only 11% of sixth formers in 1998 gave league tables as their main source of advice in choosing a university (*The Times* 12 May 1998). In practice, few applicants would rely on only one source.

121 The *National Law Journal* (11 May 1998) reported that during the academic year 1997–1998 no less than seven law school deans had been squeezed out of office and it has been suggested that a major factor was *US News* ratings: 'These days quality is not the only measure of success. Many law school deans are expected to share tuition revenues and donations with the university, while accounting for every little expense. At the same time, thanks in part to *US News and World Report*, law schools must compete publicly on the basis of very raw criteria: LSAT scores and grade point averages.' To an outsider one of the puzzles is why such a simplistic measure should have so much influence upon informed insiders.

122 League tables invite sporting metaphors. Criticism of the Research Assessment Exercises in the United Kingdom is sometimes expressed in terms that suggest that the goal posts keep moving, the system of scoring is kept secret from the players, and the prizes and penalties are determined after the event. Insofar as law schools have different missions, functions, situations etc, ranking them in a single league is more akin to popularity contests in which footballers, cricketers, swimmers, politicians, and pop stars compete for 'personality of the year'

123 Freedom House.

124 TI.

First, the phenomenon is not entirely unhealthy. The febrile *US News* debate has at least stimulated systematic collection and construction of data, sophisticated discussion of methodology and alternative schemes for evaluating and comparing US law schools. Whilst crude league tables have sometimes distorted policy, they have also provoked critical reappraisal of some institutional arrangements that to an outsider seem to be locked into rigid and often self-stultifying sets of practices and assumptions.[125] They have increased self-criticism and public accountability, but at a price.[126] Similarly, a reflective approach to evaluating the health of national legal systems, other legal orders or parts thereof may be stimulated by even the cruder efforts at producing national rankings. What is involved in seriously evaluating a legal system or order, a national criminal justice system, or any particular legal institution is a neglected job of jurisprudence.

The second point is more worrying. The rankings phenomenon tends to make explicit, often in simplistic and sensational form, what has been going on implicitly in arcane ways that may be equally crude. In a recent review of secondary and tertiary literature about comparative law, I concluded that one of the most striking omissions has been hardly any discussion of comparators, that is standards or measures for comparison.[127] On one standard model of 'comparing' – that is analysing similarities and differences between comparable phenomena – analysis requires both clear conceptions of comparability and standards or indices for comparison. Such indices may in first instance be descriptive, such as a tape measure or weighing scale or an index for measuring mortality rates; they may be explicitly evaluative, such as a marking system, or performance indicators, or international human rights norms; more often than not they are a combination of the two or implicitly evaluative, such as indexes of infant mortality or GNP. We use comparators not only to compare two or more objects, but also to describe individual phenomena. When one describes a city or a legal system in terms of its salient features one is more or less explicitly comparing it to some general norm or standard or ideal type.

125 W Twining, 'Rethinking law schools: a response to Schlegel' (1996) 21 Law and Social Inquiry 1007.

126 However, league tables confirm part of the orthodoxy, for example that only those reading for first degrees in law count as 'law students'. American law schools have long had to take internal and external evaluation seriously, but the main standards set by the American Bar Association (ABA) have been criticised as being cosy and self-serving. On the history of ABA accreditation, see Robert Stevens, Law School (1983).

127 CLLT.

Any description involves selection and comparators are the main, but not the only, criteria for selection.[128]

One reason why I have dwelt on the phenomenon of rankings is that they dramatise the use and difficulties associated with comparators – in law as elsewhere. The controversy about American law school rankings raises fundamental questions about the comparability of law schools as institutions, their nature and functions, and what are possible criteria for the evaluation and comparison of the health of such institutions, if indeed they all belong to a single genus. Similar problems arise about the description, comparison, and evaluation of legal systems or indeed of any legal phenomena. Legal institutions and practices are increasingly subject to the kinds of analysis and evaluation associated with management consultants – what might be called 'bureaucratic rationalism'.[129] Like it or not, they are increasingly important and the methodological problems and the underlying assumptions need to be examined critically. Within the discipline of law these problems are primarily jurisprudential because they raise issues about abstract concepts and general assumptions and presuppositions.

I have suggested that geographical maps involve selection from pre-existing data that themselves presuppose conceptual schemes and taxonomies. In this context such maps are little more than one technique for visual presentation of, typically simple, data.[130] Statistical tables are similarly just one kind of mental or metaphorical map, which have similar presuppositions. Rankings are just one, usually crude, form of pseudo-statistical mapping that help to dramatise some of the underlying theoretical problems. Statistical tables and ranking involve comparison; but comparison in turn assumes description or at least giving an account of salient characteristics or differentiae. Questions about comparing and evaluating legal orders and other phenomena presuppose answers to questions about what is involved in giving an account of one such system or phenomenon.

PROFILING

So let us move from ranking and comparison to profiling. My argument suggests that even a description of a single system or other phenomenon typically involves the use of comparators that may be explicit or implicit. So, what is involved in depicting (ie interpreting, describing

128 Cf Charles Taylor, 'Comparison, history, truth' in *Philosophical Arguments* (1995).

129 W Twining, 'Bureaucratic rationalism and *The Quiet (R)evolution*' 7 Legal Education Review 291 (1996).

130 On modern methods of increasing data density in presentation of information, including on maps, see Tufte (1983), (1990) (1997) (n 25 above).

and explaining) a single legal system or order? It is to such questions that a substantial part of our vast heritage of jurisprudential writing is ostensibly addressed. Most of our mainstream jurists – Kelsen, Hart, Llewellyn, and Dworkin, for example – purport to give accounts of the nature of law and legal systems.

So is not my question the central question addressed by general theories of law? Up to a point the answer is 'Yes'. I have from time to time in teaching jurisprudence set an exercise in which a motley team of jurists are planning an expedition to Xanadu – a mythical country, more like that of Coleridge or Calvino than the real place – in order to construct an account of its legal system for a new Encyclopaedia of Comparative Law. They are behind a veil of ignorance about Xanadu and they are discussing how they should go about their task. The exercise usually leads to the conclusion that each jurist would ask somewhat different questions, and that for the most part they would complement rather than conflict with each other. In short, they would bring different conceptual schemes to bear. Hart, Kelsen and Fuller might on investigation differ as to whether Xanadu has a legal system at all;[131] or, if it satisfies each's criteria for the existence of a legal system, they might give different accounts of its salient features: a disciple of Hart and Kelsen might describe, with slight variations, the basic form and structure and criteria of validity of a system of rules or norms. A Fullerite might assess how far the norms satisfy his principles for the internal morality of law;[132] a Dworkinian would try to divine the fundamental principles of political morality – the ideology in a non-pejorative sense – that give the legal order coherence or integrity. She might also provide an account of the modes of reasoning in adjudication

131 In teaching, these exercises raise familiar questions about the definition or, better, the boundaries of the concept of law. In this context I have generally not had great difficulty in persuading a class that for the purposes of the enterprise of understanding law there will always be some borderline cases, but that if one wishes to understand law in Brazil one is going to miss a great deal if one omits or overlooks the institutionalised orders of the squatter settlements which affect the property and other day to day relations of many thousands of people. In 1970, 'Pasagarda', one of the squatter settlements outside Rio de Janeiro, had an estimated population of 50,000 (Santos (n 8 above) 158). A jurisprudential basis for this view can be found in the ideas of Llewellyn and Honore: 'The first question in descriptive legal theory is then not 'What is a rule?' but 'What is a group?': A Honore, *Making Law Bind* (1987) 33.

132 L Fuller, *The Morality of Law* (1964) ch 2.

(and interpretation generally).[133] A follower of Karl Llewellyn would try to find out empirically how the law-jobs were in fact done through asking about actual disputes and how they were in fact handled;[134] if there were judges, the Llewellynite would ask questions about their styles of justification – perhaps coming up with not very different answers from Dworkin.

Each of these general theories might provide a basis (or at least a starting-point) for giving a particular account of the legal order in question. In our discussions, we usually conclude that far from providing rival or radically different interpretations, a richer account of legal ordering in Xanadu might emerge through subjecting it to such multiple perspectives. We also sometimes come to other, less banal, conclusions. First, on their own, these general theories are too abstract to give much guidance on the handling of detail. Kelsen and Hart would end up with rather thin descriptions of form and structure. Llewellyn would point to thicker and more realistic accounts, but his law-jobs theory and his extended case-method are suggestive ideas that need to be refined and fleshed out to provide an adequate methodology.[135] How far Ronald Dworkin's theory of law is applicable to different kinds of legal orders and cultures is still largely unexplored.[136]

This exercise also brings out the point that most standard accounts of actual legal systems do not draw explicitly on our stock of legal theories. Rather such accounts tend to be conventional and pragmatic, based on generally unarticulated and not very coherent or precise assumptions about law students' or foreigners' needs at the start of their studies. For example, standard introductory accounts of 'The English Legal System' rarely articulate their basic assumptions or any criteria of selection; they do not talk of basic norms or rules of recognition or interpretive concepts or 'law jobs', nor do they pause to clarify what is meant by a legal system, an institution, a process,

133 I have suggested elsewhere that Dworkin's 'theory of adjudication' is better characterised as a theory of interpretation, because it can apply to non-judicial interpreters and potentially might be applied to legal orders without courts and legal traditions such as Islam (*LIC* 165–77). For an extension to the European Union, see J Bengoetxea, *The Legal Reasoning of the European Court of Justice: Towards a European Jurisprudence* (1993).

134 Karl Lewellyn and E Adamson Hoebel, *The Cheyenne Way* (1941)

135 A classic discussion is A L Epstein (ed), *The Craft of Social Anthropology* (1967); cf W Twining, 'The idea of juristic method: a tribute to Karl Llewellyn' (1993) 48 University of Miami Law Review 119.

136 *LIC* ch 8.

a dispute, a court, or a profession.[137] Writers of such works do not draw much more directly on legal theory than writers of guide books refer to the literature of urban sociology. Similarly the *International Encyclopaedia of Comparative Law* (and similar less scholarly works) has a standard format which is based more on common sense and the conventions of comparatists than on explicit theory.[138] In short, there appears to be only a tenuous connection between our stock of general theories and standard accounts of actual legal systems.[139]

A quite different perspective on the institutions of a municipal legal system is to be found in the context of foreign aid. Development agencies, foreign donors, and institutions such as the World Bank often employ techniques of institutional analysis that are much more systematic than those used in accounts of legal systems by academic lawyers. Some of the basic ideas of institutional appraisal appear to be inspired by management consultancy perspectives, with a strong tendency to bureaucratic rationality. In my experience they tend in practice to be stronger on prescription than diagnosis, but they do pose illuminating questions about goals, structures, 'stakeholders and beneficiaries', outcomes, performance indicators and costs. There is much that could be said about what might be termed 'the Jurisprudence of the World Bank'. In the present context, the relevant point is that such perspectives and methodologies when applied to legal institutions contrast quite sharply with orthodox academic accounts of 'legal systems'. There are, of course, many other perspectives – human rights 'auditing', economic, anthropological, linguistic, historical, evocative, for example – that can be employed in depicting a legal system or order.

137 GLT 24–25. Even a more theoretically informed text, such as Fiona Cownie and Anthony Bradney's *English Legal System in Context* (1996), which explicitly espouses legal pluralism, makes so many concessions to traditional syllabuses, especially in respect of providing basic (ie orthodox) information, that its coherence and originality seem to me to be artificially restricted. A similar point is made in a review of the book by Julian Webb, (1998) 32 The Law Teacher 344.

138 The nearest thing to an attempt at theorisation is the 'Introduction' by Rene David in vol II of the *International Encyclopedia: The Legal Systems of the World: Their Comparison and Unification* which is mainly concerned with problems of internal division and classification of legal doctrine.

139 Moreover, such accounts make very little use of either maps or available statistical data. For example, *The Legal Atlas of United States Law* contains substantially different information from standard descriptions. Compare for example two very different attempts to introduce their own legal systems to foreigners, E Allan Farnsworth, *An Introduction to the Legal System of the United States* (1963) and E Blankenburg and F Bruinsma, *Dutch Legal Culture* 2nd edn (1994). Only exceptionally are statistics used in a systematic way as part of a profile of a national legal system. A partial exception is Michael Zander, *Cases and Materials on the English Legal System* 7th edn (London 1996) which makes quite extensive use of statistical data. Combine these sources and one will have quite different, mainly complementary, accounts.

Detailed analysis of particular examples must await another occasion. Instead, I wish to conclude by suggesting that depicting a legal system or order is closely analogous to depicting a city. If one is about to visit Venice or Oxford or Hong Kong for the first time and wants to do some reading in advance, there are many different kinds of literature to choose from. One might start with a map of the country and of the city. One might move on to a tourist guide – Rough for the economically disadvantaged; Blue for culture vultures or gastronomes. For setting a tone, one might turn to evocative works that report personal impressions – by a Jan Morris or a Bill Bryson – or some more orthodox travel writer. Depending on one's purposes or interests one might proceed to histories, or novels, or specialist works on politics or economics or transport or architecture or folklore or drains or even law.

I suggested earlier that Calvino's *Invisible Cities* could be interpreted as fifty-five accounts of Venice; it would not be difficult for an avid reader to find more than fifty-five different treatments of Venice or Oxford or Belfast.[140] Some of the accounts might be thicker and overlap more than Calvino's spare evocations; but the outcome would be similar – a complex, multi-layered cumulation of accounts, built up from multiple perspectives. This is the opposite of reductionism.

Cities attract metaphors. Calvino uses labyrinth, maze, chessboards, bridges, canals as symbols of aspects of invisible cities. A legal order, like a city, is typically a human construct, but not the work of a single mind;[141] rather it reflects the beliefs, decisions and practices of generations of its inhabitants. Both are complexes of muddle and order.[142]

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140 This is a very modest assessment. According to Peter Ackroyd there have been more than 25,000 printed works on London's history (Book review, *London Times* 13 August 1998, at 35).

141 Contrast the insistence of the arch-planner, Jeremy Bentham that 'each code should be drafted by a single individual' so that it would systematically conform to the principle of utility and responsibility for it should be clearly located, on which see Philip Schofield, 'Jeremy Bentham: legislator of the world' (1998) Current Legal Problems (forthcoming). Bentham did, of course, allow for participation in discussing drafts.

142 As Weis puts it: 'Calvino regards the city as a "complex symbol" which allows him to express "the tension between geometric rationality and the entanglements of human lives" (*Six Memos* 71). In fact, in order to understand fully his interest in cities and their evolution and decline, one must see them as a representative symbols of human behavior. Going back to the beginning of civilization, since their designs and disposition are never arbitrary, cities reflect the doctrine and practices of the society which creates and maintains them.' Beno Weis, *Understanding Italo Calvino* (1993) 156–157, cf Brian Simpson on the common law being more like a muddle than a system, 'The common law and legal theory' in Simpson (ed), *Oxford Essays in Jurisprudence*, 2nd series (1973).

There are some suggestive parallels between debates and divisions within urban sociology and within the discipline of law.[143]

- For example, a central theme of talk about cities is that they are all similar and yet all unique. Sir Patrick Geddes wrote: 'Though the woof of each city's life be unique, and this may be increasingly with each throw of the shuttle, the main warp of life is broadly similar from city to city.'[144] One could substitute legal order for city without changing the rest of the wording.
- Classical writers have been criticised for presenting top-down perspectives and for neglecting the points of view of the inhabitants and users.[145]
- There is much debate about whether cities are 'systems'; so too with law: Brian Simpson has memorably characterised the common law as more a muddle than a system.[146]
- Urban literature is characterised by deep ambivalences, with strong strains of extreme pro- and anti-urban views; leading theorists, such as George Simmel, take centrist and ambivalent positions. There is also pervasive ambivalence about the costs and benefits of a well-ordered and efficient urban system.[147] Similarly in law the natural law tradition and its successors idealise our subject and present aspirational perspectives, some theorists emphasise the benefits of efficiency and order, whereas Marxists, realists and others point to the repressive, problematic, or seamy side of actual legal orders.
- According to Langer, four images of the city have dominated the literature of urban sociology: the city as bazaar, jungle, organism,

143 Describing cities is a good metaphor for mental topography. We are comparing the problems of depicting cities and legal orders, not the objects of depiction. Calvino reminds us that a city is not its description; the idea of a city is abstract and a map of a city is a higher level of abstraction. Carter (n 74 above) 120–121.

144 Geddes: 'He is no true town planner, but at best a too simple engineer, who sees only the similarity of cities, their common network of roads and communications.' Even a 'sound engineer, doing work to endure, let alone an artist in his work must know the city indeed, and have entered its soul'. Cf Patrick Geddes, *Cities in Evolution* rev edn (1969); cf Calvino, 'Only the name of the airport changes', IC 128

145 OPP 208ff.

146 Simpson (n 142 above); cf Charles Sampford, *The Disorder of Law* (1989).

147 Andrew Lees, *Cities Perceived* (1985).

and machine.[148] All four of these metaphors can be illuminatingly applied to accounts of legal orders.[149]

Calvino's book depicts invisible cities. Legal orders, too, are largely invisible, that is only a few aspects are susceptible to geographic mapping, pictures or videos – or even to statistical analysis. Law is not particularly photogenic, although watching trials on television reminds one that the common law is more telegenic than the civil law. Legal orders are made up of complexes of social relations, ideas, ideologies, norms, concepts, institutions, people, techniques and traditions. Calvino's concern is 'to portray the diversity and at the same time universality of human experience.'[150] He captures brilliantly what is involved in describing and understanding a city – the elusive mixture of patterns and complexity and arbitrariness and the capacity and the limitations of the human mind to grasp these realities.[151] The dialogue between Kublai Kahn and Marco Polo revolves around how and whether the diverse cities of his empire can be mentally reduced to order. The great Khan hopes to master the invisible order by learning the rules as if they are like chess. His is a reductionist temperament.[152] Marco Polo emphasises hidden complexities, exceptions, contradictions, the elusiveness of hidden orders He accepts that there are patterns, but they are too complex to capture from a single perspective. He even acknowledges that a basic design exists, but it is too elusive to be understood through the logic of a game, even one as complex as chess. Rather, the order that structures human attributes and relationships ought to be compared to the logic and structure of dreams:

> With cities it is as with dreams: everything imaginable can be dreamed, but even the most unexpected dream is a rebus that conceals a desire, or its reverse a fear. Cities, like dreams, are made of desires and fears,

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148 Peter Langer, 'Sociology—Four Images of Organized Diversity' in Lloyd Rodwin and Robert M Hollister (eds), *Cities of the Mind* (1984) ch 6.

149 I have discussed all four images elsewhere, especially 'The Great Juristic Bazaar' (1978) 14 Journal of the Society of Public Teachers of Law (NS) 185; Holmes' Bad Man and the legal jungle, OPP 204 ff; functionalist and technological views of law, 'The Idea of Juristic Method', Twining (n 135 above).

150 Sara M Adler, *Calvino: The Writer as Fablemaker* (1979) at 49.

151 Carter (n 74 above) 123–124.

152 Kubla Khan, the pessimist, sees his chessboard as a reduction to nothingness; Marco Polo, by contrast, treats each square as a starting-point for seeing a multiplicity of things in a little piece of smooth and empty wood, for example: 'Your chessboard, sire, is inlaid with two woods: ebony and maple. The square on which your enlightened gaze is fixed was cut from the ring of a trunk that grew in a year of drought: you see how its fibres are arranged? Here a barely hinted knot can be made out: a bud tried to burgeon on a premature spring day, but the night's frost forced it to desist.' IC 130–131.

> even if the thread of their logic is secret, their rules are absurd, their perspectives deceitful, and everything conceals something else.[153]

A similar tension between geometric rationality and the messy complexities of human relations runs through our discourses about law. In jurisprudence we have our Kublai Khans and our Marco Polos. Like Calvino, I side with Marco Polo. Calvino is sometimes identified as a 'post-modernist'. If that label implies disregard for facts, or extreme subjectivity or indeterminacy in interpretation, or that all patterns are merely constructed by the reader, I think that this is a mis-reading. Calvino while emphasising complexity, paradox, the elusiveness of reality, agrees that there is a 'hidden 'filigree of design' upon which all human experience is built.'[154] The idea of a city is a good metaphor for mental topography in general and for law in particular. Like Calvino, we need many mental maps of our invisible cities.[155]

153 *IC* 44.

154 Adler (n 150 above) 51–52; *IC* 5–6, 43–44.

155 'The Great Khan owns an atlas whose drawings depict the terrestrial globe all at once and continent by continent, the borders of the most distant realms, the ships' routes, the coastlines, the maps of the most illustrious metropolises and of the most opulent ports. He leafs through the maps before Marco Polo's eyes to put his knowledge to the test.' (136). After Polo has given accounts of cities he has seen, cities he knows by hearsay, and possible that he does not know whether they exist or where they are, the Great Khan says: 'I think that you recognize cities better on the atlas than when you visit them in person.' And Polo answers: 'Traveling, you realize that differences are lost: each city takes to resembling all cities, places exchange their form, order, distances, a shapeless dust cloud invades the continents. Your atlas preserves the differences intact: that assortment of qualities which are like the letters of a name.' (137) V*ive la differance!* cf Hyland (n 75 above) on 'difference theorists'.

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MacDermott Lecture 1999: Past human rights violations: truth commissions and amnesties or prosecutions†

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Lord Chief Justice, my lords, ladies and gentlemen, Professor Jackson thank you for your kind introduction. It is a great honour to have been invited to deliver this 1999 Annual MacDermott Lecture. It is a particular privilege because of the eminence of Lord MacDermott, not only in this country, but internationally. And it is a particular pleasure because it has brought my wife and me to Belfast for the first time, and it has enabled us to meet Lord Justice MacDermott and Lady MacDermott and members of the MacDermott family.

I was going to begin by saying that I was not coming here to suggest that you could learn something from South Africa. But I decided not to because of the memory it immediately evoked of the many people who came from abroad, to South Africa during our dark days of apartheid and assured us that they were not coming to tell us that we could learn from their experience. Of course they meant the very opposite. And I'm sure many people come here, and have been doing so for many years, telling you that they are not here to tell you anything that you should learn about their condition or about their solutions. But I do think we can all learn some things from each other. Certainly I'm happy and proud to say as a South African that, countries that have the sorts of difficulties we experienced, and unfortunately, there are too many of those countries, can at least learn that solutions can be found even for situations that appeared as intractable as bringing apartheid to a relatively peaceful end.

The broader problem, contained in the title of this lecture, ie what is to be done about past human rights violations, has become fairly common. We should rejoice in this as it is a problem which presents itself as countries move out of oppression, whether they are communist societies, military dictatorships in Latin America or apartheid in South Africa. These are countries which have moved from oppression

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to some form of democracy, and the question facing those societies is what they should do about past criminality, past human rights abuses.[1] Generally the countries concerned have been faced with three broad choices. First, they can forget about the past and enter into a period of national amnesia. Secondly, they can systematically prosecute perpetrators of criminality. Thirdly, they can establish a truth commission process which is really a compromise between doing nothing on the one hand and prosecuting on the other. Now, the choice of doing nothing has appealed to some countries. It was very appealing to many in South Africa and particularly for the former leaders of the apartheid government, and leaders of the security forces. And of course they made a very beguiling case. They said, 'we've got so much to do for our future, we have so much to make up for, we have to redistribute wealth, we have to get rid of all of the evils of the apartheid system, why waste our time looking over our shoulders to the past. Let's forget about that. We're turning over a new leaf and let's get on with building a happier future for all of our people.' One thing I've learnt in South Africa, and again when I was investigating war crimes in Bosnia and the former Yugoslavia, and also in Rwanda, is that countries choosing the amnesia route have condemned their societies to more violence and more unhappiness – sooner rather than later. In the former Yugoslavia, the history lessons that I received on every visit to Belgrade, Zagreb and Sarajevo taught me what happens to a society that doesn't bring justice, some form of justice, and some form of acknowledgement, to the victims.

I read recently that the former Yugoslavia has more history than their people can consume. I thought that was certainly a neat way of encapsulating what I experienced. At the first meeting I held in Belgrade, I had scheduled a half hour meeting with the Minister of Justice and the Foreign Minister. The first forty-five minutes of the thirty minute-meeting were consumed with a long history lesson about the terrible things that had been suffered by the Serb people at the hands mainly of the Croats, but also at the hands of the Muslims.

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1 On this question, see, for example, N Roht-Arriaza, 'State responsibility to investigate and prosecute grave human rights violations in international law' (1990) 78 California Law Review 449; D Orentlicher, 'Settling accounts: the duty to prosecute human rights violations of a prior regime' (1991) 100 Yale Law Journal 2537; J Benomar, 'Confronting the past: justice after transitions' 4 (1993) Journal of Democracy 3; N Kritz (ed), *Transitional Justice: How Emerging Democracies Reckon with Former Regimes* (States Institute of Peace, Washington DC 1995); M Scharf, 'The letter of the law: the scope of the international legal obligation to prosecute human rights crimes' (1996) 59 Law and Contemporary Problems 41; J Mendez, 'Accountability for past abuses' (1997) 19 Human Rights Quarterly 255; M J Osiel, 'Why prosecute? Critics of punishment for mass atrocity' (2000) 22 Human Rights Quarterly 118.

And the history lesson began with the battle of Kosova in 1389 and ended with the Second World War and the loss of life of hundreds of thousands of Serbs at the hands of the Croatian Ustashe. And I went to Zagreb and I got a similar history lesson about the terrible things that the Serbs and the Muslims had done to the Croats. And in Sarajevo I had the story from the Muslim side. The histories never dovetailed, they never even intersected because each of these societies was completely embroiled in its own history. And the terrible things that we're reading right at this moment about Kosova might well have been averted had that history not been written the way it was, but instead had there been some attempt to uncover what really happened over the centuries, to uncover a sense of shared history.

So the objective really, if one is sensible, is to bring some form of justice to societies that have endured this sort of history of human rights violation. Prosecutions are obviously the ideal solution. In any ideal society, in any decent society, in any normal society, victims are entitled to full justice and full justice means prosecution and punishment. But, unfortunately, one is dealing with such massive numbers. In South Africa there were tens of thousands of victims of serious crime, committed in the name of apartheid. In Rwanda there were hundreds of thousands of victims and hundreds of thousands of perpetrators, people who organised the genocide and terrible crimes against humanity.[2] In the former Yugoslavia similarly, and in Bosnia alone, hundreds of thousands of people were forced to become refugees, many tens of thousands of women were raped and even more tens of thousands of people – men, women and children – were tortured, murdered and ethnically cleansed. In these situations no criminal justice system in any country can cope with prosecuting the criminals. You could opt for Nuremberg Trial-type prosecutions and place the most important leaders on trial and have them serve as an example to the victims. In some situations, and certainly after the Second World War, that was a rational and sensible solution. Yet the Nuremberg Trials have often been criticised as an impure form of justice, a 'victor's justice'. But one must bear in mind when looking at Nuremberg that the choice facing the victorious allied powers was one between lining up the Nazi leaders and executing them, military style, which is what Stalin wanted and initially what Winston Churchill wanted. Fortunately, good sense prevailed and the victors decided that there would be at least a form of justice, a decent trial at which the guilt of the accused would have to be proved beyond a reasonable doubt.

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2 On the debate over whether a truth commission should be established in Rwanda, see J Sarkin, 'The necessity and challenges of establishing a truth and reconciliation commission in Rwanda' (1999) 21 Human Rights Quarterly 767.

The Truth Commission route has really emerged as a political necessity more than the ideal solution.[3] The Truth Commission which most influenced South Africa was the Chilean model.[4] Chilean President Aylwin, as the rule of General Pinochet was ending, promised the Chilean people that there would be a Truth Commission, that the past wouldn't be covered up, that the disappearances, at least, of so many thousands of Chileans, would be investigated. And General Pinochet was prepared to co-operate to some extent but only to some extent. Firstly, he insisted, and Aylwin had to accept, that the Commission would be limited to disappearances and would not investigate other forms of human right abuses. So if people didn't 'disappear', this horrible expression which has come to us from Latin America, if people had not 'disappeared', their human rights violations would not be investigated. The second condition laid down by Pinochet was that none of the hearings would be in public. They would all be behind closed doors. And his third condition was that in no way would the names of the perpetrators ever be made public. So, if one looks at the report of the

3 On truth commissions generally, see P Hayner, 'Fifteen truth commissions – 1974 to 1994: a comparative study' (1994) 16 Human Rights Quarterly 597; J M Pasqualucci, 'The whole truth and nothing but the truth: truth commissions, impunity and the inter-American human rights system' (1994) 12 Boston University International Law Journal 321; T Buergenthal, 'The United Nations Truth Commission for El Salvador' (1994) 27 Vanderbilt Journal of Transnational Law 497; M Popkin and N Roht-Arriaza, 'Truth as justice: Investigatory Commissions in Latin America' (1995) Law and Social Inquiry 79; R Goldstone, 'Justice as a tool for peace-making: truth commissions and international criminal tribunals' (1996) 28 New York University Journal of International Law and Policy 485; H Steiner (ed), *Truth Commissions: A Comparative Assessment* (Harvard 1997). See also D Dyzenhaus, *Judging the Judges, Judging Ourselves: Truth, Reconciliation and the Apartheid Legal Order* (Hart Publishing 1998) which focuses on the South African Truth Commission's hearings into the role of the legal profession during apartheid.

4 The Chilean Commission on Truth and Reconciliation was established by Ministry of the Interior Decree No 355 of 25 April 1990, published in the *Diario Oficial* (9 May 1990). It became known as the 'Rettig Commission' after its chairman, the jurist Raul Rettig. On the role of the Chilean Truth Commission, see J Zalaquett, 'Balancing ethical imperatives and political constraints: the dilemma of new democracies confronting past human rights violations' (1992) 43 Hastings Law Journal 1425; J S Correa, 'Dealing with past human rights violations: the Chilean case after dictatorship' (1992) 67 Notre Dame Law Review 1455; R Quinn, 'Will the rule of law end? Challenging grants of amnesty for the human rights violations of a prior regime: Chile's new model' 62 (1994) Fordham Law Review 905; M Ensalaco, 'Truth commissions for Chile and El Salvador: a report and assessment' (1994) 16 Human Rights Quarterly 656.

Truth Commission of Chile,[5] you will find that no perpetrators were named although the victims were. Notwithstanding those deficiencies, the Truth Commission in Chile did help heal a nation that had been so badly traumatised by the Pinochet military regime, by the terrible human rights violations and abuses for which it was responsible.

When South Africa began to emerge from apartheid during the transition period, people in our society initiated a huge public debate. It was important that the whole of South African civil society contribute to the debate as to what South Africa should do about past human rights abuses. We held two important seminars in Cape Town. We were fortunate in having a very well qualified ambassador from Chile. Ambassador Heine was a civil rights lawyer in Chile for many years. He was not a career diplomat, but he was sent to South Africa fortuitously. And he brought with him to one of the seminars in Cape Town, President Aylwin and members of the Truth Commission. They made a very important contribution to South Africa's decision to establish a Truth Commission.

At those seminars we heard from some of the victims. Some of us were moved to tears by the stories of the victims. And one of them I recall, and will never forget, was the widow of a black lawyer in South Africa, who was murdered by the security police, because he defended people accused of contravening the apartheid laws. He was not involved in politics himself and his widow came to give evidence about the terrible loss to herself, and particularly to her young children, aged eight and ten when their father was murdered. They heard about it, not by any policeman knocking at the door, but on the radio. During the conference I spoke to her and complimented her on her courage in coming to Cape Town from her home, many hundreds of miles away, to tell us her story. And her response to me made a deep impression. She said, 'You know, last night is the first night that I've been able to sleep through since I heard about my husband's death.' I asked how she accounted for this and she said, 'I don't know, but I can only put it down to the fact that so many important people from South Africa and from abroad, were interested in hearing my story.' And it was a good illustration, I think, to me and to people to whom I repeated the story of the importance of acknowledgement to victims. It was the beginning of that woman's healing process, the fact that her story was being heard, not only by her family who knew the story, but that she could speak from, what was to her, an important public platform. Many victims know who the perpetrator is and they obviously know what happened

5 The Chilean Commission presented its final report, *Report of the Chilean National Commission on Truth and Reconciliation*, in February 1991; see further D Weissbrodt and P Fraser, 'The Report of the Chilean National Commission on Truth and Reconciliation' (1992) 14 Human Rights Quarterly 601.

to them. But they're not satisfied with that knowledge, they want the acknowledgement that comes with some form of official and public inquiry.

In South Africa, prosecutions for crimes of apartheid were never going to happen. Systematic prosecutions were not feasible for the reason I mentioned – there were simply too many perpetrators and too many victims. More compelling were the political considerations. It was astounding when President de Klerk, the leader of the Government, in control of the armed forces, initiated the transition process. Had he wished, he could have continued the apartheid system for one year, two years, ten years – for all of my life. I have heard that apartheid would last only ten years more; I heard it in the '50s, in the '60s, in the '70s and the '80s, and it went on. One apartheid leader after the other continued with some modifications – one step forward and two steps back – but continued the system. President de Klerk saw apartheid's failure and for that reason decided to begin reforms. It was truly unexpected: it certainly took South Africans and indeed the whole international community by surprise. But it would have been impossible for President de Klerk, alone to have agreed to a negotiated transfer of power to a black majority. He needed support from the ruling elite and that support would never have been attained if he had said to his colleagues in his cabinet and in the police and the army, 'Look here, not only are we going to hand over power, but we're also going to arrange for Nuremberg style trials and many of us are going to go to prison for the rest of our lives'. The transition would never have happened. There would have been no agreement if the leaders of apartheid were inevitably to be put on trial.

President Mandela and the ANC were certainly not prepared to accept a blanket amnesty and opt for the path of amnesia. Had that been the condition laid down by the de Klerk Government, again there would have been no peaceful transition. It was not acceptable to the majority of South Africans that the book on the past should be shut in 1994.

The Truth Commission in South Africa really was a political compromise more than a moral imperative.[6] The political compromise was that there would be amnesties, but only in return for full confession. And that incentive-scheme is unique to the South African form of Truth Commission.[7] There were objections from some of the victims. The families of Steve Biko and Griffiths Mxenge came before our Constitutional Court and argued that the Truth Commission was in violation of certain Constitutional provisions.[8] Our court, with difficulty, with reluctance and with hesitation, upheld the constitutionality of the Truth Commission, mainly because it had been provided for in the postamble of what was then the interim constitution.

In South Africa, prosecutions were not ruled out as they were in Chile or Argentina. If people did not apply in South Africa for amnesties they should and can be prosecuted if there is sufficient evidence presented to the Attorney General justifying prosecution. High profile prosecutions have been conducted in parallel and simultaneously with the work of the Truth Commission. The Truth Commission was given primacy which meant that if an individual was brought before a court

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6 The South African Truth and Reconciliation Commission was based on the final clause of the Interim Constitution of 1993 and was established under s 2(1) of the Promotion of National Unity and Reconciliation Act, No 34 of 1995. The objectives of the Commission are listed in s 3 and include establishing as complete a picture as possible of the causes, nature and extent of the gross violations of human rights which were committed during the period from 1 March 1960 to the cut-off date (10 May 1994); facilitating the granting of amnesty; establishing the fate of victims and granting victims the opportunity to relate their own accounts of the violations perpetrated against them; recommending reparation measures in respect of violations; and compiling a comprehensive report containing recommendations to prevent future violations of human rights. Three committees were also established under the 1995 Act for the purpose of achieving the objectives of the Commission: a Committee on Human Rights Violations, a Committee on Reparation and Rehabilitation, and a Committee on Amnesty. Chaired by Archbishop Desmond Tutu, the Commission began its work in 1995 and published its final report in October 1998 (see n 11 below). On the role of the South African Truth Commission, see I Liebenberg, 'The Truth and Reconciliation Commission in South Africa' (1996) 11 South African Public Law 123; and J Sarkin, 'The trials and tribulations of the South African Truth and Reconciliation Commission' (1996) South African Journal of Human Rights 617. On the operation of the three committees, see the Commission's website at https://www.justice.gov.za/trc/.

7 On the debate over amnesties and indemnities, see P Parker, 'The politics of indemnities, truth telling and reconciliation in South Africa: ending apartheid without forgetting' (1996) 17 Human Rights Law Journal 1; and E McCarthy, 'South Africa's amnesty process: a viable route toward truth and reconciliation?' (1997) 3 Michigan Journal of Race and Law 183.

8 See *Azanian Peoples Organisation (AZAPO) and Others v President of RSA and Others*, 8 BCLR (1996) 1015 (Constitutional Court), Deputy President Mahomed speaking for the majority of the Court.

in a criminal prosecution and then applied for amnesty, his trial was almost automatically postponed and suspended, pending the decision of the Truth Commission. Where amnesty was granted, no trial would follow.

When the Truth Commission was set up by Parliament, it was obviously important that it be set up by the first democratic parliament in South Africa's history. A parliament that truly represented the victims of apartheid. It was the representatives of the victims who agreed to the establishment of a Truth Commission. This was of fundamental significance to its moral foundation. It was not the sort of self-amnesty that people like Pinochet granted to themselves, but a decision taken almost unanimously. Although there was opposition to it from the extreme white right-wing party in Parliament, the Truth Commission had the overwhelming support of the members of the democratic South African Parliament. That fact is often forgotten in the debate on the moral justification of the South African Truth Commission.

When it was first established, its supporters were extremely nervous. Would it work? Would perpetrators come forward? Would victims come forward and give evidence of what had happened to them? Would any significant figures apply for amnesty and make full confessions? This was by no means inevitable. I headed the Commission of Inquiry into Violence in South Africa between 1991 and 1994 and, fortunately, we were able to at least scratch the surface of the police and military involvement in serious criminality, even during the negotiating period. I have no doubt that, without the knowledge of the then President de Klerk (that he should have known, it may well be, but that he didn't know I have little doubt) elements in the military, and in the police, who did not want the negotiations to succeed, who did not want a black government and who would have preferred apartheid to continue, were sabotaging the whole negotiation process by committing the most terrible criminal offences. Exposing the involvement of senior members of the military and the leaders of the police in criminal activity certainly helped pave the way for the Truth Commission. Because the denials had already begun. We heard for years in South Africa, particularly in the 1990s, that these allegations of murders and torture were untrue. That they were not committed by the police. That this was propaganda put out by the African National Congress and other liberation movements. We were told we didn't need a Truth Commission because there was no truth unknown. The disclosure of some of the truth, in 1993 and 1994, was sufficient to pull the rug from under the feet of the people who were putting forth these denials. And they were forced, in the light of those revelations, to agree and to participate in establishing the Truth Commission.

The most recent Truth Commission report, that of Guatemala is interesting too. It is a very different form of Truth Commission, a Truth Commission that was set up by agreement when the military regime came to an end.[9] The United Nations was asked to appoint the chairman of their Truth Commission, and they appointed an eminent German international lawyer, Professor Tomuschat from Hamburg University. He sat with and investigated alongside two local Guatemalan lawyers. The agreement was that this Commission, like the Chilean Commission would not name names. They would not hold hearings in public. But nonetheless their report, which was published two or three months ago, has been very important already for change in Guatemala. It exposed the involvement and complicity of former leaders of Guatemala, who denied their involvement and it also disclosed, to the credit of the United States, the covert assistance and finance which the governments of the military in Guatemala received from the CIA, who were aware of the criminal activities of those governments.[10]

Public interest is served by the search for truth and its public inscription. Although there will always be those who attempt denials and revisionist accounts of the past, their impact can be lessened. In South Africa, without the Truth Commission there would have been at least two histories as there are three in the former Yugoslavia. Denials issued by the apartheid government would have been believed, certainly by white South Africans. White South Africans would have wanted to believe the denials because they would have alleviated their guilt in respect of what they knew, or what they did not know, what they could have done and what they did not do. That belief cannot stand up against the evidence presented by the Truth Commission. Disclosure

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9 The decision to establish a truth commission in Guatemala dates back to June 1994 when, as part of the negotiations to end the conflict and under intense international pressure, the Guatemalan Government and the guerrilla movement known as the 'Guatemalan National Revolutionary Union' (URNG) agreed to the formation of a truth commission; see *Accord on the Establishment of the Commission to Clarify Past Human Rights Violations and Acts of Violence that have caused the Guatemalan Population to Suffer*, signed in Oslo, 23 June 1994 (UN doc A/48/954-S/1994/751, 1 July 1994). Although agreement was reached in 1994 to establish a truth commission, it was not to begin work until the parties had signed a final peace accord. This occurred in December 1996 and was followed by the establishment of the 'Historical Clarification Commission' which formally began its work in August 1997.

10 The final report of the Guatemalan Historical Clarification Commission was presented to President Alvaro Arzu and declared public by the Secretary-General of the United Nations, Kofi Annan, in accordance with the procedures contained in the 1994 Accord (see n 9 above) on 25 February 1999. In his inaugural address on 14 January 2000, the new President of Guatemala, Alfonso Portillo, reaffirmed his commitment to establish a mechanism to follow up on the recommendations of the Commission.

is relevant too in preventing a recurrence of atrocities because much of the evidence presented by the South African Truth Commission has ensured that certain people who would have remained in official positions, in the police and the army in particular, have been removed from office.

In the former Yugoslavia, the work of the War Crimes Tribunal, too, has lessened the impact of denials and in some ways may have helped prevent recurrences, at least in Bosnia. The Bosnian Serb army denied the massacres of 8,000 men and boys outside Srebrenica in July 1995. It was only when evidence was obtained from one of the Bosnian Serb soldiers who made a confession to us, that one of the mass graves was found and exhumed. It contained the bodies of boys and adult men, each had been killed by a single bullet wound to the head. Before the exhumation, the Bosnia Serb army had denied the massacre, had said that if there were graves, they were of those who had died in the war. Here too public disclosure helped prevent denial.

In Germany, similar problems were faced at the end of the communist era, when it was decided that the Stasi files should be made public and administered by the Gauck authority. To this day, if a former Eastern German wants any official position in government, at state or federal level, the Gauck administration must certify that the files do not incriminate the individual concerned. There too the exposure of the truth has helped to ensure that people who should not be in positions of authority are removed.

Disclosure averts collective guilt. Collective guilt has been the fuel for the tragedies in Rwanda and the former Yugoslavia. When blame is levelled at an entire people indiscriminately, individuals such as Karadzic and Mladic can take advantage and bring about the calamities to their country and people.

The advantage of a Truth Commission too, as opposed to prosecutions, is its broad focus. In South Africa, the Truth Commission has a mandate to expose human rights abuses during a period of 34 years, between 1960 and 1994. It would take many years before the same amount of information could be exposed by prosecutions. The Truth and Reconciliation Commission has been able to condense its investigations into a shorter period because of the response it received. Little could anyone have anticipated that there would be over 8,000 applications for amnesty and over 21,000 victims coming to tell their story, covering this period. And the huge five-volume report of the

Truth Commission is a testimony to that.[11] The history of apartheid which is recorded in the report of the Truth Commission, I think, will become a shared history of black and white South Africans. The process has avoided collective guilt because the Truth Commissioners themselves came from all parts of our country, black and white people served on the Commission. The victims too came from the white community and the black community and the Asian community. So it was not a question of whites or blacks judging blacks or whites. It was South Africans coming together to judge fellow South Africans. It was this shared history that will avoid the collective guilt.

Amnesties are not essential to Truth Commissions. South Africa made amnesties serve as an incentive-scheme. Without the amnesties a lot of the truth would not have emerged. Yet, the impressive fact that there were over 8,000 amnesty applications obscures one troubling reality. About 55% of the applications came from people who had already been convicted – people in prison who really had little to lose by confessing. Fortunately, the Truth Commission had an efficient investigation department and many amnesties have been refused because one of the conditions for the amnesty, a full disclosure, was not met. Many families opposed particular amnesties and the Truth Commission itself brought forth evidence in contradiction of some of the disclosures that were made.[12] There is talk of a Truth Commission now in Bosnia. Many individuals and NGOs, not government, are talking about the need for a Truth Commission in addition to the United Nations Tribunal. And if the people of Bosnia want it, I have no doubt they should be encouraged. I do not agree with some of the views expressed by people working for the UN War Crimes Tribunal that a Truth Commission would conflict with the work of the Tribunal. I think the South African experience has shown that there is no contradiction. As long as one institution is given primacy and where you have a Security Council Tribunal established, clearly it would have to be given

11 The *Final Report of the Truth and Reconciliation Commission* was presented to President Mandela on 29 October 1998, the full text of which can be accessed via the Commission's website at: https://www.justice.gov.za/trc/. Volume One (twelve chapters) is an introductory volume which describes the working methods of the Commission; Volume Two (seven chapters) addresses the commission of gross violations of human rights on all sides of the conflict; Volume Three (five chapters) focuses on gross violations of human rights from the perspective of the victim; Volume Four (ten chapters) investigates the nature of the society in which gross violations of human rights occurred and reports on a series of 'institutional hearings'; and Volume Five (nine chapters) contains the conclusions and recommendations of the Commission (including the minority position of Commissioner Wynand Malan).

12 For transcripts of the decisions on amnesty, see the Commission's website at: https://www.justice.gov.za/trc/.

primacy in the Bosnian situation. But if victims were encouraged to come forward, and to state in public what happened to them in Bosnia (and there were victims on all sides in Bosnia) and tell their stores, I have little doubt that in the experiences they relate, they would only assist the prosecutions by the International Criminal Tribunal.

This whole concept of 'Truth Commissions' which started in South America, moved to Africa, and was incorporated within Germany is composed of so many variables that it is not a tidy process one can simply import or export. It is certainly of significance to any society moving from a period of violence, from a period of ethnic division, or religious division, to a period of democracy and reconciliation. But the extent to which a particular society can employ the process can only be determined by the society itself. The choice really must depend on the history, on the culture, on above all, the prevailing politics. I hope that the South African experience will be relevant to Ireland, I do not know that it is. One thing I do know is that South Africa has received so much from the international community. We have received so much advice, so much assistance, and more importantly, the political opposition to apartheid, without which apartheid would have not come to an end. And I can assure you only of one thing as a South African, that any assistance that you may need from South Africa will be gladly and open-heartedly given to you.

Thank you very much.

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MacDermott Lecture 2001: Wringing out the fault: self-incrimination in the twenty-first century†

Lord Justice Stephen Sedley

> For at the common law . . . his fault was not to be wrung out of himself, but rather to be discovered by other means, and other men. (Blackstone, *Commentaries*, IV, 296.)

If you were sitting down today to set out the principles of a good system of criminal justice, with a blank sheet of paper and all the wisdom of hindsight at your disposal, you would probably start, as I would, with the principle that nobody is to be convicted of anything unless the court is sure of their guilt. You would probably go on, as I would, to say that it is for the prosecutor to prove the case for conviction and not for the accused to prove his or her innocence. You might be surprised in passing to learn that this particular heritage of the freeborn Briton is barely two centuries old; but the European Court of Human Rights has made it clear that the presumption of innocence is today as much a part of inquisitorial systems as it is of accusatorial systems like ours.[1]

At this point you might pause. What is to be allowed to contribute to the proof of guilt?

Previous convictions, for example? Few things can point more tellingly to the likelihood of guilt than the fact that the accused has committed a similar crime half a dozen times before. The reason why we exclude such evidence is not that it is irrelevant: it is that it is so relevant that it is likely to eclipse everything else in the case. But because of the real possibility that it is only the defendant's record that has caused him or her to be singled out for suspicion and prosecution, or to eliminate mistake on the prosecutor's part by showing method on the defendant's,[2] we do from time to time let such evidence in, and we might want to adopt both the rule and the exceptions in our criminal justice code. A rigid inclusionary or exclusionary rule would inevitably create injustices.

Then how about the accused person's silence, whether at interview or in court? The law now allows this too to contribute to the proof of

† First published in NILQ 52(2) (2001) 107–126.

1 *Funke v France* (1993) 16 EHRR 297.

2 The rationale of admission is, however, strange. It is supposed to go to credit, not to propensity: *R v Jenkins* (1945) 31 Cr App R 1. If so, convictions based on a plea of guilty should have little or no weight.

guilt, provided juries are given strict warnings about first eliminating any innocent explanation for the silence and then ensuring that there is other credible evidence of guilt.[3] The development has been intelligibly contested by advocates of civil liberties, but its best justification is that it probably does no more than corral within safe bounds something which the common sense of juries has always led them to do.

Meanwhile, still writing on the blank sheet, one would have to turn to things the accused himself has said which point to his guilt. (Both for convenience of syntax and in recognition of reality, my paradigmatic defendant is a man.) An admission of guilt is about as significant as evidence gets. But, like a string of previous convictions, it can mislead. It may have been made in fear or distress in order to put an end to an ordeal; it may come from a compulsive confessor; it may have been made in the hope of securing bail or facing a reduced charge. Well within the lifetimes of many of us in the United Kingdom, it may have been extracted by brutality or simply fabricated. So we would certainly put into our system the safeguards now spelt out in the PACE codes[4] for ensuring that police interviews are conducted without oppression or improper inducement, that live recordings of them are made and that courts have power to exclude admissions improperly obtained.

But why only a power? Why not a duty to exclude such evidence? A duty of exclusion seems to follow straightforwardly enough, not least because it will deprive police misconduct of any reward. The problem is the unauthorised phone tap or raid or random search, perhaps undertaken mistakenly rather than maliciously, which turns up damning evidence of serious crime. What principle forbids a society to use such evidence to prosecute wrongdoers? The easy answer – the rule of law – turns back on itself once it is accepted that the detection and prosecution of crime are part of the rule of law. The answer arrived at not only by appellate courts throughout the common law world but by the European Court of Human Rights[5] is that there *is* no principled answer. If you want a principle, it has to be either the common law's historic view that evidence is evidence no matter how it is obtained – a licence and an encouragement to the authorities to break the law – or the bald exclusionary principle adopted in 1961 by the United States Supreme Court[6] and since then under almost constant siege.[7] Both the United Kingdom and the European Court of Human Rights have settled into an uneasy position between the two poles, recognising that while in some cases the breach of legality will be so marginal as not to matter

3 See n 56 below.
4 Police and Criminal Evidence Act 1984, ss 66–67.
5 *Khan v UK* (2000) 8 BHRC 310.
6 *Mapp v Ohio* 367 US 643 (1961); *Miranda v Arizona* 384 US 436 (1966).
7 See *US v Dickerson* 120 S Ct 2326 (2000).

or so serious that it cannot decently be overlooked, in others it has to be painfully weighed against the importance of the evidence it has produced.[8] The persisting difficulty is that there is no legal calibration of the scales.

But the common law itself always made one crucial exception: the rule that it did not matter how evidence had been obtained did not apply to confessions. Here, for reasons which are relevant to my topic, judges historically have taken it on themselves to exclude unfairly obtained admissions of guilt;[9] and this self-conferred power has in our generation been raised to a higher-order principle by a statutory requirement[10] to exclude confession evidence which the Crown cannot prove to have been obtained in circumstances casting no serious doubt on its reliability. I doubt, in the light of the bitter judicial experiences of recent decades, whether we would want our model system to retreat an inch from this position.

So we have reached a position in relation to routine police interviewing where self-incrimination is acceptable because – and only because – it cannot be used unless it has demonstrably occurred in risk-free conditions. While those conditions include voluntariness, the suspect may nowadays be volunteering an explanation because he has been warned that an adverse inference may be drawn from unexplained silence: and to that measured extent there is pressure to speak. For my part I do not find this morally or ethically repugnant, and as a trial judge I encountered no evidence (apart from the still unresolved problem[11] of suspects whose solicitors advise them without good reason to remain silent) that it worked injustice.

With self-incrimination now strictly monitored where it matters most, in the police station, you might wonder what is left to worry about. The answer is quite a lot. So let us go back for a moment to the ideal system. We can agree that nobody should have to account for themselves simply to satisfy an inquisitive official, and therefore that nobody's refusal to do so should be taken to connote that they have been up to no good. This much we can ascribe to the fundamental right to be let alone;[12] but that is a right which has nothing directly to do with self-incrimination: it is the larger and different right of silence. We may also be able to agree that, where officialdom has good grounds for suspecting you of an offence and tells you what the grounds are, not

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8 Police and Criminal Evidence Act 1984, s 78.

9 See *R v Sang* [1980] AC 402, 437, per Lord Diplock.

10 Police and Criminal Evidence Act 1984, s76(2) ; Terrorism Act 2000, s76.

11 *R v Moshaid* [1998] Crim L R 420.

12 The phrase originates in S D Warren and L D Brandeis, 'The right to privacy' (1890) 4 Harvard Law Review 193. See now art 8 ECHR and *R v Director, Serious Fraud Office, ex p Smith* [1993] AC 1, 31, per Lord Mustill.

only what you say but what you don't say in response may be relevant at trial.

But a moment's reflection tells one that there is more to life in a developed democracy than this. A large number of private activities regulated by the state, albeit with the backup of criminal sanctions, depend on the honesty and self-discipline of those concerned. They may be financiers handling large sums of other people's money or drivers who like a drink. Such people from time to time may be required to account for themselves either to public officials or to opponents in litigation.[13] What is to happen when such a person, compulsorily answering entirely legitimate inquiries from someone who up to that point had no particular reason to suspect them of crimes, or whose suspicions lacked proof, makes an incriminating admission? In bare principle, you could take one of three attitudes. You could say that both the question and the answer are writ in water because there is a fundamental principle that people cannot be required to incriminate themselves. Or you could recognise that the regulatory regime has a legitimate need for answers to such questions but prohibit the use of the answers in court. Or you could decide not only that there is a legitimate need for answers but that if the answers afford proof of criminality they should be able to be put before a jury like any other evidence.

The first of these approaches, the total exclusion of incriminating questions, has the virtue of universality and of apparent simplicity (I say apparent because in practice there are few questions to which an incriminating answer is not possible, and it is frequently only the person being questioned who knows whether the answer will in fact incriminate him). It also has the vice – to which I am going to devote a substantial part of this paper – that, an old and never very watertight vessel, it is today leagues adrift from its anchorage and listing badly. The third approach, total admissibility, dovetails with the central purpose of particular legal regimes backed by criminal sanctions, which is to be able to prosecute people who abuse a privileged position. Its downside, at least where the equivalent of PACE procedures is not in place, is the risk of oppression and malpractice in pursuit of admissions. But the second approach – that you can ask the question but can't use the answer – has the vices of both and the virtues of neither. It does nothing to protect the innocent from oppression or therefore from unjust administrative sanctions: to do that, strong procedural controls

13 Lord Templeman in *Istel Ltd v Tully* [1993] AC 45, 53–55, instanced the Theft Act 1968, s 31 (dealings with property and execution of trusts); Supreme Court Act 1981, s 72 (intellectual property rights and passing off); Companies Act 1985, s 434 (inspectors' powers); Insolvency Act 1986, s 291 (official receiver's powers); Criminal Justice Act 1987, s 2 (powers of Director of Serious Fraud Office).

are needed. Instead, by shutting out every forensic use of incriminating answers obtained under legal compulsion, however careful and controlled the procedure by which they have been obtained, it protects the guilty from conviction. I shall have, even so, to return to it because, remarkably, it is the impasse into which the modern law of human rights in Europe has been driven.

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To see how this has come about it is necessary to unravel a long skein of history. As often happens, a significant part of the history consists of participants' own beliefs about it. Blackstone, from whom my title is taken, held that the privilege against self-incrimination was an inalienable part of the Englishman's heritage: 'No man is to be examined to prove his own infamy.'[14] It is found as a judicial maxim as early as 1568, stated plainly by Dyer CJ on behalf of the Court of Common Pleas.[15] The redoubtable John Lilburne at his trial for high treason in 1649 said to the court: 'By the laws of England I am not to answer questions against or concerning my selfe', and Keble J reassured him: 'You shall not be compeld'.[16] Dalton's *Countrey Justice* in 1618 claimed it as a maxim of the common law, and Barlow's *Justice of the Peace* in 1745 asserted that, by keeping the accused out of the witness box, the maxim showed the law of England to be a law of mercy. In fact there was nothing peculiarly English about it: it was a widespread legacy of the mediaeval *jus commune* with roots deep in the law of the early church in Europe and the near East. In today's world it has become a shield which protects corporations from having to divulge their own wrongdoing to the state by whose licence they exist and an elephant trap for public agencies trying to combat crime. How has this happened?

It was in 1898 that English juries became able for the first time to hear an accused person's sworn testimony in his own defence. Until that date the common law had considered anyone accused of felony incompetent as a witness on his own behalf.[17] He could speak from the

14 *Commentaries*, III, 370

15 *Of Oaths Before an Ecclesiastical Judge ex officio* (1568) 77 ER 1308, 1309, cited by Leonard Levy, 'Origins of the Fifth Amendment and its critics' 19 Cardozo Law Review 821, in reply to scholars cited below.

16 *The Triall of Lieut Collonell John Lilburne* (1649), 26. The right of a suspect not to incriminate himself or those close to him was a constant demand of the Levellers in the Civil War: D Veall, *The Popular Movement for Law Reform, 1640–1660*, 152–154, cites numerous sources including the 1649 Agreement of the People.

17 It was one of the much-remarked anomalies of the system that a defendant in misdemeanour, like a civil party, had the right to counsel.

dock in order to question the Crown's witnesses, call his own,[18] make an unsworn statement and argue his case to the jury. Many defendants had made brave and effective use of these limited rights, though many more had watched their fate unfold in frightened silence. But until the eighteenth century defendants in criminal trials, however wealthy, were on their own: not even the great men whose downfall is recorded in the early State Trials volumes had lawyers with them, although they might be allowed to consult counsel if points of law arose.[19] Since if they did not speak nobody spoke for them, a right of silence meant little or nothing in court; and with this came the pressure to speak and make admissions, as often as not under direct questioning from the court.[20] Indeed, until the development during the eighteenth century of the modern concept of the burden of proof, criminal procedure was essentially a dialogue between the accused, albeit unsworn, and the court.[21]

Defence counsel were first allowed into felony trials by the Treason Act of 1696, a measure which followed more than three decades first of judicial revanchism for the regicide of 1649 and then of the anti-Popish show trials and Jeffreys' Bloody Assize. It applied in treason cases only; but in a preamble that anticipates article 6(3) of the European Convention on Human Rights the 1696 Act spelt out the need for the accused to have 'just and equal means of defence of their innocencies'. It is likely to have been the same notion that from the 1730s began to

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18 It was the Hale Commission which introduced this right during the Commonwealth: Veall (n 16 above) 154.

19 See *The Triall of Lieut Collonell John Lilburne* (1649), 30: Keble J: 'If matter of law does arise upon the proof of the fact, you shall know it, and then shall have Counsell assigned to you.'

20 There are many recorded instances. John Bunyan, *A Relation of the Imprisonment of Mr John Bunyan, written by Himself*, recounts in detail how in 1661 the justices at the Bedford quarter sessions interrogated him about the apostasy with which he was charged. J H Langbein, *Torture and the Law of Proof: Europe and England in the Ancien Regime* (1977) at n 4, mentions *Throckmorton's Case* (1554) 1 St Tr 869, 872: 'How say you, Throckmorton, did you not send Winter to Wyat into Kent, and did devise that the Tower of London should be taken. ..?'

21 For example, the Gunpowder Plotters, after Attorney-General Coke's long and angry accusation, were allowed 'to make their defence. Since their deed was evident, they used very few words to defend themselves, but they denied ... many of the circumstances indicated in the indictment. They confessed to the plot, but showed no regret ...' (Oswald Tesimond's narrative, Stonyhurst MS, tr from the Italian, Folio Society, 1973). Coke famously met his match in Sir Walter Raleigh: 'Your words cannot condemn me; my innocency is my defence. Prove against me any one thing that you have broken [ie broached], and I will confess all the indictment ...' Coke's successor as Attorney-General came off still worse with Lilburne: 'Do not interrupt me Mr Lilburn.' 'I pray you then do not urge that which is not right nor true, but notoriously false; for if you persevere in't, I will interrupt you' (ibid 142)

persuade judges, prompted perhaps by the increasing use of counsel to conduct prosecutions, to allow defendants too to have counsel. By the end of the eighteenth century, it has been estimated, counsel was appearing for the defence in about one trial in three at the Old Bailey[22] and the first celebrity defence advocates were emerging.[23]

It was the continued infiltration of lawyers from the civil into the criminal justice system as the nineteenth century unrolled which produced the extraordinary paradox of accused persons who were still not permitted by the common law to give evidence but whose remaining role in the proceedings – questioning witnesses, arguing law, addressing the jury – was now assumed entirely by their advocates. A French observer remarked as early as 1820 that in consequence

> in England, the defendant acts no kind of part: his hat stuck on a pole might without inconvenience be his substitute at the trial.[24]

In fact for many decades judges continued to make the accused himself rather than his counsel address the jury until, under pressure from the Bar, Parliament legislated in 1836 to give defence counsel this right. And it was when, as the nineteenth century closed, the accused was first permitted to testify in his own defence, that Parliament by the same measure decreed that if he did so his privilege against self-incrimination went: if he entered the witness box he could be made to say on oath whether or not he was guilty – but not, except in special situations, be asked about his previous convictions: that, as I have said, would have been over-incriminating.[25] This, of course, is still the law; and it has been joined during the late twentieth century by a series of other situations in which Parliament has made it clear – or thought it had - that the public interest in the exposure of incriminating facts overrides the personal privilege of withholding them.[26]

While at trial the prosecution was by the nineteenth century expected – as it still is – to prove guilt without the accused's help, in the pre-trial phase, when accused persons were held in appalling prison conditions from which few could reach out to secure evidence in their own defence, the law afforded the accused no privilege whatever against

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22 J M Beattie, *Crime and the Courts in England, 1660-1800* (cited Langbein (n 20 above) n 96).

23 William Garrow was the George Carman of the last two decades of the eighteenth century.

24 M Cottu, *De l'Administration de la Justice Criminelle en Angleterre* (Paris 1820) (tr anon, London, 1822; cited Langbein (n 20 above) at nn 81, 97).

25 Criminal Evidence Act 1898, s 1, proviso (e) and (f), now immaterially amended by the Youth Justice and Criminal Evidence Act 1999, sch 4, para 1. Although most American states had anticipated this measure, it was not adopted in the state of Georgia until 1962.

26 See n 13 above and n 60 below.

self-incrimination. By an Act of 1555 known as the Marian Statute, anyone arrested for felony was to be taken promptly before a justice of the peace, whose duty was to take down in writing anything, including things said by the accused, which was 'material to prove the felony'. In cases of treason and other high felonies, the same task was carried out by the law officers of the crown or the Privy Council. This was not the inquisitorial *juge d'instruction* system in which all evidence, pro and con, has to be investigated, but a search for incriminating evidence from accusers and accused. Voluntary confession was naturally encouraged,[27] but there was no formal inhibition on the threats or inducements to confess which might be held out to the defendant. The common law courts did not themselves use torture but in state cases, until its virtual banning by statute in 1641,[28] the Crown's prerogative was used to authorise torture in order to secure confessions.[29] The entire record of accusation and interrogation was sent up to the assize court and – for the better part of two centuries – read out to the jury. It was against this that the accused had to do the best he or she could without legal assistance.[30]

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27 The clerk of the peace's vivid record of the trial of the Lancaster 'witches' in 1612 (*The Wonderfull Discoverie of Witches in the County of Lancaster* (1613)) illustrates the importance attached to unforced confessions: Elizabeth Device 'made a very liberall and voluntarie Confession, as hereafter shall be given in evidence against her, upon her Arraignment and Triall'; and Bromley J, passing sentence, said: 'very few or none of you, but stand convicted upon your own voluntarie confessions and Examinations ... What persons of your nature and condition ever ... had more liberty given to plead or answer to every particular point of Evidence against you?'

28 Langbein (n 20 above) traces records of 81 such cases between 1540 and 1640; but there will necessarily have been more. The 1641 Act, known as the Body of Liberties, by s 45 forbade torture for information save after conviction in a capital case, for the purpose of discovering co-conspirators, and then 'not with such Tortures as be Barbarous and inhumane'. The provision was reproduced almost *verbatim* in the 1648 *Laws and Liberties of Massachusetts*. But as late as Blackstone's time the use of the *peine forte et dure* to compel persons charged with felony or petty treason to plead rather than stand mute of malice (and so save their estates from forfeiture) was regarded as lawful (*Commentaries* IV, 320–322), and it was still in use earlier in the eighteenth century: see E S Turner, *May It Please Your Lordship*, 68.

29 Sir John Fortescue, *De Laudibus Legum Angliae* (1546), ch 22, denounces the use of torture in France; but his editor Amos (1825) points out that the products of torture were accepted in evidence by the English courts, and that such signatures as those of Coke, Bacon and (post-Restoration) King William of Orange are found on warrants authorising its use.

30 Lord Mustill in *R v Director, Serious Fraud Office, ex parte Smith* [1993] AC 1, 40, pointed out that there has been legislative provision since the sixteenth century for the potentially incriminating investigation of bankrupts.

It was during the eighteenth century that judges began to insist on oral testimony from those Crown witnesses who were available; but it was not until Jervis' Act of 1848,[31] by when defence counsel had become a dominant feature of the trial process, that it became a requirement of the law that every accused person must be told at the start of his pre-trial examination that he was under no obligation to answer questions and warned that any answers he gave might be used against him at trial.[32]

Jervis' Act marks the final transformation of a resonant aphorism, historically much honoured in the breach, into a sanctified principle of English law. It had by then been incorporated not only in the fifth of the amendments made in 1791 to the Constitution of the United States but (in discrepant forms) in many of the antecedent American state constitutions, treated in each case, as it still is, as a self-evident civil right.[33] Like the separation of powers which first Montesquieu and then Madison found it useful to discern in the British system of government, it was less a fact than an idea whose time had come. But to say this is not to say that the idea had come from nowhere. It was an idea with a very long, though not an entirely pure, pedigree.

The leading mid-twentieth century scholar of the Fifth Amendment, Professor Leonard Levy, considered[34] that the privilege against self-incrimination was an Anglo-Saxon legal device designed to stem the oppressive effects of the continental church's inquisitorial processes which disfigure the history of the later middle ages. Writing as he was in the long evening of the McCarthy era, in which the American Supreme Court had let the Fifth Amendment be drained of much of its content, as had happened in previous decades to the First, and supported as he was by Wigmore's great work on the law of evidence, Levy's approach, chiming closely with Maitland's and Holdsworth's account of English legal history, is perfectly comprehensible. It is the

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31 11 & 12 Vic 42.

32 This account relates only to official prosecutions. Until the formation of police forces after the first quarter of the nineteenth century a high proportion of prosecutions were private. There is an important body of work on the development of adversarial procedures at common law and its relationship to the development of policing and official prosecutions. See D J A Cairns, *Advocacy and the Making of the Adversarial Criminal Trial 1800–1865* (Oxford University Press 1998); S Landsman, 'The rise of the contentious spirit: adversary procedure in eighteenth-century England' (1990) 75 Cornell Law Review 497.

33 L Levy, *Original Intent and the Framers' Constitution* (1988), ch 12. This privilege is also found in the Hawaiian constitution of 1852 and the Tongan Bill of Rights of 1875: A B W Simpson, *Human Rights and the End of Empire* (2001).

34 L Levy, *The Origins of the Fifth Amendment: The Right against Self-Incrimination* (1968).

account adopted in modern common law judgments.[35] But recent American scholarship, with fuller access to early sources, has called this account in question.[36] The revised account is itself contested, not least because of its unaccountably benign view of the inquisitorial proceedings of the mediaeval church, but it does shed fresh light on the source and diffusion of the notion that nobody should be required to incriminate himself.

The maxim *nemo tenetur prodere seipsum* – literally, nobody is required to betray himself – was taken by mediaeval scholars to have its origin in the writings of the fourth-century ecclesiast St John Chrysostom.[37] What St John wrote, in fact, according to Gratian (the only surviving source) was:

> I do not say to you that you should betray yourself in public nor accuse yourself before others, but that you obey the prophet when he said 'Reveal your ways unto the Lord'.[38]

This is some way from saying that nobody should be made to confess, but like much other sanctified text it did service as the source of a succession of mediaeval assertions of a privilege against self-incrimination.[39]

But mediaeval church practice mocked the principle.[40] Le Roy Ladurie's celebrated study of the church annals of Montaillou between 1318 and 1325 found the future Pope Benedict XII of Avignon, Jacques Fournier, presiding as bishop of Pamiers over an inquisition court which interrogated on oath anyone denounced for Albigensian heresy, using

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35 For example, that of the Australian High Court in *Sorby v The Commonwealth* (1983) 152 CLR 281, and the English cases cited in n 64 below.

36 R H Helmholz, C M Gray, J H Langbein, E Moglen, H E Smith, A W Alschuler, *The Privilege against Self-Incrimination: Its Origins and Development* (1997); and R H Helmholz, 'The historical origins of the privilege against self-incrimination at common law' (1995) 92 Michigan Law Review 1047.

37 C 347–407, Archbishop of Constantinople 398–403, but originally trained as an advocate: hence the soubriquet Chrysostom – golden-mouthed.

38 Helmholz et al (n 36 above) p 26.

39 Levy, in his recent article (n 15 above), accepts that he was wrong to doubt the presence of the maxim in the canon law texts: indeed he cites his own work identifying it in Augustine, Aquinas and Gratian. But he is adamant that 'the right was not a canon law invention because the canon law merely protected the revelation of an unsuspected crime but required a suspected person to incriminate himself' (ibid 846). It is certainly arguable that there is not much daylight between the acknowledged exceptions to the privilege and Levy's proposition about its meaning.

40 The principle is not even mentioned, for example, in the Byzantinist Walter Ullman's essay 'Some mediaeval principles of criminal procedure', LIX Juridical Review (1947), reprinted in his *Jurisprudence in the Middle Ages* (Variorum 1980).

as much physical torment as was needed to produce a confession.[41] For his victims, including the five who were in consequence burnt at the stake, as for the thousands of others who were tortured in the course of the mediaeval church's inquisitions, the maxim *nemo debet prodere seipsum* did not have a great deal of significance.[42] It was held by ecclesiastical lawyers not to apply to charges of heresy, nor to other charges of grave criminality, nor to accusations based on reputed criminality (*fama*) rather than proven acts, nor to cases where the proof was considered strong. In point of law it is nevertheless apparent that it was into the church's own doctrines that the maxim against self-incrimination was first introduced.[43] Although these proceedings were in origin accusatorial,[44] manuscript records show that the privilege was not infrequently invoked on examination of suspected recusants under the *ex officio* oath, despite the mass of exceptions.[45] And importantly, the maxim survived in the popular mind.

In sixteenth-century England the ecclesiastical courts, from the time of the Reformation a limb of the Crown, and the specially created Court of High Commission,[46] made use of the *ex officio* oath, accompanied sometimes by torture, to expose apostasy and heresy

41 E Le Roy Ladurie, *Montaillou: Cathars and Catholics in a French Village 1294–1324* (1975), introduction to the English edition (1978), xiii–xvii. In addition to being held in fetters in a tiny cell and fed on black bread and water, the modes of pressure to confess included excommunication, which would have had the effect of closing off recourse to confessional privilege, and – in state-promoted cases – torture.

42 The record of Joan of Arc's interrogation under oath by the Bishop of Beauvais shows her protesting: 'By my faith, you might ask me such things as I will not tell you' (Orleans MS, third session, 24 February 1431; Folio Society, 1956, 70); but the interrogation went on for another 13 sessions, and at her trial she was formally admonished 'that she must answer and tell the truth about such things as touch her trial; and that it was essential that she should do so, since the doctors [ie lawyers] were of this opinion' (ibid 131). Interestingly, she was offered counsel and refused.

43 See the multiple early sources cited in Helmholz et al (n 36 above) ch 2, 17–18.

44 Ullman (n 40 above) 10.

45 To the exceptions mentioned above one can add, what came to be constantly asserted in the English spiritual courts, that the privilege did not apply where the purpose of the proceedings was reform and not punishment: Helmholz (n 36 above) 30. I am not convinced that Helmholz is justified in treating the torture of suspected heretics as having been marginal in England: it seems to have been routine, for example, in Thomas More's Lord Chancellorship.

46 The court of Star Chamber had been set up (or at least confirmed in its powers) by statute in 1487. The papal jurisdiction was abolished in England as from Easter 1534 and replaced by a high court of delegates. From 1559, under 1 Eliz 1, c 1, s 8, courts of high commission were set up with 'wide and often indeterminate jurisdiction in ecclesiastical causes' (G Bray, *The Anglican Canons 1529–1947* xcv–xcvi).

(not always distinguishable from sedition and treason). No privilege against self-incrimination was known to them. It is a commonplace of legal history that the courts of common law, despite their own dubious practices, responded with writs of prohibition to limit the power and effectiveness of the ecclesiastical courts; and it is probably in this process that the common law first claimed and in due course was accorded the credit for devising what was in fact a much older privilege. But it is a matter of debate whether the courts of common law, which until the eve of the Civil War themselves tolerated the use of torture when occasion required, regarded the privilege against self-incrimination as the *reason* for interfering with the ecclesiastical courts. The major recorded challenge to the High Commission's use of the *ex officio* oath, the case of *Maunsell and Ladd*[47], heard by the King's Bench in 1607, failed to secure the issue of a writ of *habeas corpus*. The argument from principle of Nicholas Fuller, one of the radical lawyers of his day, not only failed to convince a majority of the five judges that there was an overriding privilege against self-incrimination but resulted in his being prosecuted and gaoled for his arguments by the High Commission itself.[48] Popular belief came in the early seventeenth century to ascribe the privilege to Magna Carta and the Petition of Right, but it was not until well after 1640 that the privilege began to be articulated with a note of reverence by the secular courts,[49] and then in a system in which it meant little at trial, and nothing at the investigatory stage where it was most relevant. Even so, the reasons repeatedly given for it are relevant to my present purpose.

First, it was reasoned by the canonists, we are all sinners: nobody would be safe if the secular state could demand as of right that individuals own up to crimes of which there was no other evidence. There remains, it seems to me, an important truth in this. It is why I have already suggested that in the ideal system there can be no question of a roving right of inquiry on the part of the state, which would turn the rule of law into something closer to a reign of terror. The problem is answered, however, not by a blanket prohibition on incriminating questions but by a strong precondition that such questions may be asked only in situations prescribed by law and legitimately calling for an answer. I will come back to the important question of what situations these might be.

Secondly, the mediaeval schoolmen reasoned, there was an important divide between the private confession of sins in church and the public excoriation of crime before the ecclesiastical courts. It is

47 (1607) Harl MS 1631, fo 353v and 358v.

48 See C M Gray in Helmholz (n 36 above) 70–77.

49 I have omitted the contested issue of Coke's attitude: see eg Gray (n 36 above) 77–81.

intelligible that such a distinction should be adopted by a theocracy which demanded, as it still does, the unstinting confession of sins, criminal or not, and the doing of penance for them as a condition of spiritual salvation; and the legal insularity of penitential admissions continues to be both a reality and a real problem. It may well be, in fact, that the primary meaning of the maxim was that the confession of sins was not to amount without more to the confession of crimes.

Thirdly, however, it was considered invidious to place suspects in what a modern American judge has called the cruel trilemma of perjury (if they lied), contempt (if they stayed silent) and conviction (if they owned up),[50] especially in legal systems in which perjury was a common and serious charge. Whether the avoidance of psychological pressure really was a consideration in the cruel systems of inquiry, prosecution and punishment which the mediaeval church operated when its authority was threatened, or whether it was a rationalisation of systems which deprived the accused of an equal voice with his accusers, is less important to my present purpose than the moral problem it presents today and to which I will return.

What also matters, of course, is the received axiom itself, endowed with classical and theological respectability, which in our era has acquired independent life and vigour. To the historical evidence that the roots of the axiom are both longer and older than the Anglo-Saxon legal tradition one can add the striking contemporary fact that in two of the leading cases in the European Court of Human Rights judges from a total of twenty-four countries concurred in reading the right of silence and the privilege against self-incrimination into the guarantee of a fair hearing contained in article 6(1) of the Convention.[51] They described these as 'generally recognised international standards which lie at the heart of the notion of a fair procedure'.[52] Such striking testimony to the ubiquity of the principle in legal cultures as removed from each other as those of Finland, Turkey, Poland, Spain, Slovakia, Switzerland and the United Kingdom seems to speak convincingly in favour of at least this much of the revisionist thesis. But what has given the principle an iconic modern status which historically it never enjoyed?

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50 Per Goldberg J, *Murphy v Waterfront Commission* 378 US 52, 55 (1964).

51 *Funke v France* (1993) 16 EHRR 297; *Saunders v UK* (1996) 23 EHRR 313. I have included the dissenters, since they dissent not from the general proposition but in relation to its ambit. I understand from European colleagues that the former Soviet states recognise the principle and that Soviet law did so too. Once again, however, autocracy honoured it in the breach: see M Šlingova, *Truth Will Prevail* (Merlin 1968) for an account of how Beria's police, without any physical force, broke down the Czech leader Otto Sling and made him confess in open court a series of imaginary crimes, for which he was executed.

52 Ibid para 68.

The privilege against self-incrimination was not going to become, as it did become, the boast of Georgian England without attracting the caustic eye of Jeremy Bentham. Bentham as usual gave no quarter in his assault, and his beady-eyed advocacy of enforced confession as an engine of truth overlooked the many ways in which it might be an engine of cruelty and falsehood. But there is a real sting, even if his vocabulary is no longer acceptable, in his characterisation of the suspect's moral dilemma as 'an old woman's reason' and of the notion that the accuser should not look to the accused for evidence as 'a foxhunter's reason'.[53] Those whose interests are served by the exclusion of self-incriminating evidence, Bentham asserted, are 'evildoers of all sorts' and 'lawyers of all sorts'. At least he was prepared to distinguish between the two. But he was presciently right about the lawyers. The development of defence advocacy, as Georgian and Regency barristers made their lucrative way into the criminal process, and the accompanying enunciation of formal rules of presumed innocence, strict proof and – another novelty – silent defendants made the nineteenth century a criminal lawyers' heyday.[54] When, in the late Victorian era of penal reform, the accused was at last given a voice equal to that of his accusers, the price he was required to pay – an entirely logical one – was the qualified forfeiture of his common law right not to incriminate himself. It has since become an axiom of criminal practice that the defence case stands at its highest at the moment when the Crown closes its case, for since 1898 the accused has faced a new and equally cruel dilemma: to give evidence and risk being cross-examined to perdition, or to stay silent and risk the inference[55] that he is hiding something. In criminal investigations the privilege still holds good – but with the important rider, since 1994,[56] that declining to answer may legitimately lead to the drawing of adverse inferences in court. The privilege is not, however, confined to criminal investigations: well before Jervis' Act it had become applied to

53 J Bentham, *Rationale of Judicial Evidence* (1828 edn) V229 ff.

54 In Procurator Fiscal, *Dunfermline v Brown* [2000] SLT 379, 385, Lord Rodger, the Lord Justice General, noted that in Scotland too the right of silence and the right against self-incrimination had been known since at least the beginning of the nineteenth century.

55 The risk of the inference was always there, however clearly the judge told the jury that it was impermissible.

56 Criminal Justice and Public Order Act 1994, s 34. The principle has been sanctioned by the European Court of Human Rights in trials by judge alone (*Murray v UK* (1996) 22 EHRR 29), and the Court's subsequent decisions (esp *Condron v UK* [2001] EHRR 1) show that the same will apply to a properly directed jury. Recent Home Office research indicates that the proportion of suspects refusing to answer questions has fallen since the 1994 enactment from 23% to 16%, but that the proportion making incriminating admissions has remained the same: T Bucke, R Street and D Brown, *The Right of Silence: The Impact of the CJPOA 1994* (Home Office 2000).

disclosure of documents and facts in civil proceedings and to answers capable of leading not to prosecution but to forfeiture.

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So I come back to a present in which two legal imperatives confront each other. One is the need of regulatory and legal systems to be able in specified situations to insist on answers to awkward questions and, if the answers warrant it, to use them to prosecute their authors. The other is a European Human Rights Convention, binding on the United Kingdom as a treaty since 1950 and now patriated as a governing element of our domestic law, which has been held by the European Court of Human Rights in Strasbourg to forbid, as contrary to the guarantee of a fair trial, any use of exacted answers to convict the person giving them.

It has to be observed first how far we have come from the j*us commune* and the concerns which gave rise to the axiom. We are not looking at a threat to give the authorities a roving commission of inquiry into people's private lives, though the axiom remains a needed barrier to that possibility. We are not considering invading the secrecy of the confessional. We are, it is perfectly true, looking at regimes which pose the 'cruel trilemma' of perjury, contempt or conviction – but they are specific regimes to which nobody has to sign up unless they are prepared to accept the regulatory system that goes with them. It is this which, I would argue, is the critical difference between such regimes and the uninvited inquisitor.

Judge Martens in his powerful dissent in the *Saunders Case*[57] in Strasbourg spelt this out very clearly; but not persuasively enough for the majority for whom the maxim *nemo tenetur prodere seipsum* appears to have possessed a talismanic quality. They accepted that it was permissible for answers to be demanded to incriminating questions put by DTI inspectors who were inquiring under statutory powers into illicit practices in the Guinness takeover bid for Distillers, and for the answers to be used for both administrative and prosecutorial purposes. They accepted, too, that the privilege against self-incrimination did not extend to materials taken by compulsion from the suspect – documents, blood samples and so forth - because, they said, this was how the privilege was 'commonly understood in the legal systems of the Contracting Parties to the Convention and elsewhere' (a curious echo of the mediaeval body of exceptions which swamped much of the principle). But, said the majority, the principle remained intact where the compulsion was to give evidence against oneself. They would not, they said, decide whether the privilege was absolute or whether it could

57 (1996) 23 EHRR 313, 350.

properly be infringed in particular circumstances – but they went on, in a brief passage which gives little indication of the depth of issues below its surface, to say:

> It [the court] does not accept the Government's argument that the complexity of corporate fraud and the vital public interest in the investigation of such fraud and the punishment of those responsible could justify such a marked departure as that which occurred in the present case from one of the basic principles of a fair procedure. … The public interest cannot be invoked to justify the use of answers obtained in a non-judicial investigation to incriminate the accused during the trial proceedings.

That, with all respect, sounds very much like the enunication of an absolute right, yet by judges whose own jurisdictions, it appears, all recognise a welter of exceptions to the principle. It also perhaps reflects the fact that the UK's first line of defence had not been one of legal principle but an endeavour to distinguish the damaging but purportedly self-exculpating answers given by Mr Saunders to the DTI inspectors from truly self-incriminating answers. For entirely comprehensible reasons, since the Strasbourg approach is heavily fact-oriented, the question of principle was argued only as a fallback.

Having recognised the legitimacy of regulatory regimes which can insist on having answers to relevant questions, the court took what I have picked out as the second, compromising, course and decided that although it was legitimate to ask an incriminating question it was illegitimate to use the answer in court. That, it seems to me with respect, is the worst of all possible worlds – a world in which the best possible proof of criminality is on the record and cannot be used because it has not been more circuitously and less reliably obtained.[58]

How serious is the problem? How many areas of public administration and personal activity does it affect? A good impression can be obtained by looking at the mopping up operation conducted by the United Kingdom in the wake of its defeat in the *Saunders* case. The Youth Justice and Criminal Evidence Act 1999 amends eleven important pieces of primary legislation passed between 1982 and 1992, together with their Northern Ireland counterparts, most of them designed to detect financial malpractice before innocent people lose their savings or investments. The amendment in each case takes the broad form of forbidding the use of the information obtained by

58 It echoes – whether consciously or not I do not know – one of the answers given in past centuries to those who argued that obligatory answers to church inquisitions were an inducement to commit perjury: the canon law forbade the use of such answers to prove perjury in court: Helmholz (n 36) 30, citing Julius Clarus (d 1575), *Practica Criminalis*, Q 45 no 10. But the answers could be used to prove heresy, for which the penalties were even worse.

statutory investigation in any subsequent criminal proceedings except on a charge of giving false information to the inquiry.[59] One has only to look at the purposes of the amended provisions to see what a swathe this has cut through the financial regulatory system: general investigations into insurance companies; documents obtained from insurance companies; documents and evidence produced to inspectors conducting investigations into companies; insolvents' statements of affairs; statements made by directors facing disqualification; answers given to inspectors investigating building societies' affairs; investigations of persons carrying on investment businesses; investigations into insider dealing; information required from and investigations into banking institutions; statements required by the Director of the Serious Fraud Office; powers for assisting overseas regulatory authorities; inspections required by the Friendly Societies Commission; statements required in Scotland by a nominated officer.[60]

Recent post-*Saunders* legislation has likewise been tailored to fit. The Financial Services and Markets Act 2000 gives the Financial Services Authority major powers of investigation and – if the investigation warrants it – powers to impose conditions on providers' conduct, to take administrative or civil proceedings to obtain redress for people who have lost money because of providers' misconduct, to censure and impose financial penalties on them, to withdraw their authorisation or approvals, and lastly and importantly to prosecute for crimes such as money laundering. The Act gives the FSA four objectives in the deployment of these powers:[61] to maintain market confidence, to promote public awareness, to protect consumers and to reduce financial crime. But in deference to *Saunders* it forbids the FSA to rely on statements obtained under its statutory powers of investigation, and at a stroke obstructs one of Parliament's own explicit objectives, the reduction of financial crime. What sense does this make?

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59 Youth Justice and Criminal Evidence Act 1999, sch 3. Such provisions are not entirely consequential on *Saunders*: of the measures mentioned in n 13 above, s 72 of the Supreme Court Act 1981 and s 2 of the Criminal Justice Act 1987 contained similar inhibitions.

60 Respectively the Insurance Companies Act 1982, s 43A and 44; Companies Act 1985, ss 434 and 447; Insolvency Act 1986, s 433; Company Directors Disqualification Act 1986, s 20; Building Societies Act 1986, s 57; Financial Services Act 1986, ss 105 and 177; Banking Act 1987, ss 39, 41 and 42; Criminal Justice Act 1987, s 2; Companies Act 1989, s 83; Friendly Societies Act 1992, s 67; Criminal Law (Consolidation) (Scotland) Act 1995, s 28. Among other NI Orders in Council, the Proceeds of Crime (NI) Order 1996 is similarly amended. It is necessary to add, however, that the coupling of authority to demand answers with a prohibition on their use in criminal proceedings (other than proceedings for giving false answers) is not new: see Theft Act 1968, s31(1), Supreme Court Act 1981, s 72, Children Act 1989, s 98, Criminal Justice Act 1987, s 2.

61 Ss 3–6.

The tide has been stemmed in the United Kingdom, for the present at least, by the decision of the Privy Council as the final court of appeal on devolution issues.[62] A visibly drunk woman who had told police officers in Dunfermline that a nearby car was hers, was required by them under s 172(2)(a) of the Road Traffic Act 1988 to say who had just been driving it. On the basis of her answer – 'It was me' – she was prosecuted for drunk driving. The sheriff was disposed to let in the evidence of her admission, but the High Court of Justiciary, driven principally by the decision in *Saunders*, held the answer to be inadmissible. The Privy Council took the opposite view. The five opinions deserve far fuller attention than I can give them here, but in essence the Judicial Committee considered *Saunders* either to be distinguishable or its reasoning to be too uncertain to be followed. They held that the section 172 power to demand an incriminating answer was a proportionate and therefore a legitimate response to a major social problem. The decision insists – as I would also wish to do – that the privilege[63] against self-incrimination is purposive, not doctrinal, and that its legitimate use is a question of the proportionality of means to ends, not of rigid rules.[64]

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62 *Sub nom Brown v Stott* [2001] 2WLR 817. Austria, interestingly, had followed the same trajectory but in reverse. By two decisions in 1984 and 1985 the Constitutional Court held that a requirement of the *Kraftfahrgesetz* (traffic law) requiring the owner in specified situations to name the driver was an impermissible invasion of the privilege against self-incrimination. In 1986 the Austrian parliament responded by adding a clause to the *Gesetz* expressly overriding the privilege. Neither this nor the decision in *Brown* has so far been contested in Strasbourg. But see n 76 below.

63 I hope it is clear why – *pace* Professor Levy, who is adamant (n 15 above) that it is a *right* not to answer – I use the word privilege. Everyone seems to accept that incriminating questions can be asked and therefore that they can be voluntarily answered. Fifth Amendment thinking, like that of the drafter of s 14(1) of the Civil Evidence Act 1968 ('the right ... to refuse to answer any question or produce any document or thing'), holds there is a right not to answer. Strasbourg thinking accepts that, at least in a statutory regime, there is no right not to answer, but privileges the answer by making it inadmissible in criminal proceedings.

64 The House of Lords in recent years have expressed serious doubts about the meaning and validity of the privilege itself. The subject-matter of the two principal decisions (*R v Director of the Serious Fraud Office, ex p Smith* [1993] AC 1, *A&T Istel v Tully* [1993] AC 45) has now moved from the domestic to the European arena; but the speeches are a powerful critique of any notion of an absolute right in the modern world, and they deserve to be read in any fresh consideration of the *Saunders* case. See also, from a historical angle, A W Alschuler, 'A peculiar privilege in historical perspective' in Helmholz (n 36 above) ch 7; and from a criminal justice angle, A A S Zuckerman, 'The right against self-incrimination: an obstacle to the supervision of interrogations' (1986) 102 Law Quarterly Review 43.

Treating it as a rigid rule has not only given us the anomalous decision in *Saunders*. It has brought the principle into disrepute by disapplying it, without any explained rationale, to possessions and intimate samples which, because they do not consist of spoken or written words, somehow escape the doctrine altogether.[65] The Court of Justice of the European Communities, despite its policy of protecting recognised human rights, has declined to include the privilege in the rights it considers to be protected by Article 6.[66] And the privilege can be seen in almost parodic form in the consequential endeavours to give corporations the same protection as human beings from the consequences of self-incrimination.[67] While the United States,[68] Canada[69] and – marginally – Australia[70] have resisted this curious teleology, the courts of the United Kingdom have adopted it. An early and debatable Court of Appeal decision[71] that corporations enjoyed in full the privilege against self-incrimination was adopted without argument four decades later in the House of Lords[72] because of the historical accident that, both parties before the House being corporations, neither had an interest in disturbing a decision which accorded them a coveted privilege. Yet what answer is there to what the US Supreme Court said almost a century ago?:

> The corporation is a creature of the state. ... It would be a strange anomaly to hold that a state, having chartered a corporation to make use of certain franchises, could not ... inquire whether they had been abused, and demand the production of the corporate books and papers for that purpose.[73]

– or, it follows, if it could not then prosecute the company or its officers where their answers and their papers showed that they had committed crimes.

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65 The exception made in *Saunders* in favour of the exaction of documents appears to controvert the ECtHR's own decision in *Funke v France* (1993) 16 EHRR 297, as the dissenting judges in *Saunders* pointed out. The [DC/CACD] in England has accepted that such a demand breaches the privilege but was divided as to whether the breach was justifiable: *R v CCC, ex p the Guardian* [2000] UKHRR 796.

66 *Orkem v Commission* [1989] ECR 3283.

67 See D Feldman, 'Corporate rights and the privilege against self-incrimination' in C*orporate and Commercial Law: Modern Developments* (1996).

68 *Hale v Henkel* 201 US 43 (1906). And it has restricted the ability of corporate officials to claim privilege in their own right: *Braswell v US* 487 US 99 (1988).

69 *R v Amway Corp* (1989) DLR (4th) 309.

70 *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 68 ALJR 127.

71 *Triplex Safety Glass Co v Lancegaye Safety Glass* [1939] 2 KB 395.

72 R*io Tinto Zinc Corp v Westinghouse Electric Corp* [1978] AC 547.

73 *Hale v Henkel* 201 US 43 (1906), 74–75.

The jurisprudence of the European Court of Human Rights itself has become trapped in this thicket. Since it is only to criminal proceedings that Article 6, and therefore the right not to incriminate oneself, relates, much effort has been devoted to distinguishing criminal from civil and regulatory proceedings.[74] This, it seems to me, is an added misfortune. Many internal systems of regulation, both statutory and consensual, carry powers far more draconian than any court possesses – not infrequently including the power to deprive people of their livelihood. Why such systems, by being called regulatory or disciplinary, should not be expected to assure the fundamental procedural rights of those subject to their determinations I do not understand, and I do not believe that the common law, which gauges the needs of fairness substantively and not formally, understands it either. What the formal distinction has done is provide a limited but illogical escape from a generalised privilege against self-incrimination; but with it have gone the formal protections against oppression which are the genuine up-side of a legal privilege now accorded to a teenager charged with dropping a fast-food carton in the street but not (so far as the ECHR is concerned) to a person facing extradition on a charge carrying life imprisonment.[75] The substantive baby has gone out with the procedural bathwater.

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One way of cutting through the present tangle is, no doubt, to regard the maxim as historically little more than humbug on the lips of torturers and bullies, and to forget it. To do so would be not only to ignore its potential restraint of worse abuses but to abandon as much of its moral content as remains a real force for good. We ought to be able to do better than our ancestors. A measured and proportionate approach, I want to suggest, can respectably form part of the good legal

74 Decisions which have held state action against individuals not to be criminal in character, and so to fall outside art 6, include: *Krone-Verlag v Austria* (1997) 23 EHRR CD 152 (power to fine for breach of injunction); App 12827/87, 4 July 1988 (imprisonment in aid of injunction); *X v UK* (1984) 37 DR 158 (extradition decisions); *X v UK* (1979) 20 DR 202 (security classification of prisoners, impacting on prospects of release); *Galloway v UK* [1999] EHRLR 119 (mandatory drug testing of prisoners); *X v UK* (1980) 21 DR 5 (regulatory restriction on insurance activities).

75 Cf the important decision of the House of Lords in *R v Hertfordshire CC, ex p Green Environmental Industries* [2000] 2 WLR 273, holding that the privilege could not be claimed against inspectors acting under s 71(2) of the Environmental Protection Act 1990, but that PACE s 78 afforded a control on the use of the answers at any subsequent trial. Once again, the question whether corporations can invoke the privilege at all was not debated. See H Davies and B Hopkins (2000) 'Environmental crime and the privilege against self-incrimination' 4 International Journal of Evidence and Proof 177.

system we began by considering, not least because it conforms well to the requirements of the European Convention on Human Rights.

There are two irreducible standards to which legal methods for obtaining evidence must conform. One is that the use of force or fear to obtain information is morally unacceptable. The other is that no intrinsically unreliable evidence should ever be used to secure a conviction. The two are linked in that it is oppression which characteristically renders confessions unreliable, as we know to our cost in the United Kingdom. But each also has its own rationale. I have explained why I entirely accept that it would be oppressive to allow the state to exact information from people at will. The question is whether it is necessarily oppressive to allow the state both to demand information from people undertaking particular activities and to use it in court if it incriminates them.

There are two possible exits from the anomalous approval by the European Court of Human Rights of only the first, not the second, part of this exercise. One is to go the logical next step and let the answers be used in court. But the other – the first of the responses I began by describing – is to conclude that, precisely because the use of enforced answers to secure convictions *is* the logical sequel of permission to obtain them, the ideal system should not allow incriminating questions to be asked in the first place. This, in fact, appears to be the position now taken by the European Court of Human Rights in relation to the Republic of Ireland's counter-terrorism legislation.[76] If, however, the detection and prosecution of crime is a worthwhile social purpose, it is necessary to ask why not? What both history and morality show to be serious answers to the question are that individual liberty ceases to have meaning if the state can demand answers at will, and that the use of violence or fear to obtain answers is both unacceptably degrading and evidentially counterproductive. But these answers leave significant space: they allow room in particular for a democratic polity to specify by legislation activities, notably those which the state has to regulate in the public interest, which not only are to be hedged by criminal sanctions but for which a controlled power to insist on truthful answers to awkward questions is a necessary and proportionate element of effective regulation. Where such a need for regulation backed by

76 *Heaney and Quinn v Ireland* (21 December 2000) appears to compound, without addressing, the conflict between *Funke* and *Saunders* by holding that a statutory obligation to answer questions directed to detecting terrorist activity on the part of the suspect was a separate violation of the privilege against self-incrimination, as well as of the right to silence and the presumption of innocence. This may be because the first position was not argued in *Saunders*. The *Heaney* decision may nevertheless signal a shift from the second to the first position – the rule of total exclusion – at least in a criminal as opposed to a regulatory context. Whether this will be sustainable in the post-11 September 2001 world remains to be seen.

investigative powers and by criminal sanctions is established, to make the resultant answers inadmissible in evidence has more in common with snakes and ladders than with a just legal system. It protects the guilty from conviction without meeting any of the historical or moral purposes of the privilege.

But precisely because obligatory answers necessarily involve an invasion of autonomy, there has to be a cogent case for each such measure. And because there is already an element of oppression in the mere compulsion to answer, strong protections (of a kind now familiar from Code C to the Police and Criminal Evidence Act 1984) are necessary to ensure that the dignity of the individual is not further compromised. Subject to such controls, however, as the European Court of Human Rights has already recognised, every society is entitled to penalise people who decline to cooperate with a regulatory system to which they have voluntarily subjected themselves. And it is this – the voluntariness of subjection to each regime – which seems to me the final element of the pattern in the good legal system. There will be many activities which, although theoretically voluntary (owning goods or homes, for example, or using public services) are in practice a condition of life. But there are others (running a public limited company, or handling large sums of other people's money, or – more marginally perhaps – driving a car) on which a society is entitled to impose a condition of cooperation with a regulatory regime, backed by criminal sanctions. People are free take it or leave it; but if they take the plums they take the duff. If you want to give it a legal name, it is waiver.[77] It is what already occurs in legal and social reality every time someone takes a job as a shop assistant or a bus conductor: they will be required to account for the money they handle, and they will face prosecution if their account reveals that they have been stealing it.

This seems to me to be both the logic of *Brown* and the illogicality of *Saunders*. In regulatory as opposed to contractual systems, the control which remains in place is not only the will of a democratic legislature, essential though that initially is. It is the United Kingdom's treaty obligation to observe the European Convention on Human Rights. Legislation which permits the use at trial of obligatory answers to incriminating questions must still pass the test of proportionality, a test fuller and subtler than the bare balance of interests or a broad

77 See *R v Institute of Chartered Accountants, ex p Nawaz* (CO/2577/95, 25 October 1996, Sedley J).

sense of fair play.[78] In the present context it has to start from the high historic and cultural premium placed upon the privilege; it needs to recognise that the privilege at its most basic remains a shield against kinds of oppression and risks of injustice which are absolutely unacceptable; and in this light it needs to ask whether nevertheless the particular incursion meets a legitimate and necessary objective by the least invasive means available. Such means will need to include clear procedural protections, though logically they cannot include a caution to the effect that the examinee need not answer. While some compulsory answers may be sufficiently used for regulatory purposes only, it will in my view be justifiable only in exceptional cases to exclude the use of incriminating answers for the very purpose their name suggests – incrimination. In our system there is the final filter of a judicial power to exclude evidence which, though admissible, will make the trial unfair. But because it is a power without clearer guidelines for its exercise than the sense of fair play – something that will inevitably vary from judge to judge – it is initially no substitute for measured legislative provision.

No civilised system of law can hand officials the power to demand answers at will or at large. But an unscrupulous financier can cause just as much human misery as a drunk driver, and a good legal system is entitled, I suggest, to offer both prospective drivers and prospective financiers a deal: this is a regulated activity; undertake it by all means, but be prepared to answer to the authorities for what you do, and to have your answers put before a jury if they show that you've broken the law.

Regulatory systems, of course, are only an aspect of the larger process of the detection and prosecution of crime. In the world of which we have been citizens since the events of 11 September 2001, the looming question is whether – in the absence of any prior regulatory bargain between the individual and the state – the prevention and detection of terrorism is by itself sufficient to justify the exaction of answers from suspects or from those believed to be concealing information; and if so, on pain of what sanctions. It is not very long since the Israeli high court, under its distinguished chief justice Aharon Barak, outlawed torture as a legitimate expedient in all circumstances. The European Court of Human Rights has now added lesser sanctions such as imprisonment to the prohibited expedients for extracting information.[79] But in

78 Thus Sir Sydney Kentridge QC in his Tanner Lectures, *Human Rights: A Sense of Proportion* (Oxford February 2001) argues that the UK's courts have still to fine-tune their application of the concept of proportionality to the constriction of fundamental rights. It is not enough, he points out, to say that a fair balance has been struck.

79 See n 76 and text above.

Europe, at least, there is a difference between the two: torture and inhuman treatment are unconditionally outlawed by Article 3 of the Convention; imprisonment is not. It may be that here too the question is going to become one of the proportionality of ends to means, a topic on which the jurisprudence developed in Strasbourg furnishes important guidance. For it is when you stand on the edge of an abyss that it becomes supremely important not to lose your balance.

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MacDermott Lecture 2003: Can human rights put an end to social strife?†

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What hope does the law offer to communities and societies that are divided by strife? Can the legal protection for human rights foster peace? These are questions that many societies who seek to overcome conflict ask themselves. These are natural questions. When individuals in society hurt and threaten each other, we look to the law to right the matter. So it is natural that when individuals as members of groups hurt and threaten each other – what we call social conflict – we should similarly look to the law for answers. Yet while the law deals reasonably well with individual-based conflicts, it has often proved much less successful in dealing with broad social conflicts. Why is this? Does it mean that the law can do nothing to prevent social strife? And if the answer to that question is no, what precisely can the law do? These are the questions I would like to explore with you tonight.

I will suggest that the law does have a role to play in reducing social strife, particularly the branch of the law we call human rights. This role, I will suggest, involves three distinct processes. The first process is preparatory. To enable the law to do its work, we must set up the conditions in which it can function by acknowledging past wrongs, sharing conflicting narratives, and seeking reconciliation: the therapeutic function. The second process involves providing legal structures through which differences can be worked out and accommodations made: the regulatory function. The third process uses the law to concretise and communicate the values of a civil society: the discourse function. Before we get to the precise ways the law can help alleviate social strife, however, it may be useful to briefly consider the anatomy of social strife and the role of the law in maintaining social harmony.

First, let us consider the anatomy of social strife. Individual conflict in society is unavoidable. Human activities inevitably bring people into conflict with one another. Human beings are profoundly social; they can define themselves only by reference to others. Yet at the same time

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they are individual, competing with others, interacting with others, sometimes seeking to dominate others in the human equivalent of Robert Ardrey's territorial imperative. The law seeks to control and regulate these interactions. Criminal law, family law, tort law, contract law, administrative law – these and many more branches of the law deal with the day to day interactions and conflicts between individuals and their agencies. The law, in sum, represents the principle of order in social relations. It permits us in peaceful fashion to work out the accommodations essential to civil society.

Social strife involves a different order of conflict. It involves not the inevitable conflict of individual-to-individual, but conflict among individuals as members of social groups. This is not individual conflict, but group-based conflict. And because it is group-based, social conflict is more difficult to moderate than individual conflict. The group identity confers its own morality, its own language and stories, its own sense of righteousness. Violence and force may be justified – indeed glorified – in the name of the greater group aspiration.

Group belonging is good. The identity and self-worth of individuals is rooted in the groups to which they belong – their race, religion and gender, to mention only a few. The goal of civil society is to permit individuals to flourish as members of their group or groups; for the complex reality is that each individual finds himself grounded in a number of groups. Achieving this goal requires two things. First, the individual must be permitted to realize his or her identity or aspirations as a member of a group: validation, not suppression. Second, civil society must provide a peaceful way of working out the group-based conflicts that inevitably arise: peaceful accommodation, not conflict. Social strife occurs when these requirements are not met. It is the pathology of group identity gone wrong. The positive virtues of religion, race or clan become the destructive vice of a diseased and dysfunctional body politic.

This brings us to the role of the law in maintaining social harmony. The law as it developed to the middle of the 20th century was concerned primarily with individual-based conflict. Group-based conflict was largely outside its domain. Or perhaps, more accurately, to the extent that governments sought to use the law to moderate groups-based social strife, it generally failed. Typically, the group-based ethic, endowed with its own 'superior' morality and the force of numbers, was prepared to defy the law. Consequently, the principle of order, essential to a civil society, was never successfully extended to group-based social strife. The mechanisms of 19th century law, geared to individual-based conflicts, stood impotent before group-based conflicts. This is not to deny that group-based social uprisings were often crushed in the name of the law, or its deformed cousin 'law and order.' Rather, it is

to say that the normative force of the law as a principle of order and accommodation was not effective: repression, yes; legal order, no.

The challenge for civil society was – and remains – to find a way for the law to bring the same order and accommodation to social strife as it does to individual conflict. I hasten to say that just as individual conflict can never be eliminated, so group-based social conflict cannot be eradicated. Conflict is a natural outgrowth of diversity, and cannot be eliminated short of enforced hegemony. We are not concerned with elimination of social strife, but management. The goal is not a definitive resolution but a process of mutual accommodation. Accepting that in every society, diverse groups must live together, the aim is to find a way to permit them, with all their differences, to speak across what separates them and live together in harmony.

The group-based nature of social strife requires a group-based legal response. The failure of 19th century law is that it provided an individual-based response, predicated on the assumption, too often false, that each nation-state represented a single homogeneous ethnic or religious group. To respond to the reality of the group-diverse modern state, a group-tolerant legal norm is required. The law of human rights which emerged in the aftermath of the Second World War provides such a norm. The ethic of human rights is grounded in equal respect for all individuals, regardless of the group to which they belong. At the same time, it acknowledges the source of individual identity in group allegiances by forbidding discrimination on group-based grounds. If this be so, we have at hand a legal concept that may help to moderate group-based conflict and avoid the pathology of social strife.

My country, Canada, is a country of many groups and cultures. The modern Canada was created in the marriage of two colonies – one French-speaking and Roman Catholic; the other English-speaking and Protestant. The country's founding premise – a shaky one in the eyes of many sceptics – was that different peoples could realise their aspirations and live in harmony within a single nation. The mechanism for the realisation of this premise was the law. This included the law of the Quebec Act of 1774, which guaranteed to the French Catholics of Quebec the right to retain their language, religion and the French Civil Law; the law of our first Constitution, the British North America Act of 1867, which provided language, religious and educational guarantees to French and Anglo minorities wherever they might be; the law of the Charter of Rights and Freedoms of 1982, which confirmed and strengthened linguistic rights, gave constitutional protection to Aboriginal rights and formally recognized the multi-cultural character of the modern Canada; the law of equality and anti-discrimination that runs through our human rights statutes and is enshrined in section 15 of the Charter. Canada has had its conflicts, to be sure. We are not immune

to the pathology of group-based civil strife, as attested by the political rebellions of the 19th century, FLQ terrorism in the 20th century and the 1990 stand-off of the Mohawk community of Kanesatake. But in the main, we have resolved our group-based differences through respect and accommodation – a respect and accommodation grounded in legal protection.

The most divisive political issue facing Canada – the question of Quebec secession – has been characterized by civility. With the exception of the brief FLQ campaign, proponents and opponents of secession have engaged each other in perfectly peaceful debate. The issue of whether the province should form an independent state has been twice submitted to the Quebec electorate without notable incidents. The legal question of whether Quebec can secede unilaterally from Canada has even been debated before the Supreme Court of Canada.[1] The Court's advisory opinion on this issue has been generally accepted by all sides of the debate.

I believe that Canada has generally been spared conflict because of a commitment to democracy, justice and the rule of law, but also because of culture – a culture of respect, tolerance and accommodation of difference grounded in the law. The result is a country in which individuals are free to affirm and celebrate their particular group identities and where conflicts, by and large, are worked out peacefully, without bloodshed. The *Canadian Charter of Rights and Freedoms* stands as the ultimate expression and legal manifestation of a culture of respect, tolerance and accommodation of difference.

Against this background, let me return to the processes by which the ethic and legal practice of human rights can moderate group-based differences and prevent social strife.

COMING TO TERMS WITH THE PAST: TRUTH AND RECONCILIATION

The first step in coming to grips with social strife is preparatory. Societies that have been exposed to social strife must establish the conditions under which the laws and the language of human rights can do their work. Society, like individuals, are burdened by their pasts. The more troubled the past, the more difficult the way forward. Just as individuals must come to grips with their past before they can change their lives, so societies must reconcile themselves with their histories before they can move toward a just present and a peaceful future. Only when a society understands what has gone wrong in its past can it move forward to developing a culture of respect and accommodation.

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1 See *Reference re Secession of Quebec* [1998] 2 SCR 217.

One searches in vain for a universal formula for achieving the conditions that permit the healing of historic wounds. Each society must find its own way. Yet experience suggests that a society seeking to move beyond a past of civil strife after a history of violence and human rights abuse can do two things. First it can in some broad sense acknowledge the truth. Second, it can move to reconcile that truth with its present values and aspirations.

Facing the truth and reconciling victims and abusers who have opposed each other in bitter and violent conflicts is no easy task. As 19th century philosopher Wilhelm Dilthey pointed observed, we make our meanings and infuse our identities by continually narrating the stories of our lives.[2] Each group's narrative becomes its inner reality, a reality that makes it difficult to acknowledge the quite different narrative and reality of the other group. The depth of suffering, animosity and indeed hatred that may result from conflict must not be underestimated. Yet, if there is to be any hope for a peaceful future, societies that have experienced conflict must earnestly attempt to share their conflicting narratives and reconcile with each other. Without reconciliation, the memory of the conflicts and abuses of the past may well hold sway over the present and haunt the future. As Shira Herzog observes:

> The history of protracted conflicts teaches that memory, fear and pain do not disappear – but they can be balanced by the promise of a better future.[3]

Acknowledging the truth

Before a society can move to eliminate social strife, it must in some broad sense acknowledge the truth of its past. This acknowledgment must be based in an acceptance of the fundamental tenet of human rights doctrine – that every individual is entitled to equal respect and dignity and that discrimination and persecution are evil.

By acknowledging the truth of the past, I do not mean to suggest that a society can, or should try, to describe and pin down with historical accuracy, all or even most of the wrongs and conflicts that make up its past of social strife. We never can recapture the past, no matter how much we try or how much we spend. And the very process of reconstructing past wrongs in meticulous detail if taken too far can fuel rather than assuage the group sense of grievance. I mean only that in some broad sense people on both sides of endemic conflict must begin to share their stories or narratives and acknowledge the wrongs of the past.

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2 See, eg, W Dilthey, *Hermeneutics and the Study of History* (Princeton: Princeton University Press, 1996).

3 *The Globe and Mail* (13 May 2003, A15).

Many societies that have undergone the transformation from social conflict or authoritarian rule to peaceful democratic governance have used truth commissions to develop an official account of past human rights abuses: Argentina, Chile, El Salvador and South Africa to mention only a few.[4] The truth commission's purpose is to describe the overall pattern of human rights abuses over a given period, to the end of enhancing the understanding of conflicting narratives. However, truth commissions are not the only way for societies to come to grips with their past. For example, commissions of inquiry may assist in uncovering specific instances of abuse. Here in Northern Ireland, inquiries are underway into alleged past abuses. In Canada, such commissions have been used to ascertain the truth about the dark chapters of our past and present. One such example is the 1991 Royal Commission on Aboriginal Peoples.

At this point, a difficulty must be acknowledged. Truth seeking can go on forever. We can never uncover every abuse, examine every alleged wrong. Tribunal fatigue and, ultimately, contempt for the entire process is a real danger. Endemic, debilitating social guilt is also a risk. Therefore, care must be taken to structure the process in a way that achieves closure within a reasonable time. The aim is not to discover historical fact, nor to establish guilt. It is rather to confront and acknowledge the dark corners of the past.

However one achieves this acknowledgement: whether by truth commission, inquiry or some other means of coming to grips with the past, establishing the truth is only a first step.[5] Truth without reconciliation does little in moving a society beyond conflict. To achieve social reconciliation and ultimately respect for human rights, more than mere examination of the past is required.

Reconciliation

Reconciliation is site-specific. What achieves reconciliation in one situation may fail in another. The catharsis of facing the truth of the past may itself promote reconciliation. We are told how witnesses at South African Truth Commission hearings weep and forgive, even as

4 P B Hayner, *Unspeakable Truths* (New York, 2001); P B Hayner, 'Fifteen Truth Commissions – 1974 to 1994: a comparative study' (1994) 16 Human Rights Quarterly 597; J M Pasqualucci, 'The whole truth and nothing but the truth: Truth Commissions, impunity and the inter-American human rights system' (1994) 12 Boston University International Law Journal 321; T Buergenthal, 'The United Nations Truth Commission for El Salvador' (1994) 27 Vanderbilt Journal of Transnational Law 497; *The Azanian Peoples Organization (AZAPO) et al v The President of the Republic of South Africa et al*, CCT 17/96 (SA Const Ct); D Dyzenhaus, *Judging the Judges, Judging Ourselves: Truth, Reconciliation and the Apartheid Legal Order* (Oxford 1998) 1–6.

5 Ibid.

they recount the most horrifying atrocities. Reconciliation demands that members of groups in conflict come to see the other, no longer as their enemy, but as their fellow citizen. To do this, they must look beyond their own narrative and acknowledge the conflicting narrative of the enemy. Enemies may not become close friends, but through sharing narratives, they can make the other person's suffering part of their own story. But beyond this cognitive exercise, reconciliation demands an act of acceptance and social will. Abusers and victims alike must come to see that their society recognizes the wrong that has been done and is resolved to move on. Both these goals can be furthered by the simple act of acknowledging the truth.

Sometimes, however, more will be required to achieve reconciliation. One possibility is an apology, an expression of sincere and profound regret, to the victims of past conflict. An official public apology 'has the potential to set the record straight and restore dignity to the person or group harmed, under full, public scrutiny'.[6] Apologies, we are learning, are sometimes the key that unlocks the door to healing and reconciliation.

A true apology entails acknowledgment of the wrong done, acceptance of responsibility for the wrongdoing, an expression of sincere regret and profound remorse and the assurance or promise that the wrong done will not recur.[7] The sincerity and import of an apology may be seriously undermined if it is used as an occasion to provide explanations or excuses for the wrongdoing.

In Canada, official apologies have twice been used to address some of the darker periods of our history. During the Second World War, the Canadian government classified all people of Japanese ancestry as 'enemy aliens', detained 22,000 of them in internment camps, and confiscated and sold their property. In 1988, in open Parliament, Prime Minister Brian Mulroney acknowledged the wrongfulness of the government's actions and offered Japanese Canadians a formal and sincere apology for the injustices they had suffered.[8]

The second apology was for Canada's wrongs towards its original inhabitants, the First Nations peoples. The wrongs included removal from traditional lands, denial of access to natural resources and paternalistic governmental administration. In 1998, Canada issued a formal statement of reconciliation, acknowledging, that 'attitudes of

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6 S Alter, 'Apologising for Serious Wrongdoing: Social, Psychological and Legal Considerations' (Law Commission of Canada, Ottawa, 1999).

7 See N Tavuchis, *Mea Culpa: A Sociology of Apology and Reconciliation* (Stanford 1991) vii.

8 Canadian House of Commons Debates, September 22, 1988, pp 19499-19500.

racial and cultural superiority led to a suppression of Aboriginal culture and values' and that past actions resulted in 'the erosion of the political, economic and social systems of Aboriginal people and nations.'[9] The Government formally expressed 'to all aboriginal people in Canada [its] profound regret for past actions of the federal government which have contributed to [the] difficult pages in the history of our relationship together.'[10]

A victimized community is also entitled to the reassurance that injustice will not be repeated and that rights will in the future be respected. In the apology to Japanese Canadians, Prime Minister Mulroney gave a 'solemn commitment and undertaking to Canadians of every origin that such violations will never again in this country be countenanced or repeated.'[11] Likewise the Statement of Reconciliation with Aboriginal Canadians recognizes the importance of ensuring 'that the mistakes which marked our past relationship are not repeated.'[12]

Official apologies like the ones delivered to the Japanese Canadian community and Aboriginal Canadians mark a break with the past and a desire to begin a new relationship based on respect and accommodation. Sincere apologies offer the hope of forgiveness.[13] The act of asking forgiveness has healing potential; and forgiveness, should it follow, may establish full reconciliation: the 'act of forgiving can reconnect the offender and the victim and establish or renew a relationship; it can heal grief; forge new, constructive alliances; and break cycles of violence.'[14]

The challenge is to provide complete and sincere apologies for serious wrongs and inhumanities, without trivializing the technique of apology. Virtually all groups can recount wrongs committed against their members at some time in the historic past. If the apology is to retain its force as an agent of reconciliation, it must be reserved for exceptional, sustained abuses – abuses that truly constitute a dark blot on the nation's history.

Beyond apology, lie the thorny issues of reparations and dealing with the perpetrators of past abuses. The task of devising compensation for wrongs done to previous generations is challenging. Those who suffered the wrong are no longer with us; how then can money – insofar as money ever can – make up for these abuses? Canada struggled with this

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9 The Hon Jane Stewart, Minister of Indian Affairs and Northern Development, 'Statement of Reconciliation', 7 January 1998.

10 Ibid.

11 Canadian House of Commons Debate (n 8 above) 19500.

12 The Hon Jane Stewart (n 9 above).

13 Alter (n 6 above); Tavuchis (n 7 above) viii.

14 M Minow, *Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence* (Boston 1998) 14.

in devising the reparations that accompanied its apologies to Japanese Canadians and Aboriginal peoples.

Individuals of Japanese ancestry whose rights were restricted were offered monetary compensation. Moreover, an educational, social and cultural fund for the Japanese Canadian was established and an offer of citizenship was extended to persons of Japanese ancestry who were expelled or who had their citizenship revoked.[15] Likewise, upon delivering the Statement of Reconciliation to Aboriginal Canadians, the Minister of Indian Affairs and Northern Development announced a $350 million commitment to community-based healing as a first step to deal with the legacy of physical and sexual abuse at residential schools.

The quite different question of what to do with those who have committed human rights abuses raises difficult and contentious issues. Three options present themselves: prosecution, the removal from office of tainted state officials, and amnesty.

It might be argued that, in an ideal world, officials responsible for violations of human rights will be removed from office, and those who have committed criminal acts will be prosecuted and brought before justice by way of fair and impartial trials and, if found guilty, sentenced and punished in accordance with the law. Yet, in many situations, neither prosecution nor lustration are practical options for a society trying to maintain a fragile peace. Some societies have decided to accord amnesty to individuals responsible for even the most grave human rights violations. Each society coming to terms with past conflict must address the question of whether to follow the path of just retribution or forgiveness. In dealing with this issue and the question of reparations, each society must examine not only the requirements of its domestic law, its obligations under international law, the relevant political context, local circumstances, the nature and extent of the conflict and the gravity and duration of the human rights abuses,[16] but also its common values and needs.

CREDIBLE LEGAL STRUCTURES

Human rights protection is not simply a matter of coming to terms with the past. If a divided society is to overcome conflict, credible legal structures are necessary to ensure that human rights abuses cease and are not repeated. Society must provide a mechanism for resolving ongoing group-based conflicts. The credible legal structures that are

15 See J Orange, 'Bolstering the argument for redress for the comfort women: the Japanese Canadian Settlement as precedent' (1998) International Insights 27, 34–35.

16 See, eg, *Azanian Peoples Organization (AZAPO) et al* (n 4 above).

the hallmark of a civil society must be extended beyond the sphere of individual conflict to group-based conflict.

This means that in addition to an independent and impartial judiciary to administer justice in accordance with law, the laws must provide legal protection for the fundamental human rights of individuals and groups. Rights may be enshrined in a written constitution, as has been done in Canada and the United States. Alternatively, human rights may receive non-constitutional legislative protection. Examples of this approach include the United Kingdom Human Rights Act 1998 and the New Zealand Bill of Rights Act 1990. The fact that a Bill of Rights has not been enshrined does not mean that it lacks constitutional force. For example, the United Kingdom Human Rights Act, coupled as it is with a treaty-based commitment to conformity of the law to the European Convention on Human Rights Convention, effectively operates as a constitutional document.

Some states have neither explicit constitutional nor comprehensive legislative protection for human rights. That does not mean that they have no legal protection for human rights. Indeed the common law or *jus commune* of many countries includes rules and presumptions that may offer extensive and effective protection for human rights. The Australian constitution, for example, does not include an express Bill of Rights. Similarly, the Commonwealth Parliament has yet to adopt any comprehensive federal human rights legislation. Nevertheless, few would argue that human rights are less well protected in Australia than they were, for example, in the former Soviet Union which ironically included extensive protection for individual rights and freedoms in its constitution.[17] This said, the dominant model for recognizing group-based rights and dealing with the conflicts they engender, is the written Bill of Rights with constitutional force.

The legal protection of human rights involves most obviously protection of the fundamental individual rights and freedoms. These rights inhere in every person by reason of the fact that they are human beings. Many social conflicts are marked by numerous and grave violations of basic individual freedoms by both state agents and non-state actors. As a result, it is imperative to offer legal protection for the basic right to life, liberty and security. Legal protection of basic individual rights, coupled with a commitment to the Rule of Law and an independent and impartial justice system, ensures an immediate cessation of abuses and provides victims with the much needed concrete assurance that their suffering will never again be repeated.

The importance of an independent and impartial justice system in making the transition from a society of civil strife to a society of

17 See ch 7 of the Constitution of the Union of Soviet Socialist Republics, adopted on 7 October 1977.

peaceful accommodation cannot be over-emphasized. The success of the venture hinges on the state being perceived as the neutral broker of difference. Police forces must act fairly in maintaining the peace and investigating violence. Prosecutors and defence counsel must conduct their activities with high professionalism. And above all, the judiciary, the final safeguard of freedom and justice, must be perceived to be absolutely independent and impartial. The role of the lawyer or judge in a society driven by civil strife may be difficult and dangerous, as you in Northern Ireland are all too aware. But it remains vital, if peace is ever to be achieved.

I have been speaking of the mass infringement of individual human rights in times of social strife. However, we must remember that the source of the conflict usually lies in group concerns. The legal protection of group rights may provide a useful tool in addressing the origins of conflicts and in preventing their recurrence. Group rights are rights that we possess on account of membership in a particular group or community. Humans, we know, are social beings. As a result, individual identity is closely related to membership in groups based on shared culture, beliefs, language and history. In order for the individual to achieve full self-actualization, we must respect his or her membership in the groups that participate in defining his or her identity. Group rights safeguard human dignity by protecting every individual's right to retain membership in the identity communities that define oneself. Such membership is empty unless the identity community is healthy and capable of ensuring its survival. The function of recognizing group rights is to give vulnerable identity communities the tools necessary to ensure that they survive and flourish.

The protection of language rights in Canada is an example of how the legal protection of group rights can assist in maintaining peaceful co-existence in a diverse society. Language is an essential element of both individual and group identity.[18] At the individual level, it shapes the way we think and the way we perceive the world. Language also has communal dimensions. Language is a fundamental element of human culture[19] and, like religion, can be the glue that holds a minority community together.

Although many languages are spoken in Canada, we have two official languages – English and French. The official recognition of English and French reflects the primary role that English and French speaking immigrants played in building our country. Thus, our Constitution recognises that English and French are the official languages of Canada and have equal status, rights and privileges.[20] The Constitution

18 See *Ford, Quebec (Attorney General)* [1988] 2 SCR 712, 748–749.

19 See *Mahe v Alberta* [1990] 1 SCR 342, 362.

20 S 16 of the Canadian Charter of Rights and Freedoms.

guarantees the right to use English and French before Parliament, and the federal courts,[21] as well as the legislative assemblies and courts of the provinces of Quebec, New Brunswick and Manitoba.[22]

Minority language communities find support in the linguistic educational rights guaranteed in section 23 of the *Canadian Charter of Rights and Freedoms*, which guarantee their right to have their children receive primary and secondary education in their language. By enshrining linguistic educational rights in our Constitution we have recognised the importance of schools for the preservation, development and promotion of minority languages and culture. Schools are essential to ensuring the future of a linguistic minority community. They protect against assimilation. They are focal points for communities. And they promote the health and cultural vibrancy of minority communities.

The legal protection of group language rights in Canada has ensured that the Canadian linguistic tradition is grounded not in conflict or suppression, but in respect and accommodation. Every country must find its own way to recognise its particular group. I note with interest that the Northern Ireland Human Rights Commission has included proposals for language rights and rights concerning identity and communities in its consultation document on a Bill of Rights for Northern Ireland.[23]

THE DISCOURSE OF RIGHTS

Finally, legal norms founded in human rights communicate the values of a civil society. They provide space for social discourse; and they express society's commitment to the inherent dignity of all human beings and the right of all to live in peace together.

First, the language of rights provides a place of discourse. Using shared principles and values given expression by the law, speakers and audiences are empowered to express, receive, and understand each other's discourse. The language of rights provides a framework in which people holding competing perspectives can work out peaceful accommodations.

Framing claims in the shared language of rights permits individuals and groups who may not have shared experiences to understand the perspective of the other. Martha Minow suggests that the rights discourse may be viewed as 'a medium for speaking across conflicting

21 See s 133 of the Constitution Act 1867; and ss 17, 18, and 19 of the Canadian Charter of Rights and Freedoms.

22 Ibid, and s 23 of the Manitoba Act 1870.

23 Northern Ireland Human Rights Commission, *Making a Bill of Rights for Northern Ireland: A Consultation Paper by the Northern Ireland Human Rights Commission* (Belfast 2001), 24–28 and 79–83.

affiliations, about the separations and connections between individual groups and the state.'[24] Rights claimants implicitly invest themselves in a larger community, even when seeking to change it.[25] A rights claim thus initiates a form of communal dialogue;[26] '[it]draws each claimant into the community and grants each a basic opportunity to participate in the process of communal debate.'[27] This is important for societies divided by strife. As Professor Minow puts it:

The very fact of summoning 'community' through a language of rights may expose the divisions within the community – and even beyond it. Rights then can be understood as a kind of language that reconfirms the difficult commitment to live together even as it enables the expression of conflicts and struggles.[28]

The language of rights does not only communicate, but transforms. Rights language enables the expression of conflicts and struggles, but it also transforms them from physical conflict into verbal dispute.[29]

Second, the language of human rights, over and above providing a means to resolve differences, contains its own message – the inherent dignity of every human being. This is the message of the Universal Declaration of Human Rights which in the first paragraph of its preamble crisply proclaims that:

> ... recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace and the world, ...[30]

The discourse of rights tells us that all human beings have equal moral worth and are equally deserving of consideration and respect; that each human being is entitled to choose his or her own vision of the good life; and all members of the human family should be treated as ends, not means. The concept of dignity thus emphasizes our common humanity.

CONCLUSION

In conclusion, allow me to return to the question originally posed: can human rights put an end to social strife? The short answer to this question is that legal protection for human rights is, in itself, insufficient to put an end to all strife. However, accompanied by political will and

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24 M Minow, *Making All the Difference: Inclusion, Exclusion, and American Law* (Ithaca 1990) 310.
25 Ibid 294.
26 Ibid 295.
27 Ibid 296.
28 Ibid 309.
29 Ibid 293.
30 GA Res 217 A (III), UN Doc A/810, at p 71 (1948).

the resolve of the community and its leaders to effect compromise and achieve peace, the law of human rights can provide the basis for a civil society in which disparate groups can live together in peace.

Just as human rights abuses are the hallmark of inter-group conflict, so respect for human rights is a necessary element of any viable solution to a situation of social conflict. Respect for human rights may assist a community to come to terms with the past. It may provide the basis for credible legal structures to prevent future abuses. And it may found a discourse of rights, through which we develop the accommodations of the future. In these ways, human rights serve as a bridge, a bridge between a troubled and divided past and a future founded on peaceful co-existence, and a bridge spanning the conflict-gouged chasms that separate one part of society from another.[31]

But bridges, we know, are sedentary objects. By themselves they do not transport us. We must be willing to cross the bridge. Too often, we do not move out on the bridge because of fear. Fear that the past is too powerful to overcome. Fear that we will fail in building the structures required for accommodation. Fear finally, and most profoundly, that in acknowledging the other, we ourselves may be somehow diminished. Fear, in a word, that the bridge will not hold.

To that, there is but one response. The bridge must hold. It has held in my country for 350 years. And it can hold in other countries, given the chance.

31 See the epilogue to the 1993 interim Constitution of the Republic of South Africa, Act 200 of 1993.

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MacDermott Lecture 2008: Litigating international disputes – the work of the International Court of Justice in a changing world †

H E Judge Rosalyn Higgins

Given at Queen's University Belfast on 16 April 2008

The MacDermott Lecture is delivered annually at Queen's University Belfast. Previous speakers in recent years have included Lord Hutton and Rabinder Singh. Lord John MacDermott studied at Queen's in the early years of the twentieth century and went on to pursue a distinguished political and legal career, later returning to Queen's to teach and to hold the position of pro-vice chancellor. He was Lord Chief Justice of Northern Ireland from 1951 to 1971.

I am very pleased to deliver this MacDermott lecture, named for Lord MacDermott who presided over the Courts of Northern Ireland for two decades. I also take this opportunity to offer my congratulations to Queen's University Belfast on the occasion of its centenary. I have so admired the role of the University generally, and its Law Department specifically, in the difficult times of the recent past, and it gives me a very real pleasure to be here among you.

The International Court of Justice (ICJ) is the principal judicial organ of the United Nations and one of its main organs, along with the General Assembly, Security Council, Secretariat and the Economic and Social Council. We share with the other UN organs the purpose stated in Art. 1 of the Charter: the maintenance of international peace and security. Our particular contribution to this goal is the judicial settlement of international disputes in conformity with the principles of justice and international law.

We have a dual role: to settle in accordance with international law the legal disputes submitted to the court by states, and to give advisory opinions on legal questions referred to the court by certain organs of the United Nations and sixteen duly authorised specialised agencies. The ICJ was established 62 years ago at the end of the Second World War. It was the successor to the Permanent Court of International Justice that was functioning at the time of the League of Nations.

† First published in NILQ 59(4) (2008) 339–347.

In its early years the International Court had to operate against the negative background of the Cold War. There was a multi-polar international system of power, on which was superimposed the great doctrinal hostilities of capitalism and Marxism. These factors necessarily constrained the overall contribution that the court could make. It had a small, but meaningful docket during this period. A different challenge then faced the court in the 1970s with the emergence, a few years earlier, from colonialism, of new independent states. These states needed reassurance that international law was a law relevant to *their* interests as well as to the interests of the so-called First World. At the same time, the longer established states wanted to feel secure that international law would continue to provide a core stability that would be applicable to all nations. During this era, the court's caseload was relatively light and it entered a dormant period.

This all changed in the late 1980s, with the end of the Cold War and greatly improved East–West relations. There was new enthusiasm for third-party dispute settlement. Of the ninety-five judgments the court has handed down in its 60 years of existence, *one half* have been delivered in the past twenty years.

Recent years have been characterised by the phenomenon of globalisation. States are no longer the only actors in international law: individuals, corporations, and non-governmental organisations are now regarded as having both rights and responsibilities under international law. The widening reach of technology and the constant flows of information, currency, arms, narcotics and diseases have rendered national borders porous. International law has expanded to cover entirely new topics, such as space, human rights, trade law and environmental law.

The International Court lives in the real world and these changes in the world have their impact on us, too. Today, I will discuss three key features of the litigation of international disputes before the International Court of Justice: the identity of the parties, the subject-matter of the disputes, and issues of procedure.

IDENTITY OF THE PARTIES

I begin with some words on how our changing world has had implications for who litigates before us today.

The International Court is being more widely used than ever before, both in terms of the number of parties submitting cases to us and the regions of the world represented by those parties. Seventy nine states have engaged in court proceedings in the past decade. They have participated as applicants and respondents in contentious cases or have

submitted written or oral statements in advisory opinion proceedings. This has naturally had an impact on the workload of the court.

From 2002 to the end of 2005, the court decided eighteen cases. Over the same period, eight new contentious cases were filed with the court, along with one request for an Advisory Opinion. In 2006, the court disposed of one case (*Congo v Rwanda*) and continued deliberations in three other cases. Three new contentious cases were filed with the court in 2006 (one of which was later withdrawn), as well as two requests for the indication of provisional measures. Such requests have priority over all other cases and were rapidly answered by the court.

In 2007, we had our most productive year since the court was established. We issued two judgments on the merits, two judgments on preliminary objections to jurisdiction and an order regarding provisional measures. These cases have involved states from Latin America, Europe and Africa.

Thus far this year, we have held hearings in one case between Djibouti and France and two new contentious cases have been filed with the court: one between Peru and Chile concerning the delimitation of their maritime zones; and one between Ecuador and Colombia on the alleged aerial spraying by Colombia of toxic herbicides over Ecuadorian territory in connection with opium and coca plantations. Our current docket stands at thirteen cases. You will understand that when states litigate, we are speaking of mega-cases, usually larger in terms of pleadings than even the most major commercial cases.

Our cases come from all over the world: our docket presently contains five cases between Latin American states, three between European states, two between African states, one between Asian states and two of an intercontinental character. Interestingly, 2006 was an 'African year' for the Court with cases between the Democratic Republic of the Congo (DRC) and Uganda, the DRC and Rwanda, and Guinea and the DRC. The following year, 2007, was a 'Latin American and Asian year' with cases between Nicaragua and Honduras, Nicaragua and Colombia, and Malaysia and Singapore. This year, 2008, is shaping up to be a truly international year with both an intercontinental case *Djibouti v France* and two Eastern European cases: *Croatia v Serbia* and *Montenegro and Romania v Ukraine*.

Over the past few decades, the court has been gratified to see the trust placed by Asia and Africa – as well as Latin America – in third-party dispute settlement in general, and in the resolution of interstate disputes by the International Court in particular.

The past decade, in particular, has seen a dramatic increase in the number of cases brought to the court by African States. From 1960 to 1980, only five cases came to the International Court involving African

countries. In the past decade, eleven such cases – more than double in half the time – have come to the court. And in very recent times – just the past three years – eight Latin American states have submitted their disputes to the court for resolution. Of the current docket, more than one-third of the cases involve Latin American states. There seems no particular reason why this should be so.

That states from all regions of the world are now ready to appear before the International Court is warmly to be welcomed. It confirms that the International Court is truly the court of the United Nations as a whole.

Within this general trend towards wider use of the court, there are several noticeable tendencies in terms of *how* states are choosing to come to the Court. The Statute of the Court is annexed to the Charter and each of the 192 member states of the United Nations is thereby a party to the Statute. That constitutes an *entitlement* to use the court. But states cannot be compelled to use the court – consent is required to be a party to a case. There are several ways in which that consent can be expressed.

I refer first to the so-called 'optional clause', by which a state formally notifies to the Secretary General of the United Nations its agreement to be taken to court by any other state accepting the same commitment. In recent times, a number of states have taken this route: of the sixty-five declarations accepting the optional clause, one-third have been deposited in the past 15 years.

Today, approximately 300 treaties refer to the court in relation to the settlement of disputes arising from their application or interpretation and there has been a distinct trend for states to withdraw reservations they made to such treaties in earlier years. Last year, Russia passed legislation removing reservations to the ICJ's jurisdiction in six international treaties against terrorism. The court today receives many of its cases based on such jurisdictional provisions in treaties. For example, between 1998 and 2003, three cases were brought to the court by Paraguay, Germany and Mexico, claiming the United States had violated the right of their arrested nationals to consular notification. Jurisdiction was based on a clause contained in the Vienna Convention on Consular Relations.

Two states may have reached the end of the road in trying to settle a dispute diplomatically and may jointly decide to let the court resolve the matter. Two cases from Asia recently came to the court in this manner: *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)*, which was decided in 2002, and *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore)*, in which hearings were held in November 2007. That case is currently under deliberation. Such cases have been

coming in from every corner of the world: *Benin/Niger*; *Botswana/Namibia*; *Hungary/Slovakia*. This would seem to show both an increased readiness on the part of states everywhere to have recourse to a judicial resolution of their disputes, and a continuing global confidence in the ICJ.

The final method of consenting to the court's jurisdiction is *forum prorogatum* whereby one state brings a case, simply inviting the intended respondent to accept the court's jurisdiction for the purpose of the case. Since 1978, when this method of consent was included in the Rules of Court, there have only been two occasions that it was been used. It is striking that both instances have taken place in the past three years and both involved France and an African State. In 2003, France accepted the jurisdiction of the court with respect to the case concerning *Certain Criminal Proceedings in France* brought by the Republic of the Congo. And in 2006, France consented to the court's jurisdiction in a case brought by Djibouti, concerning *Certain Questions of Mutual Assistance in Criminal Matters*. That case is also under deliberation at the moment.

You may be interested to know that the International Court enjoys a very high rate of compliance with its judgments from all kinds of states in all types of cases; a rate that compares favourably with that of any national court. It is to be hoped that this is a result of the quality and impartiality of the judgments, but also due to the court's special status within the UN. No member state wants to sit in the General Assembly or Security Council, knowing that it is violating a decision issued by another main organ of the UN, which is binding upon it. That is why even in cases that have been bitterly fought and have a volatile history, we have seen the commitment to implement the judgment once it is given.

SUBJECT-MATTER OF THE DISPUTES

In our contemporary world we are finding not only do the cases come in from all the regions of the world, but they also address all types of legal problems.

States continue to bring the classical types of disputes to the court – many years after the era of decolonisation, we continue to have a steady stream of territorial and maritime border disputes submitted to the court for resolution. At the same time, cases on cutting edge topics of international law are also being brought by parties seeking judgments on disputes concerning the use of force, immunities, or mutual legal assistance in criminal matters.

To set the scene, let me give you a few examples that show how at one and the same time we continue to deal with classical topics but also increasingly respond to current preoccupations.

This 'classic topic' example is from 1994, when Cameroon brought a case against Nigeria concerning sovereignty over 1800 km of land frontier, the vast Bakassi Peninsula, and the entire maritime delimitation offshore. As you can imagine the political and economic issues at stake for both of the states were enormous. The court's judgment delimited the long land frontier, held that the Bakassi Peninsula belonged to Cameroon, and delimited the respective maritime spaces. With some assistance from Kofi Annan while he was Secretary General, the court's judgment was implemented step by step. Generally, good relations have resumed between the two states and the military have stepped back.

We continue to receive cases concerning territorial and maritime matters. In the past year alone, the court has heard three such cases. A dispute between Malaysia and Singapore concerning the sovereignty over certain maritime features is currently under deliberation. Then there are two cases brought by Nicaragua against Honduras and Colombia. The court delivered its judgment in the *Nicaragua v Honduras* case last December (2007). The dispute concerned the maritime boundary between the two countries as well as sovereignty over four cays in the Caribbean Sea. The court carefully examined the evidence, including the circumstances of an Award of the King of Spain made in 1906, diplomatic exchanges between the various governments of Nicaragua and Honduras, as well as whether there had been an actual exercise or display of authorities by the two states over the islands in dispute. The court decided the four cays belonged to Honduras and a bisector line should serve as the maritime boundary.

We dealt last year with the jurisdictional phase of a case involving Nicaragua and Colombia, which also concerned title over islands and the location of the maritime frontier. The parties are now proceeding with their written pleadings.

Later this year, we will hold hearings in a case between Romania and Ukraine concerning maritime delimitation in the Black Sea. As you can see, disputes involving classical territorial and maritime issues continue to occupy an important place on the court's docket and come from all over the world.

But we inevitably find, in the greater readiness that exists today to have disputes resolved by judicial means, that we are also deciding cases that involve the use of force and violations of human rights law and humanitarian law.

In 2005, the court issued a judgment in the case concerning Armed Activities on the *Territory of the Congo (Democratic Republic of the*

Congo v Uganda). That case involved very grave allegations relating, inter alia, to the unlawful use of force, violation of territorial sovereignty, occupation, human rights and humanitarian law violations, as well as the illegal exploitation of natural resources. This was by no means an easy case for the court. In the first place, when the deliberations on the merits started, the armed conflict was not entirely settled on the ground. Moreover, the number of specific violations alleged by the parties and the amount and variety of material submitted in support of these allegations were unprecedented.

In its judgment of 19 December 2005, the court ruled favourably on several of the Congo's claims although it did follow Uganda on one of its counter-claims. The court's detailed and objective findings helped resolve at least some of the intractable issues of fact and law in the Great Lakes region.

I am also going to have to say some words on the *Genocide* case between Bosnia and Herzegovina and what was then known as Serbia and Montenegro. The case concerned what is widely regarded as the most serious violation of human rights –the commission of genocide. Given that this was the first legal case in which allegations of genocide had been made by one state against another, the International Court was acutely sensitive to its responsibilities. The court – as it always does – meticulously applied the law to each and every one of the issues before it.

In its Judgment, delivered last February, the court found it clearly established that massive killings and other atrocities were perpetrated during the conflict throughout the territory of Bosnia and Herzegovina, but the evidence had not convincingly shown that those acts in these many locations were committed with the specific intent required for the crime of genocide, that is, the intent to destroy, in whole or in part, the group as such. However, it did find that the killings in Srebrenica in July 1995 were committed with the specific intent to destroy, in part, the group of the Muslims of Bosnia and Herzegovina in that area and that what happened there was indeed genocide.

The court then turned to the question of Serbia's responsibility for such genocide in Srebrenica. It found that all the evidence indicated that the decision to kill the adult male population of the Muslim community in Srebrenica was taken by some members of the VRS (army of the Republika Srpska) Main Staff. The army of Serbia and Montenegro was not proved to have itself been actively engaged, nor was there an 'evidence trail' to show the orders came from Belgrade.

Nonetheless, the court found that Serbia *had* violated its obligation to prevent the Srebrenica genocide. This obligation is contained in Art. 1 of the Genocide Convention. It requires states that are aware, or should normally have been aware, of the serious danger that acts

of genocide would be committed, to employ all means reasonably available to them to prevent genocide. Serbia could, and should, have acted to prevent the genocide, but did nothing.

The court further held that the respondent had violated its obligation to punish the perpetrators of genocide, including by failing to co-operate fully with the (International Criminal Tribunal for the Former Yugoslavia (ICTY) with respect to the handing over for trial of General Ratko Mladić.

The case has generated considerable publicity. The concept of genocide is often used loosely and inaccurately, not only by victims but also by those in authority. It must be welcome that today politicians and others are so committed to the idea that all efforts must be mobilised against the occurrence of genocide. But this phenomenon, so laudable in principle, has brought with it its own problems, too. We see governments passing legislation instructing citizens as to what events in history they may not deny were 'genocide'; we see art and other exhibitions being threatened or closed down because of angry responses to certain events being classified (or not classified) as 'genocide'. We see confident assertions by press, politicians, yes, and victims too, as to this or that being 'genocide'. We are at risk of losing the idea of genocide as a concept of international law. Those who invoke it know little or nothing of the Genocide Convention, in which genocide and related offences are meticulously defined.

It seems generally appreciated that other concepts of international law most usually require legal training to be appropriately invoked: and when they are invoked in the context of international litigation, it might be thought that there is a need for these legal definitions to be tested against evidence proven in accordance with relevant standards of proof. Not so, apparently, with genocide, which has become a term of general use, in much the same way that, for example, the concept of 'aggression' has. To politicians, the media, and – more understandably, victims – genocide has come to be synonymous with large-scale slaughter of civilians. That is not, of course, what genocide means in law. Article 2 of the Genocide Convention defines genocide very precisely as certain acts 'committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such' – within that definition, there are many, many complicated elements of law and fact always to be addressed.

The Judgment of the Court in the *Bosnia v Serbia* case sought not only to answer the claims before it, but also systematically to elaborate and explain each and every element in the Genocide Convention, believing this latter task is also a necessary contribution to clarity and understanding. The genocide claims that Croatia has started against

Serbia and Montenegro remain on our docket, and the case is scheduled to be heard next month (May 2008) on preliminary objections to jurisdiction.

Another contemporary type of dispute that has been appearing on the Court's docket arises from the increasing tendency for states to assert jurisdiction over heinous crimes committed against their nationals abroad, or indeed to assert a more general jurisdiction over these things. The corollary is that in so far as high state officials or even the head of state themself are implicated in these charges, state immunity is taking on a renewed and lively importance.

There has been an outburst of judicial activity in national courts on these topics in the past few years – for example, the *Pinochet* cases in the United Kingdom and the *Guatemala Genocide* case in Spain. The 'International Law in Domestic Courts' database, covering the period from 2000 to the present day, contains fifty-nine cases concerning immunities in twenty jurisdictions, ranging from Botswana to Finland and Sierra Leone. These trends have been having a knock-on effect in international courts.

At the International Court, questions of universal jurisdiction and immunities of high-level government officials were raised in the *Arrest Warrant* case of 2002. An international arrest warrant had been issued by a Belgian investigating judge against Mr Yerodia, the Minister for Foreign Affairs of the Congo. It sought his provisional detention pending a request for extradition to Belgium for alleged crimes constituting 'serious violations of international humanitarian law'. Mr Yerodia was accused of having made various speeches directly inciting racial hatred before he became Foreign Minister (at which later time the arrest warrant was issued). By the time the case came to court, Mr Yerodia had ceased to be Foreign Minister and had become Minister of Education. The International Court stated that the immunities of Ministers for Foreign Affairs were not granted for their personal benefit, 'but to ensure the effective performance of their functions on behalf of their respective States'. Freedom to travel and freedom of communication were important, as was the fact that a foreign minister 'occupies a position such that, like the Head of State or the Head of Government, he or she is recognized under international law as representative of the State solely by virtue of his or her office'. This immunity protected the individual concerned against any act of authority of another state 'which would hinder him or her in the performance of his or her duties'. The court ordered that the warrant be annulled and Belgium immediately complied.

Immunity issues have again been raised before the International Court in the *Djibouti v France* case; this time in relation to the State Prosecutor and the Head of National Security.

The rising interest among states in the investigation and prosecution of individuals outside of national borders for crimes such as crimes against humanity, torture, terrorism, and trafficking has resulted in the International Court receiving some cases concerning questions of mutual legal assistance. The current proceedings instituted by Djibouti against France are a good example. Djibouti is claiming that the refusal of French authorities to execute an international letter rogatory regarding the transmission of the record relating to a certain murder investigation violates obligations under treaties in force between the two countries. A judgment in this case will be rendered before long. In the pending case concerning *Certain Criminal Proceedings in France*, the Republic of the Congo seeks the annulment of the investigation and prosecution measures taken by French judicial authorities in response to a complaint of crimes against humanity and torture filed against, inter alia, the President of the Congo, the Congolese Minister of the Interior and the Inspector General of the Congolese Army.

I should also refer to the frequent recourse to the court for provisional measures. (This is the term used by the court for injunctions.) Whereas between 1985 and 1995 only seven requests for provisional measures were made, over the past decade the court has been asked nineteen times to exercise its power to issue provisional measures to preserve the respective rights of parties to a case. It granted the measures in fifteen of those instances. In 2001, the court ruled that provisional measures were indeed binding obligations. This phenomenon is raising a cluster of important legal issues that will surely merit our particular attention in the period ahead.

PROCEDURAL ISSUES

I am now going to say a few words on procedural matters. The proceedings before the International Court include a written phase, in which the parties file and exchange pleadings, and an oral phase, consisting of public hearings at which agents and counsel address the court. As the court has two official languages (English and French), everything written or said in one language is translated into the other.

As I mentioned earlier, all the cases that come to the ICJ are massive. Parties often raise complex jurisdictional questions as well as alleging a number of specific violations of international law on the merits. In recent cases, they have been submitting hundreds of pieces of evidence as annexes to their written pleadings. The *Bosnia and Herzegovina v Serbia and Montenegro* case, for example, required public hearings that stretched over two-and-a-half months covering both jurisdictional and merits issues. The court sifted through vast amounts of documentary and audiovisual evidence and heard witness

testimony in the courtroom. Moreover, the court paid careful attention to the findings of the ICTY, which necessitated reading and analysing dozens of decisions issued by that tribunal over the past decade. The judgment ultimately numbered 170 pages, with about one-third devoted to analysing the evidence and making detailed findings as to whether alleged atrocities occurred in specific locations and, if so, whether there was the specific intent on the part of the perpetrators to destroy in whole or in part the protected group that would classify them as genocide.

We work under the Statute of the Court (which is annexed to the UN Charter), the Rules of Procedure and the Practice Directions, which we introduced a few years ago to give us greater flexibility in the handling of litigation. We have Practice Directions directed at accelerating proceedings on preliminary objections (Practice Direction V), encouraging succinct oral statements (Practice Direction VI) and controlling the submission of new documents after the closure of written proceedings (Practice Direction IX).

The rules and Practice Directions can be amended by the court, but the statute can only be amended in the same way as the UN Charter, that is, by a vote of two-thirds of the members of the General Assembly and ratified in accordance with their respective constitutional processes by two-thirds of the members of the UN, including all the permanent members of the Security Council. The Statute provides in Art. 34 that only states may be parties in cases before the court. We cannot change that, but we can and do amend our Rules and Practice Directions to allow for non-state actors – who are now such important players on the international stage – to have a voice in relevant proceedings. In 2005, the court adopted amendments to Art. 43 of its rules to establish a mechanism to enable international organisations to submit observations on conventions that they are party to that are at issue in a case before the court. Practice Direction XII was introduced to allow states to refer to written statements or documents submitted by international NGOs in advisory proceedings.

Occasionally the court faces a situation that is right at the margin of its statute and rules. During the advisory proceedings on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, the court faced the problem of assimilating Palestine's position with that of a state or an international organisation. The hurdle of participating in the proceedings before the court was overcome due to the General Assembly resolution requesting the opinion, the report of the Secretary General transmitted to the court with the request, Palestine's special status of observer at the UN, and the fact that it was the co-sponsor of the draft resolution requesting the advisory opinion.

Palestine was therefore permitted to submit a written statement and take part in the hearings.

What has greatly changed in today's world is that there are now many litigation opportunities for states. Until the 1960s, the International Court stood almost alone as a vehicle for resolving international law disputes. But the past two decades, in particular, has seen the burgeoning of international courts and tribunals equipped to deal with disputes that might arise under the growing reach of international law. The International Court is now joined by regional human rights courts, by international criminal courts and tribunals, by courts which are part of treaty systems for regional economic integration, by a Tribunal for the Law of the Sea, by decision making panels on trade – and very many more.

The international criminal courts and tribunals are not interstate courts. Rather, they are designed to deal with the accountability of *individuals* for war crimes, crimes against humanity and genocide. Nonetheless, these courts may apply the same law as the ICJ, in particular on the use of force, the conduct of hostilities and the meaning of international crimes, and they can and do end up analysing the same situations (for example, the Balkans, Congo and Uganda).

There are fears in certain quarters of international law being 'fragmented' by conflicting decisions of international courts and tribunals operating in a horizontal, decentralised environment. But the reality suggests that such fears are exaggerated. What is striking is not the differences between the international courts and tribunals, but the efforts made at compliance with general international law. We see this in a variety of areas where more than one judicial body is operating, such as the law of the sea, human rights law and environmental law. The ICJ enjoys cordial relationships with other international courts. We have an informal system of exchange whereby judges at international courts and tribunals receive relevant excerpts of our cases that address legal questions of particular interest, and vice versa. And the ICJ has been hosting inter-court seminars to discuss legal topics of mutual interest.

CONCLUSION

As a judicial institution, the International Court must provide that core predictability that distinguishes law from politics. But we have to do this in a way that is responsive to the changes in the world around us, such as the diversity of parties who appear before the court, the wide array of subject-matter involved in the disputes, the dramatic growth of other international courts and tribunals, and the fact-intensive nature of recent cases. Not all of these phenomena may be visible when

reading our judgments, but they are very much in the minds of the judges.

The International Court has been actively engaged with these changes, adjusting its rules and working methods where necessary. In the past, there was a problem with long gaps between the close of the written proceedings and the opening of the oral hearings; a backlog had built up. In 2007, we eliminated this backlog and also had our most productive year on record. And now four months into 2008, we are on schedule for another busy year fulfilling our role as the principal judicial organ of the United Nations.

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MacDermott Lecture 2014: Virtuous voices: the advocate's contribution to the rule of law †

Michael J Beloff QC

Given at The Great Hall, Queen's University Belfast on 3 April 2014

It is a great privilege for me to be invited to deliver this annual lecture in honour of Lord MacDermott, one of the most eminent alumni of, and teachers at, this university, and a judge of international reputation. Unlike his august successors in the office of Lord Chief Justice of Northern Ireland, he took up that post *after* rather than before becoming a Lord of Appeal in Ordinary in what was surely an *upwardly* mobile career move.

Lord Kerr, last year's MacDermott lecturer, in his felicitous opening remarks, acknowledged how daunting it was to follow so long a line of distinguished lawyers to the lectern. I feel no less daunted in following Lord Kerr, not least because, whether I appeared before him in the High Court in Belfast, in the House of Lords or in the Supreme Court, I cannot recollect ever having been the recipient of a judgment in my client's favour. I for my part fear that next year's MacDermott lecturer, whoever he or she may be, will feel absolved from any need to pay any tribute to his or her immediate predecessor.

I never had the pleasure of meeting Lord MacDermott, but, in 1964, as a recent history graduate converting to law and in search of a sound guide to law's fundamental purpose and principles, I read his Hamlyn lectures delivered in 1957 on the theme 'Protection from Power under English Law',[1] the epithet 'English' being descriptive of the nature of the law being considered rather than imposing some geographical limitation. They included a prescient chapter on the power of the executive which looked forward to the modernisation of the supervisory jurisdiction, still at what Professor Sir William Wade QC has characterised as 'a low ebb'[2] but whose engagement Lord MacDermott described as work frequently requiring 'skill of a high order'.[3] That Delphic reference apart, Lord MacDermott did not comment on what contribution, if any, lawyers (other than judges) made

† First published in NILQ 65(4) (2014) 429–448.

1 Lord MacDermott, *Protection from Power* (Stevens & Sons 1957).

2 W Wade and C Forsyth, *Administrative Law* (10th edn OUP 2009) 412.

3 MacDermott (n 1 above) 97.

to the protection from power which he regarded as an aspect of the rule of law,[4] he contented himself only with the cautious observation that 'lawyers as a body are slow to depart from the settled way of things'.[5]

It is, however, the nature of that contribution which I wish to explore in your company tonight. While my theme, the advocate's contribution to the rule of law, is intrinsically perennial and knows no boundaries of time or place, my illustrations, to provide practical underpinning to otherwise theoretical and rootless musings, will be topical. They will focus from a barrister's perspective on recent events in England and Wales – that entity that, for the present at any rate, we can still describe as part, but not the whole, of Great Britain. Rudyard Kipling penned the line: 'What do they know of England who only England know?' To which my manifestly inadequate response has to be 'more at any rate of England than of the world beyond'.

At one level one may appreciate Lord MacDermott's abstinence from the theme. After all, is it not elementary that law, where not made by legislation, primary or secondary, or in exercise of the ever-diminishing prerogative powers, is *made* by judges, and not by those who argue cases before them? But that is surely not the whole picture.

In a letter to *The Times* on 10 February of this year from the chairman of the Bar Council, sundry heads of Bar associations and a *single female pupil barrister* – the inclusion of the latter being a somewhat transparent forensic tactic – the signatories fulminated: 'As the Lord Chancellor finalises plans to cut legal aid even further, barristers are coming to voice a unified opposition to changes which, if implemented, would have a devastating effect on the public's access to justice and The Rule of Law.' – the initials in the latter phrase being given, for emphasis, capital letters. One is tempted to comment, if unfairly, that (adapting Mandy Rice Davies's legendary riposte when told that Lord Astor had denied having an affair with her) 'Well they would say that wouldn't they?' It requires no particularly penetrating insight to note that there will also be a devastating effect on counsel's fees, where dependent on the public purse, and on their expectations, whether legitimate or otherwise, of a certain standard of living whatever that might be.[5a]

On 11 July 2013 in an earlier more measured response, as befits the second chamber, Baroness Deech, chair of the Legal Services Board (LSB), introduced a Motion to Take Note 'of the effects of cuts in legal aid funding on the justice system in England and Wales'. She ended her speech by saying that she was 'convinced that the protection of

4 Ibid 7.

5 Ibid 131.

5a A matter on which the House of Lords felt unable to pronounce: [2001] 1 Costs LR 7, [17]–[18].

the profession and of the public that is enshrined in Section 1 of the Legal Services Act will be undermined by the proposals of the Ministry of Justice as they stand'. There was scarcely any speaker who did not invoke the concept of the rule of law to justify their assault on the government's proposals.

This debate between the Ministry of Justice and the Bar Council has been played out in the public eye. The Justice Secretary wishes to cut £200m from the legal aid budget by 2018/2019.[6] He claims that expenditure on legal aid is in relative terms higher than in countries of equivalent size and standing. The Bar Council accuses him of dodgy dossiers, which seek to suggest that the earnings of the few so-called fat cats are trumpeted to distract attention from the multitude of starving kittens. One QC went so far as to argue that he could be charged with furthering his career by making false statements in contravention of s 2 of the Fraud Act 2006.[7] Into that debate I shall not seek to enter save to say that the Bar Council seems to have currently the better of the general argument since Sir Andrew Dilnot, head of the UK Statistics Authority, has warned the Ministry of Justice that its figures 'were indeed calculated to mislead'.[8]

The resistance of the profession to that proposed diminution in public funding came to a head when barristers declined either to defend alleged fraudsters whose cases fell within the category of so-called 'very high cost cases' in response to the government's threat to impose cuts of 30 per cent in fees on top of a series of previous reductions:[9] *or* to accept briefs for cases where colleagues were double booked – so called 'returns'. They intensified that resistance with a day of strikes

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6 Government's response on 27 February 2014, *Transforming Legal Aid: Next Steps* (Ministry of Justice 2014).

7 *The Independent on Sunday* (London 9 February 2014).

8 *The Times* (London 19 March 2013).

9 F Gibb, 'Barristers Say "No" and Put Fraud Trials in Jeopardy' *The Times* (London 23 December 2013). In *R v Crawley* [2014] 2 Cr App R 8, the Court of Appeal allowed an appeal against a decision of the Crown Court at Southwark staying an indictment of a conspiracy to defraud on the basis that the pool of qualified advocates was too small: 'The agreed test to be applied was: "Is there a realistic prospect of competent advocates with sufficient time to prepare being available in the foreseeable future?" At the date of the hearing before the judge, on our analysis, there was a sufficient prospect of a sufficient number of Public Defender Service advocates who were then available who would enable a trial to proceed in January 2015. That pool included a sufficient number of advocates of the rank of QC and was available at the date of the hearing. Consistent with the judge's finding at para 59 that the defence should instruct its advocates at a time which 'does not jeopardise the date set for trial', the obvious obligations on the defence should have been to instruct advocates at that point so as to retain them for a January 2015 trial.' [45].

on 6 January 2014,[10] with a second round on 7 March 2014 – the efficacy of the former only somewhat impaired by the fact that one of a cohort of young female barristers, carefully posed for the mandatory press photograph, was carrying a Louis Vuitton handbag. On 27 March 2014, the Justice Secretary agreed to postpone implementation of the savings until after the election in 2015 – a truce, if not an armistice.[11] Not this year, but next year, which could mean, depending on the vagaries of the popular vote, sometime, but not, I suspect, never.

To put these controversies over remuneration into some context, I read in a recent biography of Thomas Scrutton, the great commercial judge, that at the Bar in the late Victorian era – well before the notion of legal aid was even a glimmer in the governmental eye – fashionable leaders were paid a brief fee whether or not they actually appeared in Court – oh happy days! – and the reference in the law reports to juniors accompanied by the parenthesis (with Mr X QC) actually meant, not infrequently, *without* Mr X QC.[12]

But is the reference to the rule of law whether in *The Times* letter or in the House of Lords a mere rhetorical flourish or would the extinction of the professional advocate – to press the point to its limits – actually threaten the rule of law – a protean concept,[13] but which I *shall* use in the narrow sense of ensuring that justice is done according to law rather than in the broader sense of ensuring that the law itself is just and, if so, why?

Let me start with a statement so obvious that it is often overlooked. While legal giants debate whether hard cases make bad law – Oliver Wendell Holmes taking one view,[14] Lord Denning another[15] – what is beyond argument is that it is *cases* that make law.

Disputes about what the law on a particular issue is or should be is the stuff of academic commentary or of mooting competitions. Nonetheless, until some litigant, sometimes *on* the advice of counsel, sometimes *against* it, chooses to bring the matter to court, the issue will be undecided. (I have here omitted reference to the litigant in the dock, who lacks the essential element of choice.)

And the cases so brought have to reflect real issues. The civil courts will only exceptionally grant declaratory judgments about whether some person's conduct, actual or anticipated, would violate the law of the land, if the question is likely to come before, *a fortiori*, is actually

10 *The Times* (London 7 January 2014).
11 His offer was accepted by the Criminal Bar Association Council in May 2014, 6.
12 David Foxton, *The Life of Thomas Scrutton* (CUP 2014) 92.
13 T Bingham, *The Rule of Law* (Allen Lane 2010).
14 *Northern Securities v US* 193 US197, 400.
15 *Re Vandervell Trusts (No 2)* [1974] ch 269, 322.

before the criminal courts.[16] In private law it is well established that the courts will not decide hypothetical cases[17] and, even in public law, where there has been some relaxation of that stern rule, as Lord Slynn put it in *ex parte Salem*: 'Appeals which are academic between the parties should not be heard unless there is a good reason in the public interest for doing so.'[18] It is no part of the judge's role to give unsolicited advisory opinions.

There are related restraints on what can or cannot be the subject of adjudication at the highest level. The Supreme Court nowadays has almost complete control over its docket but can only select from cases contested before the lower courts, and in which there is an application for permission to appeal; and even then, for the most part, maintains the practice that it will not decide points which counsel has not argued.[19] In short, judges consume what the advocate cooks.

Advocates need not merely serve up a *table d'hôte* or even a standard *à la carte* menu. They can be more creative. Two of what are now standard interlocutory remedies in private law (the Mareva injunction,[20] which prevents dissipation of assets before judgment is delivered, and the Anton Piller order,[21] which prevents potential destruction of evidence of infringements of intellectual property) were both the inventions of counsel in the respective cases which bear the remedy's name. In the former, Lord Denning MR said that Mr Rix – later a senior judge in the Court of Appeal – 'has been very helpful'.[22] In the latter case, Lord Denning MR attributed 'credit' or, as he said with uncharacteristic caution, 'responsibility' to Hugh Laddie – later a High Court judge in the Chancery Division.[23] When these developments of the jurisdiction to grant injunctive relief were sought in association, they permitted one traditionally educated judge elegantly to make a classical pun by speaking of 'piling Piller on Mareva' in lieu – as you will all, of course, be aware – of 'piling Pelion on Ossa'[24] which described, in the Greek myth, the use made of these mountains by the giants Otus and Ephialtes to storm Olympus.[25] Since the use of Latin in our courts

16 *Zamir and Woolf: The Declaratory Judgment* (4th edn Sweet & Maxwell 2011) para 4-184.
17 *Ainsbury v Millington* [1987] 1 WLR 379, 380–1.
18 *R v Secretary of State for the Home Department ex parte Salem* [1999] 1 AC 450, 456–7.
19 A Patterson, *Final Judgment: The Last Law Lords and the Supreme Court* (Hart 2013).
20 *Mareva v Internet Bulkcarriers* [1975] ZHR 509.
21 *Anton Piller v Manufacturing Process Ltd* [1976] 1 Ch 55.
22 *Mareva* (n 20 above) 510.
23 *Anton Piller* (n 21 above) 58.
24 *Bekhor v Bilton* [1981] QB 923, 955, per Stephenson LJ.
25 Virgil, *Georgics*, 281.

is now frowned upon, such gratuitous displays of judicial scholarship are, alas, unlikely to be repeated.

And even if sometimes an advocate seems to bend the bow too far and provoke astringent judicial observations about his 'fertile mind'[26] – on a par with the phrase 'with the greatest respect' which, in the court context, means its exact opposite – in other instances the fertility bears palatable fruit. *Ridge v Baldwin* stands out as one of the major cases[27] which started to reshape public law in the swinging sixties and where Lord Reid was able to chart how once lively concepts of natural justice had been diverted into a dark tunnel but could now be exposed again to light. But it was Desmond Ackner QC, later a Law Lord and the outstanding advocate of his generation, whose submissions, as the law report reveals, helped shape Lord Reid's speech. At the other end of the scale one may instance Lord Nicholls' magisterial clarification of the law of resulting trusts in the Privy Council in an appeal from Brunei,[28] where I was counsel for the victorious appellant, but where the most charitable reading of the summary of my submissions could discern no visible connection between them and the advice given by the Board to Her Majesty. Indeed, I confess that there was none!

These examples, whether of the sublime or of the ridiculous, remind one of another important matter. In England the adversarial process, even in the highest courts, is essentially, if not exclusively, an oral process. We have not yet replicated the procedures of the US Supreme Court where advocates are conventionally limited to half an hour with no injury time for the frequent interruptions usually caused by the justices arguing amongst themselves. Still less have we replicated the processes of the European Court of Justice, where the only golden rule is that the proceedings must conclude in time for a leisurely lunch,[29] and the pre-hearing courtesy meeting in the judges' chambers resembles a bazaar in which the President will seek to bargain down the half hour presumptively allotted to each of the lawyers. Even in Singapore, a noted custodian of the colonial legal tradition, an appellate judge Rajah JA recently noted in an argument about whether overseas counsel Lord Goldsmith, the former attorney general, should be admitted to plead a case:[30] 'The appellate process in the Singapore

26 *Zamir v Secretary of State for the Home Department* [1980] AC 930, 951, *per* Lord Wilberforce on Louis Blom Cooper QC.

27 The others, also bearing Lord Reid's distinctive imprint, being *Padfield v MAAF* [1968] AC 1997 and *Animismic v FCC* [1969] 2 AC 47.

28 *Royal Brunei Airlines v Tan* [1995] AC 378.

29 D Richards and M Beloff, 'The View from the Bar' in G Barling and M Brealey (eds), *Practitioners Handbook of EC Law* (Trenton Publishing, Bar European Group, Bar Council 1998) ch 2, paras 2.20–2.28.

30 *Re Lord Goldsmith* [2013] SGHC 181, [29].

Court of Appeal has evolved to be more writing-centred than that in many other common law systems.' It would be too austere to conclude that written submissions do not equate to advocacy, but nonetheless it is surely the *dialogue* between bench and Bar which gives oral advocacy not only its savour but its strength.

For, in a classic adversarial system, it is appreciated that it is out of the clash of submissions that the judgments will be fashioned. Lord Eldon, twice Lord Chancellor in the early nineteenth century and for an unrivalled period of 26 years, said: 'Truth is best discovered by powerful statements on both sides of the question',[31] though (as is well known) he sometimes took an unconscionable amount of time to decide what the truth was. The essay on him in the Dictionary of National Biography refers to 'the arrears with which he was constantly reproached'[32] – an odd literary epitaph for someone whose maxim was that 'a lawyer should live like a hermit and work like a horse'.[33] Lord Pannick QC, in his keynote address to the Bar Conference in 2013, put it more amply: 'the law is best administered by independent judges who hear arguments on both sides of a case before they make up their mind. The advocate exemplifies the valuable principle that there is always another point of view, a different perspective, an alternative explanation.' And Mr Justice Megarry, in his judgment in *Cordell v Clanfield Properties*, put it more pithily that 'argued law is tough law',[34] citing in support a dictum of Hankford J of 1409, which he had excavated from the Year Books, and which, though in a mixture of medieval French and Latin, lost nothing in translation: 'Today, as of old, by good disputing shall the truth be known.'

And in such a system, in both criminal and civil cases, it is the *advocate* who decides what material is placed before the court. The common law system is *not* inquisitorial. Judges can rule on what evidence is or is not admissible – though rules as to admissibility are becoming ever more flexible – but cannot compel an advocate to adduce particular evidence, nor can they search out evidence themselves, nor, critically, must they enter into the arena in the way in which they did as an advocate – a habit that some judges find easier to foreswear than others!

And when there is a fact-finding body whom the judge must direct, their duty is to sum up the facts and identify the competing arguments, not to find facts, or fashion arguments of their own.

In the Channel Islands, the tribunal of fact is constituted by jurats and the trial judge, the office-holder sometimes being a commissioner,

31 *Ex parte Lloyds* [1822] Mont 70, 72.
32 *Dictionary of National Biography* vol XLII (OUP 2004) 993.
33 Ibid 988.
34 *Cordell v Claufield Properties Ltd* [1969] 2 Ch 9, 17.

has a different role, but the basic principle of judicial restraint remains the same. In a recent case on an appeal from Jersey, the Privy Council said:

> Naturally, in Jersey, where the facts are decided by the Jurats (the Commissioner retiring with the Jurats but not joining in the fact-finding unless the Jurats disagree), the facts are not summed up. But that cannot begin to justify the Commissioner seeking to give the Jurats the benefit of his analytical powers by way of his own extensive examination of the witnesses, or indicating his thinking by the nature of his questions and comments.[35]

The judge then is a referee, not a player. So it was that Sir Robin Dunn, who ended his career on the English Court of Appeal and wrote in his memoir: 'It was not until I became a judge that I realised how dependent the Bench is upon the Bar.'[36] That realisation was not the less accurate for being somewhat belated.

Advocacy, the source of that dependency, is, in so far as it is an art at all, a transient one. Even a transcript cannot capture the immediacy of its impact – assuming it has an impact – upon its audience – the tribunal to whom it is properly addressed. Televised trials will capture it a little better and will at least add to civic understanding as long as advocates are not seduced into playing to the gallery rather than focusing their attention on those whom it is their function to seek to persuade; I confess that I have never been tempted in the Supreme Court to think that the object of my exercise is to provide entertainment to that quixotic group, who, for whatever inexplicable reason, while away their daytime in watching the court's dedicated channel.

'You cannot', as yet another retired judge, Sir Peter Bristow, said in his memoirs – autobiography is an occupational hazard of judges who have hung up their wigs – 'find the advocacy skills in the books. You have to learn them from your betters and think them through for yourself as you go along.'[37] Dame Elizabeth Lane, the first woman to be appointed to the High Court bench in England, in her autobiography identified four pillars of advocacy which can be summarised as good health, good temper, good voice and last, but by no means least, good luck.[38]

Some adopt more subtle, even suspect, techniques. Peter Bristow recalled: 'In our Chambers we kept a drawer full of old-school and club and regimental ties. Should we for example deploy service, club or old

35 *Michel v R* [2009] UKPC 49, [34].

36 R Dunn, *Sword and Wig* (Quiller Press 1993) 169.

37 P Bristow, J*udge for Yourself* (William Kimber 1986) 38. Education in advocacy has now become fashionable and is provided in all the Inns of Court with Grays Inn being the pioneer.

38 E Lane, *Hear the Other Side* (Butterworths 1988) 60–2.

school tie?'[39] This anachronistic advice is of limited utility, unless the advocate was appearing unrobed before a judge, and of no utility when the advocate appeared in full legal fig before a jury – there are no old school bands – and, equally, *utterly* useless for the female advocate.

George Carman, the so-called silver fox – the vulpine metaphor being favoured for defamation lawyers[40] – certainly had Dame Elizabeth's fourth desideratum; in no less than three of his major forensic triumphs, his case for the defence was rescued by the adventitious – or so one *must* assume – arrival of a critical piece of evidence midway through or even just before the end of the trial.[41] In two of them he established that the TV journalist Janie Allen and TV soap star Gillian Taylforth, who each sued in respect of stories of exotic sexual activity, were far from vestal virgins. (I must declare an interest as the unsuccessful counsel for the plaintiff in the latter). In the third, he established that Jonathan Aitken MP, who defended a claim that, when a minister, he had allowed his bill at the Ritz Hotel in Paris to be paid by rich Arabs with whom he was dealing, on the basis that the bill had been paid at reception by his wife, was guilty of perjury since last-minute evidence from British Airways showed that, at the material time, his wife had actually been in Switzerland, of which judicial notice could be taken that Paris is *not* the capital city.

Yet other advocates rise to the top by techniques that *appear* counterproductive. Lord Devlin's account of the trial over which he presided of Dr John Bodkin Adams, accused but acquitted of murdering his patients in anticipation of a legacy, contains this cameo description of leading counsel for the prosecution: 'His disagreeableness was so pervasive, his persistence so interminable, the obstructions he manned, so far flung, his objectives so apparently insignificant, that sooner or later you were bound to ask whether the game was worth the candle, and if you asked yourself that you were finished.'[42] This did not, however, impede the career of the object of judicial derision, Sir Reginald Manningham Buller, immortalised by the journalist Bernard Levin as 'Sir Reginald Bullying Manner', who held in succession both law offices of the crown, ascended to the Woolsack and ended his professional life as a Lord of Appeal in Ordinary with the title Viscount Dilhorne.

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39 Bristow (n 37 above) 40.

40 Gilbert Beyfus, the Carman of the 1950s, was known as 'The Old Fox': see I Adamson, *The Old Fox* (Chancelot Rise 1963).

41 D Carman, *No Ordinary Man: The Life of George Carman* (Hodder & Stoughton 2000) 166–7 (Janie Allen), 178–9 (Gillian Taylforth), 243–4 (Jonathan Aitken).

42 P Devlin, *Easing the Passing: The Trial of Bodkin Adams* (Bodley Head 1985) 39.

How much influence advocates in fact have on the outcome of cases is not capable of exact measurement. According to Alan Patterson in his recent seminal study of how judgments have been and are reached in the Court of Final Appeal,[43] a number of his interviewees from the ranks of *counsel* 'were sceptical as to how often in the final court advocacy had a determinative effect on the ultimate outcome of appeals',[44] whereas 'the Law Lords and Justices were in general rather more positive as to the impact of good advocacy'[45] – as he put it, 'fortunately'. Were it not so, many clients would be paying substantial fees to no purpose.

In *Torfaen Borough County Council v Douglas Wallis Ltd*,[46] a consumer protection case brought against the company for selling food past its use-by date, where the Supreme Court was deprived of argument on both sides from the Bar, Lord Toulson commented in his leading judgment:

> The company was not represented on hearing of the appeal. The reasons are understandable but the result is unfortunate. It is a small family company. In these circumstances the court asked a member of its legal staff to prepare a note of points which might have been made on behalf of the company … Nevertheless it is still unfortunate that the Court did not have the benefit of argument from both sides.

If the size of the contribution of the advocate to the resolution of civil cases may be debatable, it is all but dispositive in criminal cases with a lay, not legal, tribunal of fact – magistrate or jury. Lord Judge, the recently retired Lord Chief Justice of England and Wales, said:

> The administration of justice depends on the quality of the advocacy deployed on each side. The jury will do its conscientious best. The Judge will make the decisions and give the directions believed by him to be appropriate. But the analysis of each side's case and all the evidence, and its importance to the case, so as to enable both judge and jury to exercise their own responsibilities depends upon high quality advocacy. And we are not discussing some disembodied theory. This is the day to day stuff of reality. It is in the public interest that the guilty should be convicted. It is in the public interest, as well as the interest of the innocent defendant, that he should be acquitted. For a truly innocent defendant to be convicted is a disaster. These disasters happen even in the best run trials with the best quality advocacy. Poor quality advocacy by either side simply increases the prospects of the guilty being acquitted, or the innocent being convicted. In the process of adversarial trial before a jury it really is as stark and simple as that.[47]

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43 Up to October 2009, the Appellate Committee of the House of Lords, since then the Supreme Court.

44 Patterson (n 19 above) 49.

45 Ibid 50.

46 *Torfaen Borough County Council v Douglas Wallis Ltd* [2013] UKSC 59, [9].

47 Kalisher Lecture 2009.

As Lord Pannick said in the speech referred to above:[47a] 'the work of lawyers on legal aid . . . makes an essential contribution to the administration of justice, defending the innocent and validating the conviction of the guilty'. Nor is the matter of concern only to the particular prosecution or defence. It bears precisely on the confidence that the community has in the legal system as a public service.

Now, given that advocates have so vital a role to play, it is imperative that they are not free to pick and choose when to play it.

In May 2012 the LSB, the legal regulators' own regulator, ever enthusiastic to bend the bow of its novel powers, commissioned two academics to analyse the impact on the market of the cab rank rule by which barristers are, in broad terms, obliged, subject to availability, adequacy of expertise and absence of conflict of interest, to represent any person who calls upon their services; however distasteful that person's character or cause. This duty has since at least the time of Henry VII[48] been part of the creed of the profession. Nonetheless, in their report published in 2013,[49] the academics concluded that: 'the logic of our report argues that the rule serves no clear purpose . . . while it can be lauded as a professional principle enshrining virtuous values, as a rule it is redundant'.

They based themselves, first, on pure economic literature, which they described as 'scant' and which they regarded as 'very sparse and ultimately not very illuminating'; second, on interviews with so-called 'stakeholders' whose testimony was given in exchange for a guarantee of anonymity; and, third, on sundry blogs and tweets. This may seem a fragile foundation on which to recommend abolition of a professional rule which dates back several centuries but this in no way deterred the authors.

There were three main points of suggested substance argued by them against retention of the rule. First, that other providers of legal services are not subject to it so why should the Bar be so subject? Second, that the rule has not been enforced and so is meaningless. And, third, that one of its purported rationales is devoid of force since there is no real problem with barristers being associated with their clients and so being dissuaded from providing representation to those whose cases do not, for whatever reason, engage immediate, or, indeed, any sympathy.

As to the first, the fact that other providers of legal services do not adopt the higher standard of conduct required by the rule can surely not

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47a See page 57 above.

48 The address of the then Chief Justice to the new sergeants-in-law included the exhortation: 'Ye shall refuse to take no man under the protection of Your good counsel.'

49 J Flood and M Hviid, *The Cab Rank Rule: Its Meaning and Purpose in the New Legal Services Market* (LSB 2013).

be a reason for abolishing the application of the rule to the Bar which supports its retention. If anything, it is an argument for application of the rule to those other providers. To enshrine the lowest common denominator in the practices of all branches of the legal professions is not the most obvious way to promote the rule of law.

As to the second, the assertion that because 'there is no evidence that it has ever been the subject of enforcement proceedings'[50] it serves no useful purpose and is not in fact adhered to is likewise a strange piece of reasoning. The fact that proceedings have not been brought[51] to enforce a rule does not mean that it has no effect on conduct. Indeed, quite the contrary conclusion will often flow: namely, that the rule *is* efficacious and *does* in fact guide conduct.

The rules contain an important statement of principle about the aspirations of the Bar and of the values which it, and indeed, society seeks to pursue.

As to the third, as explained by Lord Hobhouse in *Arthur Hall v Simmonds*,[52] the rule protects barristers against being criticised for 'giving their services to a client with a bad reputation' as it negates the identification of the advocate with the cause of his or her client. It therefore assists to provide him or her with protection against governmental or popular victimisation.

There is, contrary to the academics' premise, a real and present-day problem of counsel being associated, wrongly, with the cause they pursue for their clients. In 2012, two Asian barristers withdrew from the trial of a group of Asian men accused of running a paedophile ring (referred to by the media as 'the Rochdale grooming trial') after being intimidated and physically assaulted at the start of the case by far-right demonstrators outside Liverpool Crown Court.[53]

The Delhi rape case and the Mumbai terrorist survivor case demonstrate further the difficulties faced by defendants in jurisdictions where representation of a client suggests association *with that* client, with the consequence that lawyers for those charged with such serious offences cannot easily be found.

Barely a month ago, a lawyer representing the former military ruler of Pakistan, Pervez Musharraf, in a treason trial arising out of the 2007

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50 Ibid 2.

51 This factual assertion is in fact incorrect. But in any event it is in principle in the public interest that a lay client who cannot obtain representation from an advocate should be able, however *infrequently* the need to do so may arise, to complain of a breach of the cab rank rule as a matter of professional misconduct since the cab rank rule would otherwise be writ in water.

52 *Arthur Hall v Simmons* [2002] 1 AC 612.

53 www.thetimes.co.uk/tto/news/uk/crime/article3408066 and www.bbc.co.uk/news/uk/-england-17989463. [Links no long working.]

imposition of emergency rule was threatened in an anonymous letter with beheading and the destruction of his children.[54]

There is much anecdotal evidence that lay and professional clients in many areas of practice, including defamation,[55] seek to coerce sets of chambers into acting only for one side or the other, by coupling an offer of instructions in a *particular* case with a threat to withhold further instructions in *future* cases if the set does not accede to such demands – an offer, which to borrow the *dictum* of Marlon Brando in *The Godfather*, is proposed as an offer they can't refuse. The cab rank rule does not merely allow but actually obliges chambers, and counsel in them as a matter of professional conduct, *not* to accept this position, even if, necessarily, to their financial disadvantage.

In a legal culture whose roots are the same, but whose branches have developed in wholly different directions, the USA, in the field of media law an advocate will appear either for newspapers or against them; and it would be regarded as inconsistent, rather than consistent, with professional principle and practice to switch sides from day to day. I submit that the approach of the English Bar is to be preferred.

Certainly, the judiciary appear to be in no doubt about the cab rank rule's continued vitality. In *Rondel v Worsley*[56] in 1969, Lord Reid, in upholding barristers' traditional immunity from claims for negligence, said, about the position and duties of a barrister or advocate appearing in court on behalf of a client: 'It has long been recognised that no Counsel is entitled to refuse to act in a sphere in which he practises and on being tendered a proper fee, for any person however unpopular or even offensive he or his opinions may be, and it is *essential* that duty must be continued. Justice cannot be done and cannot be seen to be done otherwise.'

In *Arthur JS Hall & Co v Simons*[57] in 2002 when the same immunity was overturned, Lord Hobhouse of Woodborough said of the rule:

> It is in fact a fundamental and essential part of a liberal legal system. Even the most unpopular and antisocial are entitled to legal representation and to the protection of proper legal procedures. The European Convention for the Protection of Human Rights and Fundamental Freedoms (1953) (Cmd 8969) confirms such a right.'

In *R v Ulcay*,[58] the Lord Chief Justice stressed the importance of the rule despite its claimed evasion:

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54 *The Times* (London 14 March 2014).
55 But also banking, intellectual property and tax law.
56 *Rondel v Worsley* [1969] 1 AC 191, 227D.
57 *JS Hall & Co v Simons* [2002] 1 AC 615 (HL).
58 *R v Ulcay* [2008] 1 WLR 1209 (CA), [40].

> The cab-rank rule is essential to the proper administration of justice. We simply emphasise that if the cab-rank rule creates obligations on counsel in civil proceedings, it does so with yet greater emphasis in criminal proceedings, not least because to a far greater extent than civil proceedings, criminal proceedings involve defendants charged with offences which attract strong public aversion, with the possibility of lengthy prison sentences, when more than ever, the administration of justice requires that the defendant should be properly represented, so allowing the proper exercise of his entitlement at common law and his Convention rights under article 6.

Nor is the rule just an English legal curiosity. As observed by Brennan J in the High Court of Australia in *Giannarelli v Wraith*:

> If access to legal representation before the courts were dependent on counsel's predilections as to the acceptability of the cause or the munificence of the client, it would be difficult to bring unpopular causes to court and the profession would become the puppet of the powerful.[59]

Sir Sydney Kentridge QC, speaking of his experience of acting for opponents of the apartheid regime in 1986, expressed the importance of the rule in eloquent and practical terms as follows:

> ... in some types of cases – particularly in treason trials, of which there are many in South Africa – defending counsel is sustained and strengthened by the understanding of his professional colleagues – among whom for these purposes I include the judges – that what he is doing for his client, however much it may hurt or offend persons in authority, is no more than his duty. The rule also ensures that the independence of the advocate is generally recognised even by the public at large – the advocate is not necessarily associated with the views of his client. This may seem pusillanimous. Why should we care what anyone thinks of us? If we all had the courage of an Erskine or a Clarence Darrow, we should not require that sort of protection. But I assure you that for ordinary mortals the support of this professional tradition can be very comforting indeed.[60]

While Sir Sydney is himself no ordinary mortal but fit to be ranked with those with whom he declines to compare himself, his observation loses nothing in pertinence because of his modesty.

So, as explained by Lord Bingham in his chapter on a fair trial[61] in his book on *The Rule of Law*, 'scarcely less important than an independent judiciary is an independent legal profession, fearless in its representation of those who cannot represent themselves, however unpopular or distasteful their case may be'.

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59 *Giannarelli v Wraith* (1988) 81 BLR 417, 439.

60 Lecture at the Middle Temple, January 1986, entitled 'The South African Bar: A Moral Dilemma?', reproduced in Sir Sydney Kentridge QC, *A Free Country* (Hart 2012) 23.

61 Bingham (n 13 above) 92.

The academics' analysis appeared oblivious to the fact that the legal profession, while it inhabits a market, is not *only* a participant in a market, and mercifully the report has, at any rate for now, disappeared into the oubliette of history.

The fact that a barrister is not identified with his or her client has the *additional* advantage that the court will repose greater confidence in his or her submissions than if such identification were perceived or perceptible.

Judges themselves are by tradition and training expected to suppress – as far as is possible – their personal or political predilections when ruling on cases that come before them. But, over the last year, several members of the Supreme Court have yielded to the temptation of expressing their views on a topic of extreme sensitivity – the extent to which the domestic courts should defer to the Strasbourg Court's interpretation of the European Convention on Human Rights in applying those of its key provisions (and they form a substantial majority) that have been incorporated into domestic law by the Human Rights Act 1998. The issue has achieved salience over a range of cases, including the exclusive use of hearsay evidence to achieve a conviction, the rights of prisoners to vote and whole life sentences.

The basic law is clear enough. The Human Rights Act 1998 provides only that British courts must 'take into account' the decisions emanating from Strasbourg.[62] In *Ullah*,[63] Lord Bingham said that they should apply them 'no more but certainly no less' which, in Al Skeini, Lord Simon Brown countered with 'no less but certainly no more'.[64] The gap revealed by these obscurely differing emphases has widened into a chasm. On the one side, Lady Hale is an outrider in the Bingham camp contending for *Ullah*,[65] plus advocating that the domestic courts should be free to adopt a more generous construction to Convention rights than the European Court of Human Rights. On the other side, Lord Justice Laws argued that domestic courts should be free to adopt a less generous – or native – interpretation of those rights;[66] and Lord Judge proposed that the Human Rights Act 1998 be amended to make that clear.[67]

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62 S 2(1).

63 *R (Ullah) v Special Adjudicator* [2004] 2 AC 323, [20].

64 *R (Al Skeini) v Secretary of State for Defence* [2008] 1 AC 153, [106].

65 Warwick Law Lecture 2013, 'What's the Point of Human Rights', 10–11.

66 Third Hamlyn Lecture, 'The Common Law and Europe', paras 30–4, *The Common Law Constitution* (CUP 2013).

67 Lecture to the Constitution Unit, 'Constitutional Change: Unfinished Business', 4 December 2013, para 40.

Meanwhile Lord Sumption[68] was concerned that the European Court had 'gone well beyond the language, object or purpose of the Convention' in a manner which posed 'a threat to democracy', a view which Lord Mance elsewhere described as 'apocalyptic'.[69] (Lady Justice Arden, in private life, Lady Mance, has advocated a three-year stay on the rulings of the European Court of Human Rights which lay down new law.)[70] To cap it all, Lord Neuberger[71] has stated: 'The idea of courts overruling decisions of the UK Parliament, as is substantially the effect of what the Strasbourg and Luxembourg Courts can do, is little short of offensive to our notions of constitutional propriety.' Truly a court divided against itself – and one whose revelations of judicial philosophy will inform the approach adopted by advocates who appear before them.

Advocates by contrast do not enjoy even such limited licence in their professional role. Their beliefs are irrelevant to the arguments they present. Indeed, for an advocate to state to the courts his or her belief is a solecism; advocates neutrally submit. Such convictions, as they may have, are parked outside the doors of the court. Their independence is in that sense of a purer variety than that of the judges.

But is the advocate's devotion to a client's cause an unqualified benefit? In a speech last year to the St Petersburg International Legal Forum on the theme 'Learning from Each Other', the dean of the Oxford law faculty explained that, in teaching law: 'We have to focus on dispute resolution, because of the way in which the common law has developed over centuries, through the decisions of judges in trials and appeals.'[72]

But he added, provocatively:

> there are drawbacks to a common law legal education, even to a good one. We never put this on our university publicity materials but let's face the facts; we teach students how to make bad arguments sound plausible . . . We equip students to become part of an industry in which they can charge high fees for legal services in support of claims that should not be brought and in making defences against claims that should not be resisted. This form of education supports the rule of law. But the rule of law is not altogether a good thing.

And he supplied an alleged example: 'If a murderer has a good defence lawyer and a fair trial, the lawyer may prevent justice from being done', while referring in the same sentence, in deaconal paradox

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68 Razlan Shah Lecture in Malaysia, 'The Limits of the Law', 20 November 2013.
69 'Destruction or Metamorphosis of the Legal Order', 14 December 2013.
70 'An English Judge in Europe', 27 March 2014, para 70.
71 Freshfields Annual Lecture 2014, 'The British and Europe'.
72 (2013) 17 Oxford Law News 7.

to the counter case 'yet our country is worse off if a murderer cannot get a good lawyer.'[73]

While I would acknowledge the dean's analysis as superficially plausible, I would also describe it as misguided. For intrinsic to it is a sense of omniscience which, while it may be understandable in an academic, is alien to a practitioner. It confuses hindsight with foresight. It assumes that, before a case has even been argued, the answer to it is certain. Yet, it is for the judge, not the lawyer, to provide that answer. As Lord Denning observed in *Tombling v Universal Co Ltd*:[74] 'Cicero makes the distinction that it is the duty of the judge to pursue the truth, but it is permitted to the advocate to argue what only has a semblance of it.' Norman Birkett, one of the pre-eminent counsel in the golden age of advocacy, in a famous *Face to Face* television interview with John Freeman, said that he had not infrequently defended clients whom he believed to be guilty, but never one whom he knew to be so.[75] In a democracy subject to the rule of law, it is no business of counsel to judge their client. As Baron Bramwell observed: 'A client is entitled to say to his counsel "I want your advocacy, not your judgement, I prefer that of the Court".'[76]

Alex McBride's recent literary *jeu d'esprit*, *Defending the Guilty*,[77] an account of the professional life of a criminal barrister, is a book with a title which abbreviates rather than illuminates the truth. Defence counsel is representing someone who, however formidable may be the prosecution case, until convicted enjoys the presumption of innocence. Indeed, if defence counsel was in receipt of an admission by the client that the client had actually done that of which he or she was accused, the ambit of the defence would be restricted to putting the prosecution to proof rather than advancing a positive case inconsistent with the client's instructions. A fairer but less engaging title would be 'Defending a person who, notwithstanding my arguments, was found by the tribunal of fact beyond reasonable doubt to be guilty as charged'. As an exercise in sales promotion such a title would, of course, be less attractive to the publishers!

So, to the dean of the Oxford law school, I would make the riposte: 'The rule of law *is* altogether a good thing.' And the fact that in litigation the right result is not always achieved does not make it less so. Advocates, even judges, are only human!

But whatever techniques they deploy, how far *should* advocates go in their desire to promote their clients' interests. The parents of the

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73 Oxford Law News (n 72 above).
74 *Tombling v Universal Co Ltd* [1951] 2 TLR 289, 297.
75 Norman Birkett, *Montgomery Hyde* (Hamish Hamilton 1964) 488.
76 *Johnson v Emerson* (1871) LR 6 Ex 329, 367.
77 Penguin 2010.

murdered 13-year-old Milly Dowler had their own sex lives subjected to prolonged scrutiny by defence counsel for Levi Bellfield, ultimately convicted of Milly's murder – as well, of course, as having their voicemails hacked by journalists for the *News of the World*. Frances Andrade committed suicide after giving evidence against a former music teacher, Michael Brewer, accused of having sexually assaulted her when she was his pupil, apparently in consequence of her ordeal in the witness box, which, she confided in a text to a friend, made her feel that 'she had been raped all over again'. Domestic goddess Nigella Lawson, a prosecution witness in the trial of the Grillo sisters who were accused of defrauding her former husband Charles Saatchi, was accused of being a habitual user of drugs by the sisters' defence counsel to sustain a line of argument that she had licensed payments from her husband's bank account as a price for the sisters' silence. Prosecutors are under a professional obligation not to seek conviction at any cost. It may be that a similar restraint should be imposed on defence counsel rather than that they should enjoy, subject only to control by the court, what Nigella's brother, the prominent journalist Dominic Lawson, described as an 'unchecked destructive licence'?[78]

The degree to which the court's control is effective is itself controversial. Judge Robin Johnson, who had reversed an earlier ruling to exclude evidence about Ms Lawson's alleged drug-taking, was compelled to abort questions by a Ms Arden, counsel for Francesca Grillo, only when she asked Ms Lawson whether she had received a Mother's Day card with a spliff attached to it and the words 'to enjoy later' with the direction: 'That ends your cross-examination. I'm not having any more. You have exhausted my patience.' – a not entirely principled or satisfactory safeguard.

Sometimes the boundaries of forensic propriety, if not transgressed, may be thought to come close to being so in ways other than the harassment of witnesses. In the three-week trial of two al-Qaeda sympathisers for the murder of Fusilier Rigby, the advocate for Michael Adjebolo reminded the jury that it was for the prosecution to prove its case: 'The onus is on the prosecution to prove intent to kill or do really serious bodily injury.' – a submission correct in law, but somewhat ambitious given that his client had been seen to kill the soldier on the public highway and had been photographed with the murder weapon – a blood-stained machete – in his hands. Counsel also argued that his client was a soldier in war believing himself to be engaged 'in a legitimate armed conflict against an odious regime' and therefore could not have breached the queen's peace – a submission, as the judge held, incorrect in law.

78 'My Sister was Found Guilty – And She Was Given No Defence' *The Sunday Times* (London 22 December 2013).

The same advocate's dramatic and eloquent introduction ('There is no greater honour than to stand up for someone who is innocent of a charge . . .') savoured of exaggerated optimism and was also inappropriate insofar as it implied his belief in his client's innocence – which was no more relevant than would have been his belief in his client's guilt.

In *R v Farooqui and Others v R*,[79] a terrorist case, the convictions of Mr Farooqui and his co-accused were challenged last year on the basis of 'flagrant misconduct and alleged professional incompetence'[80] of Mr Farooqui's advocate. The catalogue of misconduct included: giving evidence himself – his client having declined to do so; making submissions about facts not themselves adduced in evidence; making critical comments about the prosecution police witnesses, notably that they had been guilty of entrapment, which they had been given no opportunity to answer; and making unwarranted personal attacks on the judge, the prosecution and even other defence counsel who were said to be guilty of 'sucking up' to the judge because they conducted their cases in a manner different to his own.[81]

In stressing that 'the trial process is not a game',[82] the Court of Appeal emphasised as well that:

> . . . the advocate is not the client's mouthpiece[83] ... In short the advocate is bound to advance the defendant's case on the basis of what his client tells him is the truth, but save for well-established principles ... the advocate, and the advocate alone remains responsible for the forensic decisions and strategy. That is the foundation of the right to appear as an advocate with the privileges and responsibilities of an advocate, and, as an advocate burdened with twin responsibilities, both to the client and to the court.[84]

It added only that 'in the course of any trial, like everyone else, the advocate is bound ultimately to abide by the rulings of the court'.[85]

Farooqui itself has re-emphasised the well-known principle that lawyers' duties to the court may conflict with duties owed by lawyers to their clients.[86] The reconciliation is also well known. As was said by Mason CJ in *Giannerelli v Wraith*:

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79 *R v Farooqui and Others v R* [2013] EWCA Crim 649.
80 Ibid [1].
81 Ibid [110]–[15].
82 Ibid [114].
83 Ibid [108].
84 *Farooqui* (n 79 above) [108]
85 Ibid [109].
86 D Ipp, 'Lawyers' Duties to the Court' (1998) LQR 63.

> It is not that a barrister's duty to the court creates such a conflict with his duty to his client that the dividing line is unclear. The duty to the court is paramount even if the client gives instructions to the contrary.[87]

This paramountcy is justified by reason of the court being the representative of the public interest in the administration of justice. As Lon Fuller, the noted Harvard legal philosopher wrote:

> The lawyer's highest loyalty is at the same time the most intangible. It is a loyalty that runs, not to persons, but to procedures and institutions. The lawyer's role imposes on him a trusteeship for the integrity of those fundamental processes of government and self-government upon which the successful functioning of our society depends.[88]

This proposition is well illustrated by the precept and practice that counsel must, if the other side is unrepresented, even draw the court's attention to what the other side might have said. In the *Torfaen* case, Lord Toulson mentioned that the note prepared by legal staff had been disclosed to counsel for the local authority and added:

> This was disclosed to Mr Jonathon Kirk QC, who represented the council. In addition, mindful that he was appearing for a public authority against an unrepresented respondent, Mr Kirk himself invited the court to consider those points which we would have regarded as fairly capable of argument if he had been instructed on the other side. This was in accordance with the best tradition of the bar and we believe that it has enabled us fairly to evaluate all the arguments. [9]

David Ipp, a Singaporean Judge, wrote: 'The administration of justice requires the processes of the court to be protected from abuse and particular duties enable courts to police their own procedures. They must not countenance the use of litigious procedures for purposes for which they were not intended, and from excessive zeal.'[89] But advocates should also be astute to police themselves.

It has always been necessary to ensure that only those who enjoy the privileges of advocacy deserve it. Historically, the Bar was subject to sanctions for professional misconduct imposed by judges of the High Court acting as visitors to the Inns of Court. As I have already mentioned, advocates are now subject to the same liability for negligence if they breach their duty of care as other professionals are,

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87 *Giannarelli* (n 59 above) 421.

88 L Fuller and J Randall, 'Professional Responsibility: Report of the Joint Conference' (1958) 44 ARA J 1159, 1162.

89 Ipp (n 86 above) 105.

although still enjoying absolute privilege from the perspective of the law of defamation as do other participants in judicial proceedings.[90]

Nonetheless, a sea change occurred with the coming into effect of the Legal Services Act (LSA) 2007, which substantially reformed the provision of legal services in England and Wales. At its heart were eight regulatory objectives which included 'supporting the constitutional principle of the Rule of Law'[91] and 'promoting and maintaining adherence to the professional principles'[92] 'which themselves required that' 'authorised persons should maintain proper standards of work.'[93] Part 2 of the Act established the LSB, whose domain extended to oversight of, amongst others, the Bar Standards Board to whom the Bar Council had delegated its own regulatory functions.

The LSB determined to drive forward a quality assurance scheme for advocates (QASA). There were no less than four rounds of consultation and commissioning of further reports. The mountains laboured and produced not so much as Horace's ridiculous mouse, but an animal of an entirely different nature – an evaluation scheme by judges for all advocates to be introduced in stages with the criminal Bar being the first target. Market forces were no longer deemed sufficient to weed out the incompetent, nor the acquisition of points for continuing professional development – a euphemism if ever there was one – to improve them.

It was unsurprising that the Bar should challenge the scheme and no less surprising that the challenge has been at any rate *to date* unsuccessful, given the support of the majority of the senior judiciary.[94] The impetus behind the challenge, based on the thesis that for judges to have to mark advocates who appeared before them would compromise the integrity of both, is to be found in a lecture by Lord Justice Moses where he posed the question: 'Can anyone who has spent any time in Court listening to advocacy really believe that a system of marking will encourage, influence or inspire, or will it deaden and crush in pursuit of a bland and colourless uniformity?'[95]

Lord Denning said succinctly: 'Courage and courtesy should go hand in hand.'[96] Lord Justice Moses clearly thought that a courtesy might survive but courage would not and, in consequence, the court would

90 *Munster v Lamb* (1883) 11 QBD 588, 603–4, per Brett MR. Barristers are also liable in appropriate circumstances to wasted costs orders: *Ridehalgh v Horsefield* [1994] Ch 205; *Medcalf v Mardell* [2003] 1 AC 120.

91 LSA 2007, s 1(1)(b).

92 Ibid s 1(1)(h)

93 Ibid s 1(3)(b).

94 *R on the Application of Lumsdon and Others v LSB* [2013] EWHC 28 (Admin).

95 South Eastern Circuits Ebsworth Lecture 2012.

96 'The Road to Justice', Lord Denning Stevens in his Hamlyn Lecture 1954, 55–6.

be deprived of the quality of uninhibited argument that it required to reach the right result, whereas for their part judges might hesitate conscientiously to criticise advocates for fear of being sued.

The Administrative Court rejected all these arguments. While recognising expressly that the independence and impartiality of the criminal Bar, both prosecutor and defence, enshrined 'values to the great advantage of the rule of law in this country',[97] it considered implicitly that the QASA promoted rather than impaired it.[98]

Let me now seek to weave the threads of this lecture into something that more closely resembles a seamless robe than a patchwork quilt and hark back to Lord MacDermott's lectures on protection from power. For, coupled with the albeit postponed reduction in legal aid is the imminent curtailment of judicial review – through the vehicle of the Criminal Justice and Courts Bill currently before the Westminster Parliament.[98a] Since judicial review is concerned with ensuring that government itself is not guilty of abuse or misuse of power, it has never been popular with governments of whatever political complexion.[99] Whilst the Lord Chancellor was himself a judge he could and did defend the judiciary against attack. The present incumbent, a politician not a lawyer, has no judicial role.[100]

But, although complaints about judicial overreach by ministers where they are the objects of unfavourable judgments are legion, the target of the Lord Chancellor, who retains statutory responsibility for judicial independence[101] and is properly mindful of that particular constitutional duty, is the advocates, not the judges.

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97 *Lumsdon* (n 94 above) [1].

98 It also rejected arguments that the scheme, contended to be an authorisation scheme, was disproportionate and at odds accordingly with the EU Services Directive 2006/123/6c and of Article 1 of the First Protocol to the European Convention on Human Rights said to protect the advocates' asset in the form of an established practice and clientele.

98a At the time of writing the outcome is unknown. The Bill returns to the Commons in November 2014 where reversals in the House of Lords are themselves likely to be reversed.

99 See for an appreciation now more than a decade old, Lord Woolf, 'Judicial Review: The Tensions between the Executive and the Judiciary' (1998) LQR 579.

100 Indeed, the title Lord Chancellor, which the Justice Secretary currently enjoys, now has no greater substance than the smile on Lewis Carroll's Cheshire cat. Given its significant differences in terms of function with that of the office-holders prior to the coming into effect of the Constitutional Reform Act 2005, the name itself could be said to constitute a misleading statement as well as being past its sell-by date.

101 Constitutional Reform Act 2005, s 3(6)(a).

In the foreword to his response to the consultation on judicial review the Lord Chancellor wrote:[102]

> I believe in protecting judicial review as a check on unlawful executive action, but I am equally clear that it should not be abused to act as a brake on growth. In my view judicial review has extended far beyond its original concept, and too often cases are pursued as a campaigning tool or simply to delay legitimate proposals. That is bad for the economy and the tax payer, and also bad for public confidence in the Justice system.

He added in the substantive part of the document:

> the Government's view is that the better way to deliver its policy is through a strong package of financial reforms to limit the pursuit of weak claims, especially but not only by aiming to deprive parties and interveners of protective costs orders unless permission has been granted.[103]

The devil is in the detail – it amounts to death by a thousand cuts![104]

But what is notable is that the case against what are perceived to be extravagant applications for judicial review is couched in economic, not constitutional, terms. Yet the Lord Chancellor had another relevant obligation under the Constitutional Reform Act 2005 which is set out in its initial section, but assumed in its very language to be of far greater vintage:

> This Act does not adversely affect –
>
> (a) the existing constitutional principle of the rule of law: or
>
> (b) *the Lord Chancellor's existing constitutional role in relation to that principle* [emphasis added].

The same monocular approach informs the Lord Chancellor's explanation for postponement of his legal aid reforms: 'I wanted to do what I could to ease their effect on *lawyers*.' The Lord Chancellor, with the greatest respect, has wrongly focused on the singer, not the song; who lawyers are, not what they do. In the words of Lord Henry in Oscar Wilde's *Picture of Dorian Gray*, his department knows the price of everything, but the value of nothing.

For these two streams of reforms, curtailment of legal aid and of judicial review, are interrelated, not distinct. As Lord Faulks QC said in the House of Lords debate on the former:

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102 *Judicial Review – Proposals for Further Reform: The Government Response* Cm 8811 (Ministry of Justice 2014) para 35.

103 Ibid para 5.

104 See the critique by Sir Stephen Sedley, 'Not in the Public Interest' (2014) 36(5) London Review of Books 6 March and Rowena Moffat and Sarita Thomas, 'And Then They Came for Judicial Review: Proposals for Further Reform' (2014) JIANL 237.

> what is at stake is not just the standard of living of lawyers; but the ability for members of the public to obtain competent representation when facing criminal charges, the consequences of marital breakdown, abuse of power by public authorities, threats of repossession of their homes or deprivation of contact with children or grandchildren. The cuts affect the most vulnerable; asylum seekers, prisoners, the mentally ill.[104a]

Lord Faulks has himself been since promoted to the Ministry of Justice and hence presumably disabled from reprising his critical observations; better no doubt, as Lyndon Johnson once said of a critic, to have him doing something inside the tent outwards rather than outside the tent inwards – in this, a public lecture, I bowdlerise the verb the former President actually used.

Lord Neuberger, President of the Supreme Court, has added in a newspaper interview this melancholy reflection: 'cut price litigation leads to unrepresented litigants and worse lawyers'.[105] The direct consequences are elongation of hearings and increase in costs of the courts themselves, but more importantly the indirect consequences are the risk of judicial error and hence of injustice.

In R v Crawling the Court of Appeal articulated similar sentiments and ended with the exhortation: 'It is of fundamental importance that the MoJ led by the Lord Chancellor and the professions continue to try and resolve the impasse that presumably stands in the way of delivery of justice in the more complex cases.'[105a]

In *Re R (A Child)*, Lady Justice Black said:

> This case is illustrative of an increasing problem faced by this court. More and more litigants appear in front of us in person. Where, as here, the appellant is unrepresented, this requires all those involved in the appeal process to take on burdens that they would not normally have to bear. The court office finds itself having to attempt to make sure that the parties to the litigation are notified of the appeal because litigants in person do not always know who should be served; the only respondent named by M here was LA. The bundles that the court requires in order to determine the appeal are often not provided by the litigant, or are incomplete, and proper papers have to be assembled by the court, not infrequently at the request of the judges allocated to hear the case when they embark upon their preparation for the hearing just days before it is

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104a 11 July 2014.

105 See F Gibb, 'Is the Rise of DIY Litigants the Death Knell for Court Lawyers?' *The Times* (London 22 May 2014) which suggested that judges might have to take a more proactive role to respond to the absence of lawyers.

105a At fn 9, [58]–[59]. The London Criminal Courts Solicitors Association achieved a temporary triumph by having quashed a decision about Duty Provider Work contracts available to solicitors on reduced fees: [2014] EWHC 3020 (Admin). Mr Justice Burnett who handed down the decision, based on unfair consultation, was shortly afterwards promoted to the Court of Appeal.

> due to start. The grounds of appeal that can properly be advanced have to be identified by the judge hearing the permission application and the arguments in support of them may have to be pinpointed by the court hearing the appeal.
>
> I said more about the cost to individuals and to the legal system of the absence of legal assistance in *Re O-A*, a private law children case decided on 4 April 2014. Everyone involved in public and private law children cases is attempting to achieve the best possible result for the children whose welfare is at the heart of the proceedings and, without legal representatives for the parties, that task is infinitely more difficult.[105b]

For, there is alas, a limit to which courts can assist litigants in person. In a decision in the Jersey Court of Appeal, in an appeal on a charge of grievous and serious assault, the court noted:[106]

> The applicant was of course a litigant in person. Obviously a court will seek to assist such a litigant in his presentation but *not* at the expense of the rules of evidence and proper procedures appropriate to lawyers.

It can be said of the Bar, not only that it presents arguments better than litigants in person – an under-ambitious aspiration – not that it does it perfectly, but rather, as was said of James Bond in the Carly Simon lyric, 'Nobody does it *better*.'[107]

In short, my thesis is that the fulfilment of the forensic function by a profession, educated, conscious of its plural duties and the balance to be struck between them, subject to proper education, monitoring and, where necessary, discipline, and ever-faithful to its fundamental principle, the cab rank rule, is necessary for the prevention of injustice and the protection of the rule of law.

The many changes to which the Bar of England and Wales has been subjected over the last 20 years may appear to deflect its attention from some of its core values.[108] An increasing number of qualified barristers in an age of austerity prefer the security offered in the employed sector. Yes, as Sir Ivan Lawrence, one of the diminishing number of lawyers active both in the Commons and in the courts, said: 'The *independence* of the self-employed lawyer owing allegiance to his client not to an employer telling him what is in the best interests of the firm is of

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105b [2014] EWCA Civ 597, [6] and [9], and is similar to: *Wright v Wright* [2013] EWCA Civ 234, per Ward LJ, [2]; *Q v R* [2014] EWHC 7, per the President, [19]; *C (A Child)* [2014] 1 WLR 2182, per Ryder LJ, [4]. See also A Zuckerman, 'No Justice without Lawyers: The Myth of an Inquisitorial Solution' [2014] CJQ 355.

106 *R v Baglin* [2014] JCA 41.

107 The theme song of the film *The Spy Who Loved Me*.

108 'Although 42% of the Bar carry out pro bono work': Counsel Chairman's Column November 2013, para 41.

particular importance to the integrity of the justice system.'[109] – an independence put at particular risk if the employer is the state. The vision said by sceptics to be prevalent in the Ministry of Justice of a future where a Crown Prosecution Service is confronted by a state defender system is not one calculated to inspire public confidence.

Concurrently, the emphasis on marketing and branding of sets of chambers, as if they were *de facto* if not *de jure* partnerships, *rather than* an association of independent practitioners; the imminent ability now to convert chambers into partnerships and even to become subsumed in commercial entities; as well as the deliberate withholding of labour by barristers suggests that – paradoxically – they are adopting features both of business and of trade unions. The possibility for a barrister to practise as a limited company with consequent tax and limited liability advantages and, even with his or her spouse as a shareholder, has been advertised in a recent brochure by a firm of chartered accountants.[110] This, if nothing else, would add new hazards to the phenomenon of 'conscious uncoupling'.[111]

As trial is not, as was said in *Faroqui*, a game. Nonetheless, Grantland Rice, the American sports journalist, penned a quatrain, which is usually attributed to cricket but in fact refers to basketball, but would be equally appropriate to advocacy;

> For when the one Great Scorer comes.
>
> To write against your name,
>
> He marks – not that you won or lost –
>
> But how you played the game.

A trade, profession, or a vocation? That is, as it always was, the choice for the Bar. On how it exercises that choice will depend in part the future of the rule of law itself.[112]

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109 *My Life of Crime* (Book Guild 2010) 40.

110 *Barristers and Incorporation* (Place Campbells Chartered Accountants 2014).

111 Attributed to the actress Gwyneth Paltrow announcing her divorce from Chris Martin of the group Coldplay.

112 As far as possible where events have moved on since the delivery of the lecture, I have sought to reflect that in the footnotes. MJBQC.

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MacDermott Lecture 2021:† Should judges be neutral?

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INTRODUCTION: SHOULD JUDGES BE NEUTRAL IN THE SENSE OF AN INDIFFERENCE TO THE OUTCOME OF A CASE?

Writing in the aftermath of the tragic space shuttle *Challenger* disaster in 1986, the great American physicist and Nobel laureate, Richard Feynmann, famously observed that for a successful technology 'reality must take precedence over public relations for Nature cannot be fooled'.[1] By this he meant that there were immutable scientific laws which could not be wished away or somehow glossed over. Is there, I wonder, a lesson here for lawyers and judges as well?

Even though law is a purely human construct and not a natural science, for at least 150 years judges have generally sought to emulate the scientific method of rigorous, detached reasoning even if this method of reasoning sometimes leads to results which are surprising, unwelcome and inconvenient. Feynmann's essential point was that in a scientific context such conclusions cannot be ignored or discounted just because they are unwelcome or inconvenient. But do judges as guardians of a human system enjoy a freedom denied by Nature to scientists? Can we elect to avoid conclusions which might be unwelcome or inconvenient, irrespective of whether this is done for reasons of pragmatism or because such a conclusion offends our own sense of justice? Or is it the case that, just as with Nature, she who Cardozo famously described as 'Our Lady of the Common Law'[2] cannot be fooled?

The question I want to pose this evening accordingly is whether judges should be neutral. There is no question at all but that it is

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1 *Report of the (Rogers) Presidential Commission on the Space Shuttle Challenger Accident*, vol 2, appendix F.

2 Benjamin N Cardozo, 'Our Lady of the Common Law' (1939) 13 St John's Law Review 231.

possible that they *can* be neutral in the sense of disregarding their own personal preferences or views as to the desirability of the outcome. Two recent appointees to the US Supreme Court have made this point rather well in the course of their respective confirmation processes. In her speech immediately preceding her taking the declaration of office, Coney Barrett J said that the most important feature of judicial independence was the independence from one's own personal views. And Gorsuch J said at his Senate confirmation hearing that:

> I have decided cases for Native Americans seeking to protect tribal lands … for victims of nuclear waste pollution … for disabled students, prisoners and workers alleging civil rights violations. Sometimes, I have ruled against such persons too. But my decisions have never reflected a judgment about the people before me – only my best judgment about the law and the facts at issue in each particular case. For the truth is, a judge who likes every outcome he reaches is probably a pretty bad judge, stretching for policy results he prefers rather than those that the law compels.[3]

Lord MacDermott would, I am sure, have approved of these sentiments. After all, he found for the punter in *Hill v William Hill (Park Lane) Ltd*[4] in holding that the money which the bookmaker sought to recover was an irrecoverable gaming debt and even though – in Lord Lowry's memorable words – this must have been 'Lord MacDermott's closest ever contact with a bookmaker'.[5]

There is, of course, another sense in which judges are not and cannot be expected to be neutral. Judges are not neutral about legal values or matters which are part of the core constitutional identity of their own State. The UK Supreme Court is not, for example, neutral about the great legal inheritance that is the common law. One may expect that that Court will see that it is under a duty to ensure that these principles remain vibrant for the modern legal world. South of the border, the Irish Supreme Court is not neutral about upholding the values and principles contained in the Irish Constitution. Indeed, if it were not to go about the business of developing and integrating these values and rules into the legal system it would come under criticism. And much the same can be said in turn for courts in Luxembourg, Strasbourg, Karlsruhe, Rome, Washington DC and elsewhere. This question of ultimate legal and constitutional identity – and which court is under a duty to protect

3 John Greenya, *Gorsuch: The Judge who Speaks for Himself* (Threshold Editions 2017) 210.

4 [1949] AC 530.

5 Lord Lowry, 'The Irish Lords of Appeal in Ordinary' in D Greer and N Dawson (eds), *Mysteries and Solutions in Irish Legal History* (Four Courts 2001) 213.

it – is currently the subject of extensive debate between the German[6] and Italian Constitutional Courts,[7] on the one hand, and the Court of Justice on the other. That is a fascinating debate in its own right, but it is not the subject of my discourse this evening.

My query is rather whether judges *should* be neutral in the sense of a blithe indifference to the outcome. Or should judges instead have regard to the outcome in making decisions so that, so to speak, they reason backwards from the desired result instead of the reverse? And is this not what judges do anyway a good deal of the time, even if this is not often admitted? These, of course, are not new or novel ideas. For over 100 years legal realists have argued that the orthodox theory of judging was wrong because in Dworkin's words, it had taken:

> … a doctrinal theory to jurisprudence, attempting to describe what judges do by concentrating on the rules they mention in their decision. This is an error, the realists argued, because judges actually decide cases according to their own political or moral tastes, and choose an approximate legal rule as a rationalisation. The realists asked for a 'scientific' approach that would fix on what judges do, rather than what they say, and the actual impact their decisions have on the larger community.[8]

This point was well expressed by Ryan P – the former President of the Republic's Court of Appeal – in a scintillating post-retirement lecture. He made the point that it was important for the barrister to know the 'form' of the type of judge before whom the case was assigned and the key role of the identity of that judge:

> The Tammany Hall politician who said: 'Don't tell me what the law says, tell me who the judge is' is accurately enough reflecting the role that I played as a barrister. Most practitioners in the common law world of personal injuries – long the dominant category of litigation—and non-jury actions considered themselves experts on the inarticulate major premises of the judges before whom they appeared. Barristers operated like share analysts or, perhaps, more accurately like punters selecting likely winners. Holmes's man in the State penitentiary did not want to know the law; just like my clients, he wanted to know the likely outcome.

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6 See, eg, judgment in the *Bond Buying* case of 5 May 2020 2 BvR 859 15 and see, generally, J-M Perez de Nanclares, 'Verfassungsgerichtliche Kooperation in europäischen Rechtsraum' in von Bogdandy, C Grabenwarter and P Huber (eds), *Handbuch Ius Publicum Europaeum – Verfassungsgerichtsbarkeit in Europa* (Max Plank Institute 2021) 539–619.

7 See, eg, Case C-105/14 *Taricco* EU:C: 2015: 555, Case C-42/17 *MAS* EU:C:2017:936, judgment of the Italian Constitutional Court of 10 April 2018 115/2018 and see, generally, G Piccirilli, 'The *Taricco* Saga: the Italian Constitutional Court continues its European Journey' (2018) 14 European Constitutional Law Review 814.

8 R Dworkin, *Taking Rights Seriously* (Duckworth 1977) 3.

> That I think is pragmatism at work. The business of the bar is not law, but cases and judges.[9]

It is idle to deny that these observations contain at least a lot of truth, even if they are not perhaps the full picture. It is nonetheless striking that there are very few judges who openly admit to this in their judgments. How often does one hear a judge – even the 'Completely Adult Jurist' originally posited by the avowed leader of the realist school, Jerome Frank[10] – openly say that he or she decides cases by reference to their own political or social views and then later chooses an approximate legal rule as a rationalisation for that decision? Indeed, the only 'completely adult jurist' then recognised by Frank – Holmes J – appeared to say the exact opposite when he declared in a letter to Harold Laski that 'if my fellow citizens want to go to Hell, I will help them. It's my job.'[11]

One of the rare instances where a judge openly said that the consequences of a decision should be considered was the following account of what the then President of the Irish High Court, Kearns P, said in a speech on his retirement:

> Mr Justice Kearns said judges should never put themselves in the position of realising, too late, that a particular decision has opened a Pandora's Box of unintended consequences which if proper consideration had been applied, might have led to a different approach being taken. He said this was particularly the case where the boundaries of judicial and executive function intersected.[12]

This, however, was in the course of a retirement speech and was not contained in an actual judgment. Post-retirement Lord Sumption expressed similar views, albeit with an important caveat:

> Almost all judges start from an intuitive answer and work backwards. Most of them, however, recoil in the face of intellectual difficulty or constitutional principle.[13]

But, if is this what judges actually *do*, why do they generally seem reluctant to admit to this?

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9 Mr Justice Sean Ryan, 'Confessions of a pragmatist', Vivian Lavan Lecture (UCD Law Society 2019). I am very grateful to Mr Justice Ryan for supplying me with the text of this lecture.

10 Jerome Frank, *Law and the Modern Mind* (MIT Press 1930) ch 4.

11 Mark De Wolfe Howe (ed), *Holmes-Laski Letters* vol 1 (Harvard University Press 1953) 249.

12 Quoted by Richard Humphreys, 'The Constitution and law as living instruments for a living society' (2017) 40 Dublin University Law Journal 45, 63.

13 Lord Sumption, 'Covid-19 and the courts: expediency or law?' (2021) 137 Law Quarterly Review 353, 357.

SHOULD JUDGES STRIVE TO AVOID CONSEQUENCES WHICH THEY (SUBJECTIVELY) CONSIDER ARE NOT IN THE PUBLIC INTEREST?

For those of us of a certain age, the decline of Lord Denning – still, on any view, one of the greatest ever English judges – was in some respects painful to watch. By the end of the late 1970s Denning's tussles with the House of Lords had become the stuff of legend. But it is probably sufficient for this purpose to refer to the series of trade union decisions in the late 1970s and the early 1980s which culminated in *Duport Steels v Sirs*.[14] By this stage Lord Denning – spurred on by a wholly understandable reaction to trade union excesses – was taking his fellow judges in the Court of Appeal down a road which led ultimately to a repudiation of the authority of the Law Lords[15] and, worse again, the authority of Parliament, given that the doctrine of parliamentary sovereignty was then (and, perhaps, still is) a key feature of the UK constitutional regime. In *Duport Steels* Lord Scarman spelt this out when allowing the appeal from Lord Denning's decision:

> My basic criticism of all three judgments in the Court of Appeal is that in their desire to do justice the court failed to do justice according to law … Unpalatable statute law may not be disregarded or rejected, merely because it is unpalatable …[16]

While acknowledging that, within certain limits, judges have a genuine creative role 'as the remarkable judicial career of Lord Denning himself shows', Lord Scarman went on:

> Great judges are in their different ways judicial activists. But the constitution's separation of powers must be observed if judicial independence is not to be put at risk. For, if people and Parliament

14 [1980] 1 WLR 142.

15 In *Express Newspapers v McShane* [1980] AC 672 the House of Lords had held that the test as to whether a particular act had been done in furtherance of a trade dispute (and, hence, to attract a statutory immunity) was purely subjective. In the Court of Appeal in *Duport Steels*, Lord Denning said of the House of Lords judgment in *McShane*: 'We have gone through that case and read the judgments. They are not nearly so clearly on the point as some would believe …'.
On appeal, however, Lord Diplock would have none of this ([1980] 1 WLR 142, 161–162): 'Lord Denning … was unwilling to accept that the majority speeches … in *McShane* had expressed a clear opinion that the test of whether an act was done in furtherance of a trade dispute was purely subjective. This led him to conclude that this House had not rejected a test based on remoteness that he himself had adumbrated and adopted in three earlier cases … Among the three tests rejected [in *McShane*] as wrong in law was the test of remoteness the authorship of which was specifically ascribed in my own speech to Lord Denning. Recognising this, counsel for the respondents has not felt able to support the judgment of the Court of Appeal on this ground either.'

16 [1980] 1 WLR 142, 168.

> come to think that the judicial power is to be confined by nothing other than the judge's sense of what is right ... confidence in the judicial system will be replaced by fear of it becoming uncertain and arbitrary in its application.[17]

In passing it may be observed that this passage from Lord Scarman is itself a notable exposition of the importance of judicial neutrality.

Others commented on these general developments. One academic commentator spoke of:

> ... the tragic drama of a great judge whose acute sense of rightness has become a conviction of righteousness, whose consciousness of the need for justice has led him to become a self-appointed arbiter in the politics of society and whose desire to draw attention to defects in our law has more noticeably drawn attention to himself. Aided and abetted by the media, whose motives are not coincident with the interests of justice, of the legal system nor of the noble judge himself, the process has accelerated and the Master of the Rolls now takes his daily place alongside the good and bad in the nation's headlines.[18]

Denning's decline coincided with the publication of the first edition of JAG Griffith's *The Politics of the Judiciary* in 1977. There is no doubt but that this was a powerful and influential book, which obliged all those who believed in judicial independence, orthodox theories of judicial reasoning and the rule of law, to re-examine many of their basic premises. Even if Griffith's targets were simplistic and, in any one sense, easy ones – after all, why should it be a surprise to learn that earlier generations of English judges who had been public school educated, gone to Oxbridge, who had served in the forces and who were often found dining at the Athenaeum[19] should generally be supporters of the police and private enterprise and should be generally hostile to the rights of trade unions? – he nonetheless had a point. That point essentially was that judges were not – and were not perceived to be – neutral in such matters. Perhaps his real point was that in his view such judges could never be neutral given that they were – in Marxist terms – the embodiment of class interests in a society where labour and capital were in enduring conflict.

Let us take another example from south of the border: *Re Tilson*.[20] This concerned the exceptionally sensitive topic of the religious education of the offspring of mixed marriages. Prior to 1922 the position at common law had been that the right of paternal supremacy was recognised.

17 [1980] 1 WLR 142, 169.

18 Andrews, 'Book review' (1980) 14 Cambrian Law Review 114.

19 As Cozens-Hardy MR memorably said in a letter to the incoming Lord Chancellor Buckmaster in May 1915, 'all judges, without exception, are members of the Athenaeum': see R V F Heuston, *Lives of the Lord Chancellors 1885–1940* (Clarendon Press 1987) 269.

20 [1951] IR 1.

And in custody disputes the Irish courts had for very practical reasons generally followed the rule that boys took the religion of their father and girls that of their mother. There was a supremely practical justification for this rule, for as Gibson J said in *Re Storey*,[21] religion was a matter in respect of which a court must be neutral: 'each of the various lawful creeds having equal rights', the Court, he declared, was 'not at liberty to consider what religion is best for the infant'.[22] Whatever the general merits and demerits of such a rule, it was at least a rule that could be applied neutrally as between the various religions and was something which bolstered at least the appearance of judicial neutrality.

All of this came to an end with the Irish Supreme Court's decision in *Tilson*. This was a *cause célèbre* where the Church of Ireland father had given a pre-nuptial promise to the Roman Catholic mother that, in line with the papal *Ne Temere* decree, the children would be raised as Roman Catholics. When the ensuing custody dispute ultimately came before the Supreme Court, that Court ultimately held that the common law rule was contrary to Article 42.1 of the Irish Constitution which speaks of the right of 'parents' to the care and custody of their children. The reasoning of the Court – which I think has been much misunderstood[23] – is admittedly controversial and the result certainly caused much dismay and grief to the Protestant communities in the Republic. The question, however, which I wish to pose is this: would it have been permissible for the court to take the potentially harmful consequences of its decision for a (at least on one view, beleaguered) minority community into account? Or should it simply have applied the constitutional text neutrally – as in a sense it purported to do – and be indifferent as to the result? After all, the constitutional text does say 'parents' – plural – so that a pre-1937 common law rule which assigns this task to the father alone is difficult to square with this constitutional provision. And if you say that the court could have had regard to those consequences, then one must reckon with an argument with the shade of Lord Denning. Why was it not permissible for him to have regard to (what he would certainly have said was) the baneful consequences of the trade union legislation?

SOME JUDICIAL DILEMMAS

I propose to return to this wider question presently because I want now to explore another aspect of this judicial neutrality which is, I think, both imperfectly understood and under-explored in the legal

21 [1916] 2 IR 328.
22 [1916] 2 IR 328 at 342, 343.
23 See, generally, G Hogan, 'A fresh look at *Tilson*'s case' (1998) 33 Irish Jurist 311.

literature. As I have already indicated, the classic theory of judging is that, following approximately the scientific method, judges should decide without fear or favour and (implicitly at least) that they should not have regard to the consequences of their decisions. But, in the real world the situation is not quite as straightforward. Judges are not so Olympian or detached from reality that they are immune from psychological pressures, invariably self-generated by personal doubt and personal concerns about the implications of their decisions and – perhaps especially – how they will be perceived by their legal peers. Let us first briefly explore a series of judicial dilemmas to see how they were resolved and which each in their own way illustrate the psychological pressures of which I have spoken.

The *Abrams* case: the dilemma of Oliver Wendell Holmes

Let us first examine a number of historical examples of these judicial dilemmas. The first I have chosen was the dilemma faced by Oliver Wendell Holmes in *Abrams v United States*.[24] In the period immediately after the end of the First World War, the US Supreme Court was faced with the first wave of free speech cases brought by motley groups of communists and anarchists who were convicted of offences under the Espionage Act for urging support for Soviet Russia. It was in this case that Holmes penned his famous dissent championing the First Amendment and free speech:

> ... but when men have realised that time has upset many fighting faiths ... the ultimate good desired is better reached by free trade in ideas – that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes can safely be carried out. That, at any rate, is the theory of the Constitution.[25]

The prospect, however, of a dissent on this sensitive issue alarmed many of his colleagues. A few days before the dissent was to be delivered in November 1919 a delegation from his colleagues came to see him:

> Holmes' colleagues McKenna, Pitney and Van Devanter appeared at the doorstep of 1720 Eye Street. With Mrs. Holmes joining them in the study, they urged him politely but in no uncertain terms not to go through with his planned dissent given Holmes' great reputation and military record ... it would do great harm which he perhaps was unaware of ...[26]

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24 230 US 616 (1919). See, generally, M I Urofsky, *Dissent in the Supreme Court: Its Role in the Court's History and the Nation's Constitutional Dialogue* (Pantheon Books 2017) ch 6.

25 250 US 616 at 630.

26 S Budiansky, *Oliver Wendell Holmes, A Life in War, Law and Ideas* (W W Norton & Company 2019) at 390.

Even though his wife said that she completely agreed with them 'Holmes made clear his mind was made up'. Yet:

> In the shadow of the Red Scare and the vehement disapproval of much of the legal profession and indeed much of the country, Holmes staked his reputation – Boston Brahmin, Civil War hero, pre-eminent legal scholar, distinguished judge – to defend freedom of speech for communists, pacifists and foreign-born anarchists.[27]

And, as Collins has observed, Holmes' indefatigable adherence to his convictions meant that 'Free speech in America ... was never the same after 1919 ...'.[28]

The *Childers* case: the dilemma of Sir Charles O'Connor MR

Our second example comes from November 1922 at the height of the Irish Civil War. The then Master of the Rolls, Sir Charles O'Connor, presided over a *habeas corpus* application brought on behalf of Erskine Childers.[29] Childers was a noted author who had in fact been secretary to the Irish Treaty delegation to Downing Street in December 1921, but who later had taken the side of the Anti-Treaty rebels. Childers had been sentenced to death by a military court for the unlawful possession of a pistol in breach of a resolution which had been approved by Dáil Éireann that September. Childers' fundamental argument was that such a prohibition could only have been imposed by Act of Parliament – and not by resolution – and it was irrelevant that the Dáil would only enjoy the power to legislate in the true sense once the Irish Free State was itself established.[30]

The Civil War had itself commenced with the shelling of the Four Courts in June 1922, so that at the time the courts were scattered around the City of Dublin. O'Connor delivered his judgment by candlelight in a Kings' Inns guarded by Free State troops following a four-day hearing. His bristling sense of indignation as he rejected the application still rings through the decades almost 100 years later:

> I am sitting here in this temporary makeshift for a Court of Justice. Why? Because one of the noblest buildings in the country, which was erected for the accommodation of the King's Courts and was the home of justice for more than a hundred years, is now a mass of crumbling ruins, the

27 Ibid 460–461.

28 Ronald K Collins, *Fundamental Holmes: A Free Speech Chronicle and Reader* (Cambridge University Press 2010) at 376–377.

29 *R (Childers) v Adjutant General, Provisional Forces* [1923] 1 IR 5. See, generally, Ronan Keane, 'The will of the general: martial law in Ireland, 1535–1924' (1990–1992) 25–27 Irish Jurist 151; G Hogan, 'Hugh Kennedy, the Childers habeas corpus application and the return to the Four Courts' in C Costello (ed), *The Four Courts: 200 Years* (Four Courts 1996) 171.

30 Which occurred one month later on 6 December 1922.

> work of revolutionaries, who proclaim themselves soldiers of an Irish Republic. I know also that the Public Records Office (a building which might have been spared even by the most extreme of irreconcilables) has been reduced to ashes, with its treasures, which can never be replaced … If this is not a state of war, I would like to know what is.[31]

O'Connor, however, refused an application for a stay on the execution order even though the Court of Appeal was just about to hear an appeal in a similar case in a few days' time. Childers was executed at dawn within hours of the delivery of O'Connor's judgment while an appeal was pending.

O'Connor was appointed as a judge of the first Supreme Court in June 1924 but he resigned suddenly in the following April 1925 when he and his wife moved to London. It would seem that both he and his wife suffered a sort of mental breakdown as a result of what he had come to believe was his failure of nerve in the *Childers* case.[32] But, if it brings any comfort to his haunted shade, I think that it is easy to be too critical of O'Connor. The entire atmosphere was an intimidating one – a King's Inns building guarded by Pro-Treaty troops and a hurried judgment delivered by candlelight – and the case had engendered raw passions. If the point raised by *Childers* was correct, a key part of the Government's armoury in the course of the Civil War would have been lost, leading potentially to use of extrajudicial methods on the part of the Free State to counter the Anti-Treaty side's lack of compunction in these matters, and leading possibly to the strangling of democratic institutions at their birth. Was O'Connor haunted by his pragmatic response?

Liversidge v Anderson: the dilemma of Lord Atkin

Our third example is also from war-time: the celebrated dissent of Lord Atkin in *Liversidge v Anderson*.[33] In doing so, I recall that the late Lord Kerr, when delivering this lecture eight years ago, referred to Lord Atkin's celebrated aphorism in *Liversidge v Anderson*, 'amidst the clash of arms, the laws are not silent' which Lord Kerr observed acted as:

> … an inspiration to today's judges in the solemn duty that they must perform in, to quote Lord Atkin again, 'stand[ing] between the subject

31 [1923] 1 IR 5, 13–14.

32 Or, as his biographer put it, 'for undisclosed urgent domestic considerations': see Robert D Marshall, 'Charles Andrew O'Connor', *Dictionary of Irish Biography* vol 7 (Royal Irish Academy 2009) 235.

33 [1942] AC 206.

> and any attempted encroachments on his liberty by the executive, alert to see that any coercive action is justified in law.'[34]

In *Liversidge v Anderson* the central question posed was did the Government have to give reasons for its detention of the plaintiff under the regulation 18B internment powers? As you will all know, a majority of the House of Lords said 'no'. Atkin delivered a majestic dissent saying that the arguments of the Attorney General might comfortably have been addressed to the judges of Charles I. He added for good measure:

> I know of only one authority which might justify the suggested method of construction. 'When I use a word,' Humpty Dumpty said, in rather a scornful tone, 'it means just what I choose it to mean, neither more nor less.' 'The question is,' said Alice, 'whether you can make words mean so many different things.' 'The question is,' said Humpty Dumpty, 'which is to be the master, that's all.' After all this long discussion the question is whether the words 'If a man has' can mean 'If a man thinks he has'. I have an opinion that they cannot and the case should be decided accordingly.[35]

Thanks to the work of Heuston and others,[36] the story of how Atkin had to resist pressure from the then Lord Chancellor Simon to change the draft judgment by omitting the 'Humpty Dumpty jibe' before the judgment was delivered is generally well known. The fact that the author of the majority judgment, Viscount Maugham, took the unprecedented step of writing to *The Times* in defence of the Attorney General and that the entire issue was later made the subject of an (again, at the time, unprecedented) parliamentary debate in the House of Lords is also a matter of public record.

But what I find intriguing about this entire episode is what happened afterwards. Atkin appears to have been snubbed by his colleagues, many of whom it seems never really spoke to him again prior to his death in June 1944:

> ... the Law Lords refused to eat with Atkin in the House of Lords or, at one point, even to speak to him. Many felt that he never really recovered from his treatment before his death in 1944.[37]

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34 Lord Kerr at the Lord MacDermott Lecture, 'Human rights law and the "War on Terror"', Queen's University, Belfast, 2 May 2013, 3–4. Or, as Lord Diplock, famously put it, the majority were 'expediently and, at that time, perhaps, excusably, wrong and the dissenting speech of Lord Atkin was right': *Inland Revenue Commissioners v Rossminister Ltd* [1980] AC 952 at 1011.

35 [1942] AC 206 at 245.

36 R V F Heuston, '*Liversidge v Anderson* in Retrospect' (1970) 86 Law Quarterly Review 33; Heuston (n 19 above) 58–60.

37 Robert Stevens, *Law and Politics: The House of Lords as a Judicial Body, 1800–1976* (Weidenfeld & Nicolson 1976) 287.

In his biography of Atkin Lewis maintains that Atkin was unperturbed by this entire affair and points to the fact that in correspondence with friends dating from this period he was more interested in describing the details of a fascinating hand of bridge which he had recently played one evening than giving his account of the controversy.[38] Yet it is hard to avoid the conclusion that the event must have been profoundly destructive of the friendship and collegiality which is indispensable in an appellate court. The central question here is whether Atkin would have taken this step had he but foreseen the extent of the counter-reaction from his colleagues. If he did – or if, like Holmes in *Abrams*, he was prepared to take the risk – then this bespeaks judicial bravery of an exceptional kind.

The dilemma of (the fictional) Redmond J in *The Heather Blazing*

Atkin's courage may be contrasted with (the fictional) Redmond J in Colm Toibín's great novel, *The Heather Blazing*. In this novel we learn that Eamon Redmond has grown up in a staunchly nationalist Fianna Fáil background in County Wexford. In his twenties and thirties he is closely associated with the party and, as his career at the Bar prospers, he eventually appears for the State in many of the major constitutional cases from this period. Toibín describes how Redmond came to be appointed to the High Court following an apparently chance encounter with the then Minister for Finance, Charles Haughey TD, at a Dublin restaurant – presumably sometime in the late 1960s. Following some light-hearted banter:

> Haughey gave him a mock punch in the chest and grinned.
> 'You're for the bench', Haughey said.
> Eamon said nothing but held his stare.
> 'Will you take if you're offered it?,' Haughey asked.
> 'I will,' Eamon said.
> 'I'll see you soon,' Haughey said. 'It's good to meet you again.'[39]

While one might query whether these informal methods of judicial appointment would meet modern requirements in respect of judicial independence as recently articulated by both the European Court of Human Rights[40] and the Court of Justice[41] respectively, the real point of the story for our purposes comes when Redmond J wrestles with the idea of finding for the plaintiff in a major *cause célèbre* involving the dismissal of a schoolteacher from a Catholic school in a small

38 Geoffrey Lewis, *Lord Atkin* (Hart 1999) 142.
39 Colm Toibín, *The Heather Blazing* (Picador 1992) 222.
40 *Astradasson v Iceland* CE: ECHR: 2020: 1201.
41 See, eg, Case C-896/19 *Repubblika* EU: C: 2021: 311.

rural town because she was living with a married man.[42] Redmond ultimately thinks the better of it, in part because of concerns about what his colleagues might think:

> The family, according to the Constitution, was the basic unit of society. What was a family? The Constitution did not define a family, and, at the time it was written, in 1937, the term was perfectly understood: a man, his wife and their children. But the Constitution was written in the present tense. It was not his job to decide what certain terms ... such as 'the family' had meant in the past. It was his job what these terms meant now. This woman was living with a man in a permanent relationship, they were bringing up a family ... In what way were they not a family? They were not married. But there was no mention of marriage in the Constitution.
>
> *He thought about it for a while and the consternation it would cause his colleagues, a definition of the concept of the family*. The teacher would have to win the case then, and the nuns would have to lose. The idea suddenly seemed plausible, but it would need a great deal of thought and research. It had not been raised as a possibility by counsel for the teacher. Lawyers, he thought, knew that he was not the kind of judge who would entertain such far-fetched notions in his court. If he were another kind of person he could write [that] judgment ...[43]

I cannot help thinking but that in this passage Toibín shows an acute understanding of judicial psychology. Unlike Atkin in *Liversidge*, Redmond *is* deterred from doing what he is worried may be the right thing by a consideration of how his colleagues would react. Again, let us not be too hard on Redmond. The views of our peers *are* important, and it is those views which often save us from impulsive and foolish choices which we might otherwise have made, and this is as true of law and judging as it is of life. At the same time, undue deference to collegiate views often leads to group-think and slavish adherence to conventional wisdom when independent judgment is called for.

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42 This fictional case is loosely based on the facts of *Flynn v Power* [1985] IR 648. Following the death of the retired former President of the Irish High Court, Hon Mr Justice Declan Costello – who was the trial judge – Toibin published a revised edition of *The Heather Blazing* in 2012 with the revised version of the novel even more closely resembling the facts of *Flynn v Power*: see, generally, Barry Sullivan, 'Just listening: the equal hearing principle and the moral life of judges' (2016) 48 Loyola University Chicago Law Journal 351, 397–403.

43 Toibín (n 39 above) 91–92. Emphasis supplied. It is interesting to note that, while the Irish Supreme Court had previously stated that the reference in article 41 of the Irish Constitution to the family was to the family based on marriage (see, eg, *The State (Nicolaou) v An Bord Uchtála* [1966] IR 567), recently there have been strong signals that the argument which the fictional Redmond J was toying with has been gaining sway: see, eg, the judgment of McKechnie J in *Gorry v Minister for Justice* [2020] IESC 55.

One way or another these various judicial dilemmas illustrate that, in practice at least, judging is an art and not a science in the sense of the automatic application of autonomous principles similar to mathematical equations or chemical formulae. Holmes had famously said as much in those celebrated opening lines of *The Common Law*. But if the life of the law is experience, it must just as easily have been influenced by judicial psychology.[44]

HOW COULD JUDGES PROPERLY TAKE ACCOUNT OF THE CONSEQUENCES OF THEIR DECISIONS?

As I have grown older, I find myself increasingly drawn to the doctrine of textualism. If law is the 'articulate voice of some sovereign or quasi-sovereign that can be identified',[45] then in western democratic societies at least we can generally hear it only through the written words of legislation enacted by Parliament or legislative assemblies in the exercise of their democratic mandates. All of this means that judges should not readily depart from the ordinary meaning of the legislative text because to do so would effectively involve the rewriting of that text, thereby undermining the legislative – and, ultimately, the democratic – process.[46] A further consideration is that the private citizen can only really regulate their affairs – if needs be, with the benefit of legal advice – by reference to the actual legislative text. The key word here is 'readily': because, of course, rules as to context (such as *noscitur a sociis*), purpose and object often serve to leaven the bare words of the legislative text.

One objection to this approach was set out by a judge of the Irish High Court, Humphreys J, in a very interesting paper written in 2017. Drawing on the work of Posner and Weaver, Humphreys posited two

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44 See also Michael McDowell SC, 'Reflections on the limits to the law's ambitions' in B Ruane, J O'Callaghan and D Barniville (eds), *Law and Government: A Tribute to Rory Brady* (Round Hall 2014) 31–39.

45 *Southern Pacific Co v Jensen* 244 US 205 (1917), 223, per Holmes J.

46 As an aside, that is why I consider that departing from the text to look at parliamentary debates in the manner originally sanctioned by *Pepper v Hart* [1993] AC 593 is, in the main, undesirable because it dilutes the importance of the actual legislative text. As Lord Hobhouse said in *Robinson v Secretary of State for Northern Ireland* [2002] UKHL 32, [2002] NI 390 at 413: 'It is fundamental to our constitution and the proper ascertainment of the law as enacted by Parliament that the law should be found in the text of the statute, not in the unenacted statements or answers of ministers or individual parliamentarians. This requirement is simply an *a fortiori* application of the rules for the proper recognition of what are and are not sources of law and the construction of written instruments.'

general approaches to legal interpretation. The first was what he called the 'doll's house' theory of law:

> That approach sneers at what it calls 'result-oriented jurisprudence' and clasps to its bosom the concept of *fiat justitia*, *ruat caelum*. Justice must swing her sword blindly and leave it to the 'little people' to pick up the pieces. Decisions that unleash particularly egregious consequences are sometimes accompanied by a disclaimer such as that the court is unfortunately coerced by 'the law' into the particular result, as if the law were some objective, monolithic certainty …[47]

Humphreys continues by saying that:

> Legal rules are an implementation of a social contract and those called upon to interpret that social contract (principally the judiciary) must put front and centre that … interpretative and adjudicative decisions have real-world effects on real people. A theory of adjudication … that has negative, even disastrous and anarchic, results in the real world is generally to be regarded as a failure; insidiously so where the anarchic decision bestows glistening rights on individuals who, as a matter of fact, are behaving in anti-social or lawless manner, at the expense of their victims or, in a more diffuse way, of law-abiding members of society.[48]

Irrespective of one's views on the matter, this is a particularly valuable analysis because it is rare that one finds a judge expressly arguing that courts must have regard to the consequences of their decisions in arriving at a decision, even if since the emergence of the realist school there are many who contend that this is what many judges actually do. Certainly, if courts are going to have regard to the wider policy considerations/consequences in their judgments it would be preferable that such were openly articulated, rather than remaining as a silent unarticulated premise which potentially distorts the reasoning process. But if this can properly be done at all, how would this work? Allow me to take five examples – drawn from each side of the border – and for this purpose conduct a sort of very rough and ready thought experiment.[49]

Example 1: *Moynihan v Moynihan*

In about 2013 I heard the late Adrian Hardiman[50] start a lecture by telling the story of how as a young junior he was asked to write an opinion in respect of a plaintiff who had suffered horrible and life-

47 Humphreys (n 12 above) 62.

48 Ibid 63.

49 It is very rough and ready because, to do this properly, one would need to survey perhaps hundreds of examples. But these five examples may nonetheless highlight the point I wish to make.

50 Judge of the Irish Supreme Court 2000–2016.

changing injuries as a result of an industrial accident. In the opinion Hardiman expressed considerable sympathy for the plight of the plaintiff but argued that, as he could discern no negligence on the part of the employer, he thought that the plaintiff had no case. His more worldly wise silk gently told him to put the opinion away, because no jury[51] would reach that conclusion. The case was subsequently settled by the employer's insurer and in many ways the road to *O'Keefe v Hickey*[52] started at that point.

This latter case concerned the question of whether the State could be held vicariously liable for the sexual abuse perpetrated by a teacher at a Catholic school, but which was one nonetheless which had been in receipt of public funds. A majority of the Irish Supreme Court rejected the vicarious liability argument, but what is of interest for our purposes is the treatment found in Hardiman J's judgment of an earlier decision of that Court in *Moynihan v Moynihan*.[53] In that case a small child was injured in her grandmother's house, to which her parents had brought her, when she pulled down a pot of tea on herself. The tea had been made by her aunt who had then left the room to answer the telephone.

A majority (O'Higgins CJ and Walsh J) of the Supreme Court held that the aunt who had made the tea was under the *de facto* control of the grandmother, so that the latter could be made vicariously liable for the negligence of her daughter. There was, however, a dissent from Henchy J:

> Much as one might wish that the law would allow this plaintiff to recover damages from some quarter for the consequences of the unfortunate accident that befell her, the inescapable fact is that there is *a* complete absence of authority for the proposition that liability should fall on the defendant (who was innocent of any causative fault) rather than on Marie whose conduct is alleged to have been primarily responsible for the accident. I see no justification for *stretching the law* so as to make it cover the present claim when, by doing so, the effect would be that liability in negligence would attach to persons for casual and gratuitous acts of others, as to the performance of which they would be personally blameless and against the risks of which they could not reasonably have been expected to be insured. To transfer or extend liability in those circumstances from the blameworthy person to a blameless person would involve *the redress of one wrong by the creation of another*. It would be unfair and oppressive to exact compensatory damages from a person for an act done on his behalf, especially in the case of an intrinsically harmless act, if it was done in a negligent manner which he could not reasonably have foreseen and if – unlike an employer, or a person with a primarily personal duty of care, or a motor-car owner,

51 In the Republic juries in personal injury cases were only finally abolished in 1988 by the Courts Act 1988.

52 [2008] IESC 72, [2009] 2 IR 302.

53 [1975] IR 192.

> or the like – he could not reasonably have been expected to be insured against the risk of that negligence.[54] (emphasis supplied)

Hardiman J was later to point to this dissent in his own judgment in *O'Keefe v Hickey*:

> It is of course almost inconceivable that an infant plaintiff suing by her father would sue the father's mother, the infant's grandmother, if it were anticipated that that lady, a widow, would have to pay the damages herself. It seems inescapable that the action was taken in the hope of accessing an insurance policy, perhaps the grandmother's household insurance. In any event, the majority judgment proceeded on the basis of an elaborate legalistic analysis of the entirely casual relationship whereby the defendant's daughter had made a pot of tea in her mother's house, where she herself lived. What, it is speculated, if the daughter were an employed domestic servant or a contractor? (But she was neither). An elaborate analysis, in my view highly artificial, took place of the relationship leading to an adult daughter making a pot of tea in her family home ...[55]

Warming to this theme on the issue of the distortion of the law, Hardiman J continued:

> It may be noted that the plaintiff in *Moynihan* had not sued her aunt, the person alleged to be directly negligent, but only the grandmother, hoped to be a 'deep pocket'. The case appears to me to be an early example of the dismantling or muddying of the long established boundaries or limits of vicarious liability. This was done for the very humane reason of helping an innocent injured party to recover compensation, but it was done at a very considerable social cost, not often considered or discussed ... In all cases where there is a serious injury to an innocent person, there is a human tendency to wish that that person should be compensated. But the social and economic consequences of providing a law so flexible that it can be used to provide compensation in the absence of liability in the ordinary sense is addressed in the judgment of Henchy J.[56]

This is an unusual – almost unprecedented – example of where one judge had expressly contended that his colleagues had previously distorted the law in order to secure a particular result, in this case, the provision of compensation of the injured little girl. It is, I think, difficult to stand over the vicarious liability aspects of the majority decision in *Moynihan* and, irrespective of its criticism by Hardiman J in O *Keefe v Hickey*, it is a decision which has engendered little subsequent enthusiasm.[57]

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54 Ibid 202–203.

55 [2009] 2 IR 302, 318.

56 Ibid 319.

57 See, for example, the observations of B M E McMahon and W Binchy, *Law of Torts* (4th edn, Bloomsbury Professional 2013) para 43.109.

Like all of you present, I am all in favour of the provision of compensation to little girls who have been scalded by boiling teapots. The difficulty with *Moynihan*, however, is that in their desire to secure that result, the majority appear to have been tempted to expand the law on vicarious liability with potentially adverse consequences for other and for future cases. In its own way it shows the difficulties associated with result-oriented jurisprudence.

Example 2: *R (Hume) v Londonderry JJ*

The background to this seminal case is well known. In *R (Hume) v Londonderry JJ*[58] the late John Hume and others challenged the legality of their arrest and conviction following a civil rights protest at Derry/Londonderry. They challenged the validity of a statutory instrument made under the Civil Authorities (Special Powers) Act (NI) 1922 which allowed a member of Her Majesty's forces on duty to effect an arrest where it was suspected that an assembly of three or more persons might lead to a breach of the peace. The Queen's Bench Division held that this legislation was *ultra vires* the Northern Ireland Parliament given that section 4(1) of the Government of Ireland Act 1920 had prevented that Parliament from legislating on military matters. Fresh emergency legislation was necessary to restore the *status quo ante* so that the British Army could in fact act in aid of the civil power,[59] and section 1 of the Northern Ireland Act 1972 was thus enacted within a matter of hours.

But let us leave the merits of that legislation to one side for the moment. How does this decision fit into Posner's argument – as narrated by Humphreys – that for judges to say that they are coerced by 'the law' amounts to the 'theory of power without responsibility'?[60] Putting it more prosaically: to what extent should the members of the Court[61] have had regard to the consequences of its decision? And if they did not, would this have been another example of a judgment with 'downstream consequences of chaotic situations unleashed by judgments …' being regarded as an 'unimportant and an essentially janitorial problem with which the Olympian judge is generally unconcerned?'[62]

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58 [1972] NI 91. See, generally, B Hadfield, 'A constitutional vignette: from SRO 1970 241 to SI 1989 509' (1991) 41 Northern Ireland Legal Quarterly 54.

59 The Attorney General (Sir Peter Rawlinson) told the House of Commons that the decision had left the army 'without essential powers which enable it to discharge the duties for which it was sent to Northern Ireland' HC Deb 23 February 1972, vol 831, col 2364.

60 Richard A Posner, *Overcoming Law* (Harvard University Press 1995) 124.

61 Lowry LCJ, Gibson and O'Donnell JJ.

62 Humphreys (n 12 above) 61.

Looking back, it is clear that the Court in *Hume* did not have regard to the consequences of its decision. The Court would, of course, have been perfectly aware of the consequences which were to flow from its judgment and that fresh legislation would have been immediately required. For my part, I consider that the judgment represented an entirely correct application of the rule of law. Westminster had clearly forbidden the Parliament of Northern Ireland from legislating on such topics and the Queen's Bench Division duly gave effect to that parliamentary command.

So far as the consequences were concerned, it is impossible to deny that – irrespective of one's views on the conflict itself – the support of the British Army of the civil power was necessary and it could not have been simply withdrawn at the stroke of a pen. Should therefore the court have sought to uphold those provisions of the Special Powers Act on the basis that to do otherwise would have brought about these undesirable consequences? For me, the answer is surely not. Any endeavour by the court to fix the problem itself would have risked the obvious distortion of the law in the manner which was, I suggest, discernible in *Moynihan*. And besides, how could the Court have known what the proper answer should have been, even if one has regard to the social contract theory? Given the realities which prevailed in Northern Ireland in 1971 and 1972 one could, I suppose, have posited a wide variety of possible responses, ranging from assuming that Parliament would have wanted the army to enjoy the full range of police powers on the one hand to very limited functions on the other. As Lord Lowry LCJ remarked – admittedly in respect of the second issue of reasonableness which the Court ultimately did not have to decide – this was an intensely *political* question which no court could possibly answer.[63]

Example 3: *Bohill v Police Service of Northern Ireland*

Our third example is *Bohill v Police Service of Northern Ireland*.[64] Here the applicant was a former police officer who had given distinguished service over a 30-year period. He then applied to a recruitment agency for temporary work as an investigator with the Police Service of Northern Ireland, but despite his name having appeared on a panel on some 13 occasions he was never selected for this work. He contended that he had been discriminated against on grounds of his religious beliefs or political opinions. The essential question, however, was whether the Fair Employment Tribunal had jurisdiction to entertain

63 [1972] NI 91, 117, quoting Lord Pearson in *McEldowney v Forde* [1971] AC 632, 655.

64 [2011] NICA 2. I am very grateful to Professor Brice Dickson for drawing my attention to this case.

his claim under the terms of the Fair Employment and Treatment (Northern Ireland) Order 1998.

The Court of Appeal concluded that it had not. As Coghlin LJ observed, given that the tribunal was the creature of statute, it followed that the claimant 'must show that he comes within one of the relevant concepts defined within the provisions of the 1998 Order so as to confer jurisdiction upon the Tribunal to hear and adjudicate upon the substantive merits of his claim'. But the Tribunal's jurisdiction was confined to hearing claims brought by 'employees', which term was itself defined as extending to persons who were either employed or who had a contract for services. Yet, as Coghlin LJ observed, the appellant fell into neither category:

> [11] ...While the respondent might arguably fall within the definition of 'employer' contained in Article 2 of the Order, the difficulty faced by the appellant is bringing himself within the definition of 'employee'. In the event that the appellant had been selected as a temporary worker by the respondent he would have signed a document constituting a contract for services between himself and the recruitment agency Grafton Ltd. to the period during which those services were supplied to the respondent. At no time would he have been employed under a contract of service either by the respondent or by Grafton. Unless and until his name had been put forward by Grafton and accepted by the respondent the appellant would not have been in any contractual relationship with either Grafton or the respondent. In such circumstances, the appellant was not a person who was seeking employment with the respondent within the meaning of the order.

It followed that the tribunal lacked jurisdiction to hear the claim:

> [18] For the reasons set out above this appeal must be dismissed but the case does seem to illustrate how an agency arrangement may deprive potential employees of important protections against discrimination. Northern Ireland enjoys a well deserved reputation for the early development and quality of its anti-discrimination laws and this is an area that might well benefit from the attention of the section of the office of OFM/DFM concerned with legislative reform. We emphasise that, as a consequence of the lack of jurisdiction, we are unable to give any consideration to the substance of the appellant's case.

To my mind, the reasoning and analysis found in this judgment is impeccable. Viewed objectively, most people would, I am sure, agree that it was unfair that Mr Bohill had no effective opportunity of having the merits of his claim tested in this fashion. Yet the words of the definition of employee in Article 2 of the 1998 Order were pellucidly clear. And unless words cease to have any meaning at all, I fail to see how the Court of Appeal were not bound to arrive at the result which they did.

Example 4: *O'Neill v Minister for Agriculture and Food*

My next example is *O'Neill v Minister for Agriculture and Food*.[65] In 1947 the Irish Parliament enacted a rather short item of legislation dealing with the grants of licences in respect of the artificial insemination of cattle. In the late 1950s the Department of Agriculture decided upon an extra-statutory scheme whereby for this purpose the State was divided into nine regional geographical areas. The Minister then adopted a policy of granting a regional monopoly to one licensee in each region. In *O'Neill* the applicant successfully challenged the *vires* of this licensing system. If one leaves aside some specific features of Irish constitutional law and EU competition law, any UK public lawyer would immediately recognise the specific features of this judgment. The parent Act did not envisage the creation of regional monopolies and the Minister's power to grant exclusive licences on this geographical basis was clearly influenced by unlawful policy considerations.

The comments made by Keane J are nonetheless of some interest. While he found that the scheme was plainly *ultra vires*, he nevertheless regretted arriving at this conclusion:

> I reach these conclusions with regret. The evidence in the High Court established overwhelmingly that some scheme of this nature was essential if the practice of artificial insemination was to be both controlled and facilitated in the interests of an industry of paramount importance in the Irish economy. This Court is solely concerned, however, with the legality of the scheme and, for the reasons already given, I am forced to the conclusion that it was ultra vires the Act of 1947 and, in any event, could only have been carried out in the form of regulations made under that Act.[66]

In passing it might be said that these comments represent a paradigmatical example of the Sumption theory that, while all judges start from an intuitive answer and work backwards, they generally 'recoil in the face of intellectual difficulty or constitutional principle'. It could be said that in *O'Neill* the Irish Supreme Court might not have wanted to invalidate this scheme, but recoiled from this conclusion when it became clear that to do otherwise would have offended standard constitutional principles.

A bit of background here might nonetheless not be amiss. At least two of the original licensees – Kerry Group and Glanbia – have gone on to become major multinationals in the food and dairy sector. An economic historian might say that this was a successful example of nascent State dirigisme which involved 'picking winners' and giving a major advantage to new emerging companies in this sector which

65 [1998] 1 IR 539.
66 [1998] 1 IR 539, 547.

in turn helped them over time on their way to major multinational status. To that extent, those economists might well agree with the comments of Keane J. Other economists might argue that the granting of regional monopolies of this kind simply stifled competition in an important aspect of the food sector and animal genetics and was deeply unfair to both consumers and new entrants alike. Yet judged from the perspective of administrative law,[67] this question does not admit of judicial resolution precisely because, issues of competition law apart, the manner in which a licensing system for the provision of artificial insemination to cattle should operate is ultimately a matter for economic and political judgment.

Herein lies my difficulty with the Posner–Humphreys analysis. It would, I suggest, have been wrong for the Supreme Court to have allowed their own views as to what was good or bad for the development of agriculture to colour what essentially was a straightforward legal analysis. Again, at one level, the court's judgment in invalidating a system which had been in operation for almost 40 years could be portrayed as another instance of what Humphreys has described as the 'downstream consequences of chaotic situations unleashed by judgments …' Yet it was perfectly clear that the Irish Parliament had never sanctioned this exclusivity system and it would essentially have been an affront to the rule of law not to have invalidated it. If, on the other hand, the court had said something like 'we think that this system of exclusive geographical licences has worked just fine and, as we do not want to create chaos in the agricultural sector, we will find some adventitious legal principle which will enable us to uphold the vires of the scheme', then this would be open to the objection that legal reasoning was being distorted by the subjective personal preferences of unelected judges in relation to the functioning of the scheme. What, moreover, would happen in the case of a challenge to the next exclusive licensing system where the judges considered that the scheme happened to work, not well, but badly. If that challenge were to succeed on this ground, then the objection would be that judges were deciding cases by reference to their own subjective personal views, the very objection raised by Wechsler[68] in the first place.

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67 It is admittedly different from a competition law perspective. But, if this is so, it is again because there was then in force either legislative (now Competition Act 2002, ss 4 and 5) or European Union (EU) Treaty (now article 101, article 102, and article 106(2) Treaty on the Functioning of the EU) guidance ordaining that the legality of the actions of either undertakings or (in the case of EU law) domestic legislation be judged by reference to certain defined (largely free market inspired) principles.

68 H Wechsler, 'Towards neutral principles of constitutional law' (1959) 73 Harvard Law Review 1.

Example 5: *Robinson v Secretary of State for Northern Ireland*

My final example is *Robinson v Secretary of State for Northern Ireland*.[69] Here the question was whether the election of Mr David Trimble and Mr Mark Durkan to the positions of First Minister and Deputy First Minister in November 2001 was valid even though this election had taken place beyond the six weeks period following the restoration of devolved government prescribed by section 16(8) of the Northern Ireland Act 1998. In the end, following the decision of Kerr J, a majority of the Court of Appeal and the House of Lords held that the election was a valid one.

For the majority Lord Bingham concluded that these statutory provisions should be interpreted generously, saying that they had the generality of a constitutional provision:

> The 1998 Act does not set out all the constitutional provisions applicable to Northern Ireland, but it is in effect a constitution. So to categorise the Act is not to relieve the courts of their duty to interpret the constitutional provisions in issue. But the provisions should, consistently with the language used, be interpreted generously and purposively, bearing in mind the values which the constitutional provisions are intended to embody. Mr Larkin submitted that the resolution of political problems by resort to the vote of the people in a free election lies at the heart of any democracy and that this democratic principle is one embodied in this constitution. He is of course correct. Sections 32(1) and (3) expressly contemplate such elections as a means of resolving political impasses. But elections held with undue frequency are not necessarily productive. While elections may produce solutions, they can also deepen divisions. Nor is the democratic ideal the only constitutional ideal which this constitution should be understood to embody. It is in general desirable that the government should be carried on, that there be no governmental vacuum. And this constitution is also seeking to promote the values referred to in the preceding paragraph.
>
> It would no doubt be possible, in theory at least, to devise a constitution in which all political contingencies would be the subject of predetermined mechanistic rules to be applied as and when the particular contingency arose. But such an approach would not be consistent with ordinary constitutional practice in Britain. There are of course certain fixed rules, such as those governing the maximum duration of parliaments or the period for which the House of Lords may delay the passage of legislation. But matters of potentially great importance are left to the judgment either of political leaders (whether and when to seek a dissolution, for instance) or, even if to a diminished extent, of the crown (whether to grant a dissolution). Where constitutional arrangements retain scope

69 [2002] UKHL 32, [2002] NI 390. I am grateful to Professor Christopher McCrudden for this reference.

> for the exercise of political judgment, they permit a flexible response to differing and unpredictable events in a way which the application of strict rules would preclude.
>
> All these general considerations have a bearing, in my opinion, on the statutory provisions at the heart of this case. The parties are agreed that section 16(8) imposes a duty on the Assembly. The parties are also agreed that such duty is mandatory, although further agreeing that the old dichotomy between mandatory and directory provisions is not a helpful analytical tool ... Parliament did intend the Assembly to comply with the six-week time limit laid down in section 16(8). That is why it conferred power on the Secretary of State to intervene if, at the end of that period, no First Minister and deputy First Minister had been elected. It is the answer to the second question which fundamentally divides the parties.
>
> Had it been Parliament's intention that on a failure to elect within six weeks as required by section 16(1) and (8) the Secretary of State should forthwith put arrangements in train to dissolve the Assembly and initiate an early poll for a new Assembly, this could very easily and simply have been stated. But this is not what section 32(3) says and such a provision:
>
> (1) would have been surprising, particularly in the context of section 16(1), since little more than seven weeks would have elapsed since the last poll (section 31(4)) and there could be no assurance that a further poll would procure a different result;
>
> (2) would have precluded the possibility of negotiation and compromise to find a political solution to an essentially political problem, contrary (as I would suggest) to British political tradition; and
>
> (3) would have deprived the Secretary of State, acting as the non-partisan guardian of this constitutional settlement, of any opportunity to wait, even briefly, for a solution to the problem to emerge.
>
> It is difficult to see why Parliament, given the purposes it was seeking to promote, should have wished to constrain local politicians and the Secretary of State within such a tight straitjacket.[70]

In his concurring judgment Lord Hoffmann was even more explicit on the issue of the consequences of the decision:

> Mr Larkin QC, in the course of his admirable argument for the appellant, politely but firmly reminded your Lordships that your function was to construe and apply the language of Parliament and not merely to choose what might appear on political grounds to be the most convenient solution. It is not for this House, in its judicial capacity, to say that new elections in Northern Ireland would be politically inexpedient. Mr Larkin cited Herbert Wechsler's famous Holmes Lecture, *Towards*

70 [2002] UKHL [11]–[14], [2002] NI 390 at 398–399.

> *Neutral Principles of Constitutional Law* ((1959) 73 *Harvard LR* 1). My Lords, I unreservedly accept those principles. A judicial decision must, as Professor Wechsler said (at p. 19) rest on 'reasons that in their generality and their neutrality transcend any immediate result that is involved.' But I think that the construction which I favour satisfies those requirements. The long title of the Act is 'to make new provision for the government of Northern Ireland for the purpose of implementing the agreement reached at multi-party talks on Northern Ireland ...'. According to established principles of interpretation, the Act must be construed against the background of the political situation in Northern Ireland and the principles laid down by the Belfast Agreement for a new start. These facts and documents form part of the admissible background for the construction of the Act just as much as the Revolution, the Convention and the Federalist Papers are the background to construing the Constitution of the United States.[71]

Despite the protests of Lord Hoffmann, some might think that this is a 'consequentialist' approach whereby the Court opted for the most politically convenient solution and worked backwards. For my part, however, I am not so sure because it does not necessarily follow that just because the six-week time limit was not complied with the consequence that what happened thereafter was thereby void. At the same time it is undeniable that there had been a significant non-compliance with a key statutory provision which Parliament – doubtless for its own good reasons – had seen fit to prescribe.

There is indeed a comparison here with what happened in 1960 and 1961 in the Republic following the High Court's decision[72] that legislation enacted in 1959 revising the electoral boundaries was unconstitutional. The Irish Parliament rushed to enact new legislation which respected the High Court's decision. One result of this finding of unconstitutionality was that the constitutional requirement to the effect that the constituencies had to be revised every 12 years[73] had not been complied with because no valid law had been enacted within that constitutionally stipulated period, as the previous constituency revision had taken place with the Electoral (Amendment) Act 1947. The Irish Supreme Court subsequently held, however, that this omission to comply with that requirement did not affect the constitutionality of the *new* electoral legislation because:

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71 [2002] UKHL [33], [2002] NI 390 at 403–404.

72 *O Donovan v Attorney General* [1961] IR 114.

73 Article 16.4.2 of the Irish Constitution provides that the Oireachtas (Parliament) 'shall revise the constituencies at least once every twelve years, with due regard to changes in distribution of population ...'.

> ... if this period has been allowed to elapse without a revision being carried out, the obligation remains to carry it out as soon as possible. There is, of course, a satisfactory explanation in this case.[74]

But what if there had not been a satisfactory explanation? This is where consequentialist reasoning starts to come into play, because it cannot be that the courts would allow the *ruat caelum* principle to be applied blindly where the fundamentals of the legal order are threatened by a judicial decision with immense consequences, such as where a particular law is held invalid or unconstitutional. In a variety of jurisdictions, the courts have developed techniques ranging from prospective overruling to suspended declarations of unconstitutionality to limit the potentially chaotic consequences of a judicial decision of invalidity.[75] For my part, however, even in these circumstances any potential remedy should not overbear or distort the substantive decision. Accordingly, rather than saying that 'the consequences would be so bad I must find a way of finding against X on the merits', it is, I suggest, much better to say, for example, that the prison conditions which X is currently enduring are legally unacceptable even if this finding does not in itself mean that X must be immediately released.[76]

CONCLUSIONS

Article 1(2) of the Swiss Civil Code famously states that where the court is required to decide a matter not otherwise provided for in the Code or in customary law, it shall decide the matter 'in accordance with the rule that it would make as legislator'.

> (2) In the absence of a provision, the court shall decide in accordance with customary law and, in the absence of customary law, in accordance with the rule that it would make as legislator.
>
> (3) In doing so, the court shall follow established doctrine and case.[77]

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74 *Re Article 26 and the Electoral (Amendment) Bill 1961* [1961] IR 169, 180, per Maguire CJ.

75 This, again, has been the experience of the Irish Supreme Court, particularly in dealing with the aftershocks caused by a finding of constitutional invalidity of a law, precisely because, as Geoghegan J astutely observed in *A v Governor of Arbour Hill Prison* [2006] IESC 45, [2006] 4 IR 88 [203], unless courts limited the retroactive and other effects of such a finding, the consequence would be that judges would be less willing to invalidate laws in future: 'there would be a grave danger that judges considering the constitutionality of enactments would be consciously or unconsciously affected by the consequences'.

76 See, eg, *Kinsella v Governor of Mountjoy Prison* [2011] IEHC 235, [2012] 1 IR 467.

77 G Picht and G Studen, 'Civil Law' in M Thommen (ed), *Introduction to Swiss Law* (Carl Grossman 2018) 283–284.

There is, I think, no equivalent provision in any common law system. And so we return to the question posed at the start: should judges have regard to the consequences of their decisions when adjudicating upon the merits of the case or should they be guided by purely legal factors? Judging is an art, not a science. Pragmatism is a practical human virtue which often represents the better part of valour. One cannot therefore say that pragmatism properly has no role in the judicial process and, even if one did, the reality of human psychology is such that many of us would recognise Eamon Redmond in *The Heather Blazing* in ourselves. One might also say that the fact that a judgment might have far-reaching consequences is itself a reason which should give a judge an occasion to pause and reflect. In such circumstances it would generally be prudent to re-examine the premises and reasoning of any proposed judgment before arriving at such a decision.

Yet, on the whole, judges are better guided by the application of principle rather than any endeavour to peek behind the blinds of justice and to seek to anticipate the consequences of their decisions and to work backwards in their reasoning. To repeat the words of Neil Gorsuch, any judge who seeks to ensure that the result assorts with their own personal views is likely to be a pretty poor judge and, in that respect at least, Our Lady of the Common Law cannot be fooled. And here, I think, is the nub of the problem with the Posner–Humphreys analysis.

I say that for two reasons.

First, I cannot agree that judges are not bound by the text of the law and, inasmuch as Posner says otherwise, I profoundly disagree. One may fully acknowledge that there are nearly always interpretative choices which are open to judges, but the statement that judges are never bound by the legal text is, with respect, far too dogmatic and wrong, as the decisions in both *Hume* and *Bohill* illustrate. And this, after all, was the point with which Lord Scarman could gently chide Lord Denning in *Duport Steels*. To repeat, legislation *is* the authentic voice of the legal sovereign and judges can only hear that voice through the application of well-established principles of statutory interpretation. If, for example, legislatures wish to bring about an important legal change the application of the presumption against unclear changes in the law serves to require that this must be done expressly and not in some indirect manner.[78] So, far from saying that the principle that the court is bound by the legal text to reach a result which Parliament might have never contemplated or intended amounts to the exercise of power without responsibility, I would respectfully contend for the contrary: it is rather the exercise of the judicial power in a manner which is most faithful to the rule of law.

78 See, eg, *R v Home Secretary, ex p Simms* [1999] UKHL 33, [2000] 2 AC 115.

Second, our own thought experiment tends to show, even allowing for the necessarily tiny sample, that the courts cannot satisfactorily seek to cure the deficiencies of legislation or the law generally by *ad hoc* solutions or by a form of working backwards reasoning. If, for example, you think that the licence exclusivity scheme at issue in *O'Neill* worked well and that for that reason you seek to uphold its *vires* by an *ad hoc* solution, then how do you deal with the next exclusive licensing system that you consider is not working well? More to the point, how do unelected judges make value judgments that are essentially policy-driven and legislative-based in character? Most – admittedly not all – orthodox economists would, for example, be sceptical of the supposed value of regional monopoly licensing systems as being bad for consumers and as tending to create inefficiencies and as stifling innovation. I dare say that few would disagree with the comments of Coghlin LJ in *Bohill* to the effect that there were no particular reasons why agency workers should be excluded from the scope of fair employment legislation, but, again, this is ultimately a judgment which a legislature and not judges should make. The Court of Appeal should not have distorted the language of the all too clear provisions of the 1998 Order just because they think that this would be fairer and better and even if in that case almost no one would disagree. Unless, therefore, one was going to transpose with some adaptations a provision such as Article 1(2) of the Swiss Civil Code, one must acknowledge that the capacity of the judiciary to effect a sort of running repairs to the legislative machinery is limited.

And so I close with this tentative conclusion: human psychology runs deep and judges are often affected deeply by the facts and circumstances of hard cases with real life consequences. The desire to please, to be collegiate and to be flexible are features of that psychology and it allows us to leaven a certain strict and unforgiving legal logic with a necessary degree of pragmatism and, indeed, common sense. To that extent judges cannot be entirely neutral in the sense of effecting a complete, Olympian detachment from the real-life consequences of their decisions: sometimes, perhaps, expediency has a role. Yet experience has shown that judges are at their best when they act independently of their own personal, subjective views and when they listen only to the authentic voice of the legal sovereign. If psychology and pragmatism means that judges cannot always be neutral, then they should nonetheless strive to be so.

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MacDermott Lecture 2022: Democracy, expression and the law in our digital age

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INTRODUCTION

It is a real honour, both professionally and personally, to have been asked to join you this evening to deliver the School of Law's annual MacDermott Lecture. I will leave to my closing remarks the reason for the very personal pleasure I derive from this invitation to speak in Belfast.

In his inaugural lecture 50 years ago, Lord MacDermott emphasised the fact that the 'vitality and fortunes of a people are closely linked to the quality of their laws'. He urged members of the legal community to scrutinise from time to time the health and condition of principal legal concepts with a view to safeguarding the common good or, as he said, 'common weal'.[1] It is with this in mind that I chose this topic.[2]

The Strasbourg Court has consistently held that democracy constitutes a fundamental element of the 'European public order'.[3] If we had lost sight of the fact that the maintenance and further realisation of human rights and fundamental freedoms are best ensured, on the one hand, by an effective political democracy and, on the other, by a common understanding and observance of human rights, then the tragic events unfolding in Ukraine since February have reminded us of the importance of what our forebearers fought so hard for. In the words of the UK representative drafting the Convention, in a speech delivered on 8 September 1949:

> The Convention was to … ensure that the states of the Members of the Council of Europe *are* democratic and *remain* democratic.[4]

* Delivered as the 50th Annual MacDermott Lecture at Queen's University Belfast on 28 April 2022. My thanks to the School of Law, the legal community in Belfast and the MacDermott family for their warm welcome. The views expressed are personal to the author.

1 Lord MacDermott, 'The decline of the rule of law' (1972) 23 Northern Ireland Law Quarterly 475.

2 It is, moreover, a topic of global and growing concern. See, just a few days before the Belfast lecture, the speech of Barack Obama, 'Technology and democracy' delivered at Stanford University on 22 April 2022.

3 *Zdanoka v Latvia* [GC], no 58278/00, 16 March 2006, § 98.

4 Coll Ed, II, 60 (emphasis added).

Over the last two decades, advances in information and communications technology have been critical to facilitating access to information and the free flow of ideas prior to and during elections. Few in our orbit would contest what the Strasbourg court and other national courts have oft-repeated; to quote Lord Steyn, 'freedom of speech is the lifeblood of democracy'.[5] And few ignore the potential of the internet and social media to enhance its supply. In the words of the Strasbourg court in a 2012 Turkish case called *Ahmet Yildirim*, which involved the blocking of access to Google websites:

> In the light of its accessibility and its capacity to store and communicate vast amounts of information, the Internet plays an important role in enhancing the public's access to news and facilitating the dissemination of information in general.[6]

However, it is now well-established that state and non-state actors exploit technological advances to alter what and how information reaches the electorate and, in some cases, to interfere with democratic participation and access to information during election periods and beyond.[7]

In a remarkably short space of time, a variety of new words have made their way into our democratic lexicon – fake news, junk news, disinformation and 'alternative facts', to name but a few. The *Oxford English Dictionary* word of the year in 2016 – a year whose political significance needs no explaining – was 'post-truth', defined as follows:

> relating to or denoting circumstances in which objective facts are less influential in shaping public opinion than appeals to emotion and personal belief.

Commentators writing during the last United States (US) Presidential election referred to 'lie machines', consisting of the governments and political campaigns that produce lies alongside the social media platforms, algorithms and bots that distribute them. These machines attack not just individual targets but also:

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5 *R v Secretary of State for the Home Department ex parte Simms* (2000) 2 AC 115 HL at 126: 'Freedom of speech is the lifeblood of democracy. The free flow of information and ideas informs political debate. It is a safety valve: people are more ready to accept decisions that go against them if they can in principle seek to influence them. It acts as a brake on the abuse of power by public officials. It facilitates the exposure of errors in the governance and administration of justice of the country.'

6 *Ahmet Yildirim v Turkey*, no 3111/10, § 48, 18 December 2012.

7 See the report of the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, *Freedom of Expression and Elections in the Digital Age* (2019) Research Paper 1/2019.

> the liberal epistemic order, political systems which place trust in essential custodians of factual authority, including science, …, journalists, public administration and the justice system.[8]

A 2019 Chatham House report emphasises that disinformation in elections is part of a broader problem, evident subsequently during the pandemic, resulting from the spread of disinformation in day-to-day online discourse:

> [This] has encouraged tribalism and a polarization of views on a wide range of societal issues … [and t]his polarization feeds into voters' preferences in elections and into the tenor and content of political debate.[9]

Turning to the 70-year-old European Convention, Article 3 of Protocol no 1 provides that:

> The High Contracting Parties undertake to hold free elections … by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.

Rory O'Connell, at Ulster University, has studied electoral rights under the Convention.[10] As he outlines in a most accessible way, Strasbourg case law on Article 3 of Protocol no 1 covers a wide range of different issues, not least what constitutes a legislative body, the Convention compliance of conditions of access to voting, the organisation of elections or election campaigns and the processing of electoral results.[11]

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8 See the review of T Rid, *The Secret History of Disinformation and Political Warfare* (Farrar, Straus & Giraux 2020) by J Freedland, 'Disinformed to death' (2020) *New York Review of Books*.

9 See K Jones, 'Online disinformation and political discourse: applying a human rights framework' (2019) Chatham House, Royal Institute of International Affairs, 8.

10 R O'Connell, Law, *Democracy and the European Court of Human Rights* (Cambridge University Press 2020).

11 See, for examples, in this order, *Matthews v the United Kingdom* [GC], no 24833/94, §§ 45–54, 18 February 1999 (on the European Parliament as a legislature); *Hirst v the United Kingdom (No 2)* [GC], no 74025/01, § 62, 6 October 2005 (on the right to vote of prisoners); *Shindler v the United Kingdom*, no 19840/09, 7 May 2013 (justifiable restrictions on voting rights of non-resident citizens); *Sejdić and Finci v Bosnia-Herzegovina* [GC], nos 27996/06 and 34836/06, 22 December 2009 (rule excluding the eligibility to stand for election of persons who refused to declare affiliation with a 'constituent people'); *Bowman v the United Kingdom*, no 141/1996/760/961, § 42, 19 February 1998, (on interaction with Article 10 and the importance in the period preceding an election for opinions and information of all kinds to be permitted to circulate freely – discussed further below); *Davydov v Russia*, no 75947/11, 30 May 2017 (on post-election periods, including the counting of votes and the recording and transmission of the results) and *Petkov and Others v Bulgaria*, nos 77568/01, 178/02 and 505/02, 11 June 2009 (on the need for effective remedies in electoral disputes).

Most cases have not been as controversial as the *Hirst* ruling on prisoners' voting rights[12] and most have proved essential to protecting what in this day and age has become a remarkably undervalued right integral to the peaceful coexistence at European level of democratic societies based on the rule of law.

What is striking about the cases in this field is that one still finds few if any references to the words digital, technology, electronic, internet or social media in the Strasbourg case law on free elections. The votes and elections which have been the subject of the court's case law thus far have been votes cast physically, in elections organised in bricks and mortar polling stations, after election campaigns which have followed traditional lines and have been subject to traditional rules, such as a ban on campaigning in the physical vicinity of a polling station or in the hours or days before voting. Yet, looking at the recent US elections or, closer to home, at recent referenda in the two parts of this island, we know that this is no longer the only, or perhaps even the predominant way in which 'the People's approval' is sought or captured nowadays.

I propose this evening to provide a brief overview of Strasbourg case law on free elections and closely related case law under Article 10 on political speech and campaigning. Thereafter it becomes a little more delicate. Like any sitting judge asked to give a public address, I have to balance my own vow of discretion with your understandable desire not to be bored stiff this evening. In a speech on law and politics delivered by a judge, a delicate line has to be tread. I propose:

i to ask whether and where there may be gaps in existing Strasbourg case law when it comes to the type of electoral and expression questions which now arise, and

ii to question whether some of the underlying philosophy which has informed Strasbourg case law to date may be ripe for reconsideration.

STRASBOURG CASE LAW ON THE INTERPLAY BETWEEN FREEDOM OF EXPRESSION AND THE RIGHT TO FREE ELECTIONS

The court has consistently held that there is little scope under Article 10 § 2 of the Convention for restrictions on political expression.[13] It has

12 See *Hirst (No 2)* (n 11 above). The UK was not alone in resisting changes to its electoral laws on prisoner voting. See also *Anchugov and Gladkov v Russia*, no 11157/04, judgment of 4 July 2013, discussed in G Bogush and A Padskocimaite, 'Case closed, but what about the execution of the judgment? The closure of *Anchugov and Gladkov v Russia*' (*Ejil Talk!* 30 October 2019).

13 See, for instance, *Perinçek v Switzerland* [GC], no 27510/08, § 197, 15 October 2015 (extracts).

generally allowed states only a narrow, indeed very narrow, margin of appreciation in this field. This is because of the particular importance the Convention and contracting parties attach to free political debate.[14]

The interplay between expression rights guaranteed under Article 10 of the Convention and those under Article 3 of Protocol no 1 was summed up in a Belgian case from the 1980s – *Mathieu-Mohin*. At issue in that case was the complex system of governance set up to accommodate the coexistence of three linguistic communities in Belgium. In it the court emphasised the basic premise which it has repeated in decades of case law spanning 47 different states and numerous electoral disputes ever since:

> Free elections and freedom of expression, particularly freedom of political debate, together form the bedrock of any democratic system.[15]

Between these two interrelated articles, however, one finds a fundamental distinction. The narrow margin of appreciation which generally applies to political expression contrasts with the wider margin which prevails as regards the right to free elections. This wider margin is understandable. For the purposes of Article 3 of Protocol no 1, the court assesses electoral systems in the light of the political evolution of the country concerned. It recognises that features that would be unacceptable in the context of one system may be justified in the context of another, so long as the chosen system provides for conditions which will ensure the 'free expression of the opinion of the people in the choice of the legislature'.

A very good example of how the margin operates with reference to local history, experience and domestic context in the electoral field is provided in the Northern Irish case of *Lindsay v the United Kingdom*.[16] There the European Commission of Human Rights examined and upheld the legitimacy of adopting a different voting system (proportional representation) for Northern Ireland to that pertaining

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14 See *Féret v Belgium*, no 15615/07, § 63, 16 July 2009.

15 *Mathieu-Mohin and Clerfayt v Belgium*, no 9267/81, § 47, 2 March 1987. See, for further discussion, R Mastroianni, 'Fake news, free speech and democracy: a (bad) lesson from Italy?' (2019) 25 South Western Journal of International Law 42, 45, who argues that an election process is 'free' if the electorate's choice is based on its access to or receipt of a wide range of proposals and ideas and if false information does not distort or alter election results.

16 *Lindsay v the United Kingdom (dec)*, no 8364/78, 8 March 1979.

in the rest of the United Kingdom (UK) (first past the post).[17] Leaving aside the question whether, in 1979, the European Parliament could be regarded as a 'legislature', the Commission emphasised that Article 3 of Protocol no 1 does not impose a particular kind of electoral system. It concluded that the choice of:

> a system taking into account the specific situation as the majority and minority existing in Northern Ireland must be seen as making it easier for the people to express its opinion freely.

Another reason for the difference in approach to Article 3 of Protocol no 1 compared to Article 10 is that the former is not just about the protection of *individual rights*, it is also about the protection of the integrity of the *electoral system* within which individual rights are exercised.[18] As the court has recognised in its case law since *Mathieu-Mohin*, electoral systems seek to fulfil objectives which are sometimes scarcely compatible with each other. On the one hand, they seek to reflect fairly and faithfully the opinions of the people and, on the other, they seek to channel currents of thought so as to promote the emergence of a sufficiently clear and coherent political will.[19] The requirement under the Convention that provision is made for 'free elections' thus implies, apart from freedom of expression, the principle of equality of treatment of all citizens in the exercise of their right to vote.[20] Most member states of the Council of Europe have rules on paid political advertising. Their aim is to maintain the integrity, fairness and legitimacy of the election process and outcome, and to guard against the possibility that private interests and powerful minorities can control those outcomes. Until now, these rules have tended to be

17 See also *Mugemangango v Belgium* [GC], no 310/15, judgment of 10 July 2020, § 73. In many European states, not least the UK and Ireland, legislation regulating broadcasting may have traditionally favoured equality of political opportunity at the expense of freedom of expression whereas in the US, in relation to legislation which placed limitations on campaign expenditure, the US Supreme Court has held that: 'the concept that the Government may restrict the speech of some in our society in order to enhance the relative voice of others is wholly foreign to the First Amendment' (*Buckley v Valeo* 424 US 1 (1976) at 48–49 *per curiam* opinion). See further *Austin v Michigan State Chamber of Commerce*, 494 US 652 (1990).

18 See further O'Connell, cited above, ch 9: 'Regulation of elections', and cases like *Saccomanno and Others v Italy*, no 11583/08, 13 March 2012, where the court referred at § 47 to a right to have the benefit of legislative elections conforming to Article 3 of Protocol no 1 principles.

19 See *Mathieu-Mohin* (n 15 above) § 54.

20 Ibid.

scattered across a variety of election laws, broadcasting law and self-regulatory codes.[21]

Two contrasting cases, both of which originated in the UK, are illustrative of how and in what context the Convention approach to political speech and campaigning has developed and of the interplay between Articles 10 and 3 of Protocol no 1. The applicant in the first case – *Bowman v the United Kingdom* – was the executive director of the Society for the Protection of Unborn Children. She arranged to have some 1.5 million leaflets distributed in different constituencies in support of pro-life candidates.[22] As a result of this she was charged with an offence under the Representation of the People Act which prohibited expenditure above a certain limit by an unauthorised person during the period before an election. The flavour of the court's case law on the intersection between free elections and freedom of expression is on display in the *Bowman* judgment, handed down in 1998.[23] The court considered that it is particularly important in the period preceding an election that opinions and information *of all kinds* are permitted to circulate freely. Nonetheless, it also recognised that in certain circumstances the two rights may come into conflict. It accepted that, *in the period preceding or during an election*, it may be necessary to place certain restrictions, of a type which would not usually be acceptable, on freedom of expression. In the *Bowman* case the court held that the relevant provision of the UK statute, operated, for all practical purposes, as a total barrier to the applicant publishing

21 As regards electoral law, the main ways campaign communication has been regulated until now has been through **a.** spending limits and campaign finance controls, **b.** subsidies for campaigning communications, **c.** pre-poll black outs, **d.** media regulation and, in particular, broadcast licensing, **e.** rules on political advertising and **f.** self-regulation and journalism ethics. For an overview, see Council of Europe, *Study on the Use of the Internet in Electoral Campaigns*, DGI (2017) April 2018.

22 See *Bowman v United Kingdom*, no 24839/94, 19 February 1998.

23 See ibid § 42 citing *Mathieu-Mohin* (n 15 above) § 47, and *Lingens v Austria*, no 9815/82, §§ 41–42, 8 July 1986 ('freedom of political debate is at the very core of the concept of a democratic society which prevails throughout the Convention'). See also the General Comment No 25 on the Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public Service under Article 25 of the Covenant, UN Doc CCPR/21/Rev1/Add7, 12 July 1996.

factually accurate information with a view to influencing the voters and it found a violation.[24]

The second judgment of interest, which dates from 2013, is *Animal Defenders International*.[25] In that case a non-governmental organisation (NGO) was refused permission to place a TV advert as part of a campaign concerning the treatment of primates. This was due to a statutory prohibition of political advertising whose aim was to maintain impartiality in the broadcast media and to prevent powerful groups from buying influence through airtime. The prohibition applied not only to advertisements with a political content but also to bodies which were wholly or mainly of a political nature, irrespective of the content of their advertisements. The decision of the British regulatory authority (the Broadcast Advertising Clearance Centre or BACC) to refuse to clear the advert,[26] had been upheld by the High Court and the House of Lords, with the latter holding in 2008 that the statutory prohibition was justified by the aim of preventing government and its policies from being distorted by the highest spender.

How would the Strasbourg court react, given its dislike of blanket bans and previous Article 10 case law which had found violations in very similar circumstances? When determining the proportionality of such a general legislative measure, the court in *Animal Defenders International* attached considerable weight to the fact that the complex regulatory regime chosen to govern political broadcasting in the UK had been subjected to exacting and pertinent reviews by both parliamentary and judicial bodies. The disputed legislation was the culmination of an exceptional examination of the cultural, political and legal aspects of the prohibition and its proportionality had been debated in detail in

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24 The court was not satisfied that the £5 sterling expenditure threshold had been necessary to achieve the legitimate aim of securing equality between candidates. There were no restrictions, it noted, placed upon the freedom of the press to support or oppose the election of any particular candidate or upon political parties and their supporters to advertise at national or regional level, provided certain conditions were fulfilled – *Bowman* (n 22 above) § 47. Six judges dissented and the majority judgment was subject to quite critical legal commentary. Judge Valticos, dissenting, indicated at the time that there was 'something slightly ridiculous in seeking to give the British Government lessons in how to hold elections and run a democracy'. Professor Conor Gearty, in contrast, criticised the majority's reluctance 'to recognise the debilitating effect of disproportionate financial resources' ('Democracy and human rights in the European Court of Human Rights: a critical appraisal' (2000) 51 Northern Ireland Legal Quarterly 381, at 394).

25 *Animal Defenders International v the United Kingdom*, no 48876/08, 22 April 2013.

26 The BACC held that the political nature of the applicant NGO's objectives meant that the broadcasting of the advert was caught by the prohibition in s 321(2) of the Communications Act 2003.

the High Court and the House of Lords.[27] The outcome in this case was, however, far from uncontested, as the finding of no violation by nine votes to eight laid bare.

The case raised a question which has worried national courts and divided commentators, and which I will touch on below, namely the proper role of courts as overseers of democratic procedure.[28] Speaking as an international court which plays a subsidiary and external role, the Strasbourg court in *Animal Defenders* located the most appropriate place for the necessary balancing to occur at national parliamentary and, if necessary, national judicial level; on condition of course that the review at both levels was of a certain quality.

Apart from this important expression of subsidiarity and respect for parliamentary processes which one finds in the Grand Chamber judgment, another aspect of *Animal Defenders* is particularly pertinent for the purposes of our discussion. The impugned prohibition applied only to paid, political advertising and it was confined to radio and television. On the one hand, the targeted nature of the prohibition fed positively into the court's proportionality assessment. On the other hand, however, the applicant NGO had contested the rationale underlying this targeted legislative choice, which it considered illogical given the comparative potency of newer media such as the internet. In its 2013 judgment, the court emphasised the particular influence of the broadcast media and held:

> Notwithstanding ... the significant development of the internet and social media in recent years, there is no evidence of a sufficiently serious shift in the respective influences of the new and of the broadcast media in the [UK] to undermine the need for special measures for the latter.[29]

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27 The line adopted by the court in the UK case was reminiscent of that it had taken in *Murphy v Ireland* in relation to the prohibition of broadcast religious advertisements (application no 44179/98, § 75, 10 July 2003). Contrast *Animal Defenders* (n 25 above), however, with the violation of Article 10 of the Convention previously found in *VgT Verein gegen Tierfabriken v Switzerland*, no 24699/94, 28 June 2001, which had concerned a similar ban of a general nature on political advertising on the broadcast media, or the judgment in *TV Vest As & Rogaland Pensjonistparti v Norway*, no 21132/05, 11 December 2008, where similarly a violation of Article 10 had been found. Interestingly, both the Irish and UK Governments had intervened in the latter case arguing for a wider margin of appreciation, along the lines of that which had been accorded in the religious context in *Murphy*.

28 See further F Schauer, 'Judicial review and the devices of democracy' (1994) 94 Columbia Law Review 1326.

29 *Animal Defenders* (n 25 above) § 119. See the alternative view expressed by Judges Tulkens, Spielmann and Laffranque at § 11 of their dissenting opinion in *Animal Defenders*: 'Information obtained through the use of the Internet and social networks is gradually having the same impact, if not more, as broadcasted information. Their development in recent years undoubtedly signals a sufficiently serious shift in the influence of traditional broadcasting media to undermine the need to apply special measures to the latter.'

Leaving aside whether this distinction between traditional and new media was tenable even in 2013, fast forward nine years and it seems unlikely that the court could reason in a similar vein nowadays.

Before I end this brief overview, one final aspect of Article 10 case law is worth recalling. That provision recognises the essential role played by the press in a democratic society. The court has consistently held that:

> The *duty* of the press is to impart … information and ideas on all matters of public interest. The public's right is to receive that information.[30]

Because of this, members of the broadcast and print media have been regarded as playing a vital 'public watchdog' role. In this capacity, they are the recipients of a right granted heightened protection, but also the bearers of important duties and responsibilities.[31]

THE UNDERLYING PHILOSOPHY OF CONVENTION CASE LAW ON ELECTORAL AND EXPRESSION RIGHTS: ADAPTING TO A DIGITALISED WORLD?

When analysing restrictions of the right to freedom of expression, the court follows the well-trodden methodological path laid out in Article 10: has there been an interference, is that interference provided by law and is it necessary in a democratic society?

In a case called *MKKP v Hungary*, the Strasbourg court got its first taste in 2020 of the use of new technologies, namely a mobile phone

30 See, for example, *Bladet Tromsø and Stensaas v Norway* [GC], no 21980/93, §§ 59 and 62, 9 July 1998.

31 To give a concrete recent example of this proviso in operation, the finding of no violation in the recent case of *Société éditirice Mediapart and Others v France* (nos 281/15 and 34445/15, 14 January 2021) was partly premised on a failure to observe journalistic duties and responsibilities. The applicant company complained that an injunction forcing it to remove from its website taped extracts of private conversations involving Liliane Bettencourt, heir to the L'Oreal fortune, in her own home, on subjects quite clearly of public interest, infringed the newspaper's Article 10 rights. In rejecting this complaint, the court emphasised not only the illicit nature of the recordings, the vulnerability of the applicant and the extent of the intrusion into her private life but also the need for those who benefit from public watchdog status, and therefore enhanced protection of their Article 10 rights, to fulfil their own clear duties and responsibilities. On the fact that the duties and responsibilities imposed may vary depending on the medium concerned, see *Jersild v Denmark*, no 36/1993/431/510, § 31, 22 August 1994; on the fact that the extent of those duties and responsibilities may vary in a given situation and the technical means used, see *Handyside v the United Kingdom*, no 5493/72, § 49, 7 December 1976.

application, in the context of a political campaign.[32] The case arose in the context of a referendum held in Hungary in 2016 in relation to the European Union's (EU) migration relocation plan, which was highly contested by the incumbent government. Just prior to the referendum a small opposition party (MKKP), which was against the referendum and whose platform encouraged the spoiling of ballots, had made available to voters an app allowing them to anonymously upload and share, in real time, photographs of their ballot papers, preferably spoiled.[33]

Following complaints by a private individual to the National Election Commission (NEC), the applicant party was fined for infringing the principles of fairness and secrecy of elections and that of the exercise of rights in accordance with their purpose provided by Hungarian law. Handing down its second of two rulings *after* the referendum had been held, the Kúria upheld the NEC's main finding regarding the infringement of the Hungarian principle of the exercise of rights in accordance with their purpose. However, it dismissed its conclusions regarding voting secrecy and the fairness of the referendum.

The Grand Chamber held, by 16 votes to one, that the relevant provisions of Hungarian law pursuant to which the injunction and a fine had been ordered, were neither sufficiently clear nor foreseeable. It is important to stress that the court took no position on whether ballot photographs could or should be legalised. That is not its role. Instead, the court enjoined Hungary, and indirectly other states, to provide for a clear regulatory framework in that regard; regardless of whether they had chosen a permissive or restrictive approach. The existing Hungarian legislation had allowed for the restriction of voting-related expressive conduct on a case-by-case basis, thus conferring a wide discretion on electoral bodies and domestic courts. However, the court noted that the NEC and the Kúria had disagreed as to the applicability of the basic principles of electoral procedure. In addition,

32 *Magyar Kétfarkú Kutya Párt v Hungary (MKKP)* [GC], no 201/17, 20 January 2020. It should of course be noted that Article 3 of Protocol no 1 does not as such apply to referenda (see, for example, *Moohan and Gillon v the United Kingdom (dec)*, nos 22962/15 and 23345/15, 13 June 2017, in relation to the Scottish independence referendum). However, in cases on referenda to date the court has indicated that 'Given that there are numerous ways of organising and running electoral systems and a wealth of differences in historical development, cultural diversity and political thought within Europe which it is for each Contracting State to mould into their own democratic vision …, the Court has not excluded the possibility that a democratic process described as a "referendum" by a Contracting State could potentially fall within the ambit of Article 3 of Protocol No. 1 … . However, in order to do so the process would need to take place 'at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature".' (ibid § 42)

33 The app could be downloaded through Google Play and Apple Store free of charge and it was advertised on the political party's web and Facebook pages.

while the NEC had issued guidelines to the effect that the taking of ballot photographs was in breach of domestic law,[34] those guidelines were held not to be legally binding. As indicated previously, their relevance and legal effects were only clarified by the Kúria *after* the referendum had taken place.[35]

Context was central to the court's strict requirements regarding regulatory foreseeability:

> The electoral context takes on special significance in this regard, given the importance of the integrity of the voting process in preserving the confidence of the electorate in the democratic institutions. Accordingly, the Court has found wide and unpredictable interpretations of legal provisions governing elections to be either unforeseeable in their effects or indeed arbitrary and therefore incompatible with Article 3 of Protocol No. 1 ... .[36]

It is worth exploring whether future cases on freedom of expression and elections in a digital age may put some of the basic tenets of the established case law on Articles 10 and 3 of Protocol no 1 to the test.

1 Firstly, take the margin of appreciation which states enjoy. As I explained previously, it is narrow when the expression involved is in the context of a political debate; narrow when the work of a political party is at issue; wide when what is involved is the organisation and running of an electoral process,[37] but wide also when the issue at hand is not governed by a European consensus. This means that, where a complaint finds itself at the intersection between freedom of expression

34 Prior to the holding of the referendum, NEC guidelines had indicated, for over two years, that taking photographs of ballot papers in the polling station constituted an infringement of the principle of proper exercise of voting rights in accordance with their purpose. The same guidelines indicated that the use of ballot papers contrary to their purpose – namely to represent the choice of voters and establish the results of voting – could also infringe the principle of the secrecy of elections. Voters were under no obligation not to divulge how they had cast their ballot, but they were under an obligation to exercise their voting rights in accordance with their purpose. Voters, according to the NEC guidelines, 'cannot take the ballot paper out of the polling station and cannot take a photograph with either a telecommunication, digital or any other device with the purpose of showing it to another person'.

35 *MKKP* (n 32 above) §§ 113–114.

36 Ibid § 99. Compare with the very deferential approach in *Zhermal v Russia*, no 60983/00, 28 February 2008, where, despite imprecise electoral legislation, the court rejected an application under Article 3 of Protocol no 1 as manifestly ill-founded since the legislative imprecision of which the applicant voter complained had not, it held, dissuaded voters from exercising their right to vote in a manner which thwarted the free expression of the opinion of the people.

37 See *Bowman* (n 22 above); *Ždanoka v Latvia* [GC], no 58278/00, 16 March 2006; *Tv Vest AS* (n 27 above) and *Orlovskaya Iskra v Russia*, no 42911/08, 21 February 2017.

and the right to free elections, the court in Strasbourg may resort to a margin which expands and retracts – I've said on other occasions, a little bit like an accordion – depending on the circumstances of a given case. This flexibility in a Convention system which caters for 47 states is indispensable; but it should not become a source of jurisprudential inconsistency.

2 What constitutes a 'public watchdog' within the meaning of Article 10 has been changing as different and new forms of under or unregulated media emerge. The vital role of the print and broadcast media as 'public watchdogs' in a democratic society has been repeatedly recognised by the court.[38]

However, in recent case law on the right to receive information under Article 10, the court has highlighted the function of 'bloggers and popular users of the social media' who, it held, may also be assimilated to 'public watchdogs'.[39] There is something very 'democratic' in this approach, but it is potentially a major leap and one which could have important ramifications in electoral contexts. The individuals involved have not been subject to the same type or level of regulation as traditional media.[40]

It is important to remember that the heightened protection afforded freedom of expression until now has always been offset not only by the possibility of restrictions of that right, but also by the fact that Article 10 § 2 is the only Convention provision which explicitly refers to 'duties and responsibilities'. As the Council of Europe observed in a 2018 study, the factual basis of politics has until now been in part supported by a filter of journalism ethics and fact-checking. As a greater proportion of electoral information is now shown independently of such editorial gatekeeping,

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38 *Bladet Tromsø* (n 30 above) §§ 59 and 62, 20 May 1999.

39 *Magyar Helsinki Bizottság v Hungary* [GC], no 8030/11, § 168, 8 November 2016.

40 In *Delfi v Estonia* (GC), no 64569/09, 16 June 2015, the court held that an award of damages against an internet news portal for offensive comments posted on its site by anonymous third parties did not violate Article 10. Limiting the scope of the Grand Chamber judgment, it stated, §§ 115–116: 'The Court emphasises that the present case relates to a large professionally managed Internet news portal run on a commercial basis which published news articles of its own and invited its readers to comment on them. ... the case does not concern other fora on the Internet where third-party comments can be disseminated, for example an Internet discussion forum or a bulletin board where users can freely set out their ideas on any topic without the discussion being channelled by any input from the forum's manager; or a social media platform where the platform provider does not offer any content and where the content provider may be a private person running the website or blog as a hobby.'

this raises questions about the efficiency and adequacy of the type of self-regulatory filters on which reliance has been placed to date.[41]

Earlier this month the Committee of Ministers issued a series of recommendations to member states which respond to the fact that electoral communication is increasingly online and that online platforms are rapidly taking precedence over the traditional media as platforms for political advertising, while usually not being subject to a specific level of regulation and public oversight.[42] However useful these new recommendations, one still has a sense in 2022 that policymakers, lawmakers and courts are playing catch up.

3 The nature of the legal obligations which Article 3 of Protocol no 1 imposes on states is also worth highlighting. This article of the Convention does not lay down an obligation of non-interference, as with the majority of civil and political rights. It lays down an obligation of adoption by the state, as the ultimate guarantor of pluralism, of positive measures to 'hold' democratic elections to the legislature.[43]

The character of Article 3 Protocol no 1 obligations has ramifications when Article 10 comes into play in an electoral context. It seems likely that we will see more cases in which the court emphasises that states have a positive obligation under Article 10 to ensure that coverage is objective and compatible with the spirit of 'free elections', even in the absence of direct evidence of manipulation.[44] A positive obligations approach means that legislators need to strike the right balance

41 Council of Europe study (n 21 above) 19. See also the Council of Europe report, 'Information Disorder', DGI (2017) 09, according to which false or harmful information risked spreading among potential voters on an unprecedented scale and without oversight or rebuttal, and the Venice Commission, 'The Impact of Information Disorder (Disinformation) on Elections', 26 November 2018.

42 Recommendation CM/Rec (2022)12 of the Committee of Ministers to member states on electoral communication and media coverage of election campaigns, 6 April 2022.

43 See *Mathieu Mohin* (n 15 above)§ 50 and recently *Mugemangango* (n 17 above) § 68.

44 See *Communist Party of Russia and Others v Russia*, no 29400/05, 19 June 2012. The court found no violation of Article 10 in this regard, the respondent state had had legislation addressing neutrality and seeking to ensure a degree of pluralism and the parties had had access to airtime and the possibility of spreading their message on other media outside the state broadcasters.

between 'the two most important components of democracy'[45] and provide the necessary regulatory framework to allow both to thrive.[46]

The Hungarian case about the app which facilitated ballot sharing in real time suggests that regulatory gaps at domestic and European level in relation to freedom of expression and democratic processes may be a regular feature of cases in coming years.[47] The states' margin of appreciation to regulate electoral questions will necessarily remain wide in electoral cases. However, the question of the margin only arises once the judicial examination reaches the proportionality assessment. At a prior stage, in relation to the lawfulness of any interference, the Strasbourg court will assess the foreseeability and accessibility of the legal rules being challenged.[48] If legislators continue to play catch-up with information technologies, it is possible, if not likely, that problems will arise at that earlier lawfulness stage.

4 Another point which emerges from the Hungarian case is that the integrity of electoral systems may be undermined not just by the *content* of messages but also by the nature of the *medium* via which a message is conveyed. The established electoral rules in Hungary clearly prohibited campaigning in the vicinity of polling stations; yet the impugned mobile phone app, designed and made available as a campaign tool, could operate within the polling booths themselves. A form of digital political campaigning simply escaped the type of

45 See the judgment of Lady Hale in the House of Lords in *Animal Defenders* (n 25 above) at 49.

46 See further *Mugemangango* (n 17 above) § 109: 'Although Article 3 of Protocol No. 1 does not contain an express reference to the "lawfulness" of any measures taken by the State, the rule of law, one of the fundamental principles of a democratic society, is inherent in all the Articles of the Convention … . This principle entails a duty on the part of the State to put in place a regulatory framework for securing its obligations under the Convention in general and Article 3 of Protocol No. 1 in particular …'; or *Animal Defenders* (n 25 above) § 101.

47 See also *OOO Informatsionnoye Agentsvo Tambov-Inform v Russia*, n 43351/12, 18 May 2021.

48 See also, for a violation of Article 3 of Protocol no 1 due to the lack of foreseeability of legislation regulating the finances of political parties, *Cumhuriyet Halk Partisi v Turkey*, no 19920/13, 26 July 2016. Given the risk that state scrutiny of party finances might be used as a 'political tool to exercise control over political parties', the court in that case required the impugned legal measures to demonstrate a high degree of foreseeability.

traditional or physical restrictions to which existing electoral rules had been geared.[49]

However much political parties are still prepared to pay for TV advertisements, it is difficult to conceive in 2021 of the European court or national courts for that matter reiterating the predominant place of television and radio broadcasting as the court did in 2013.[50]

In the nine years since *Animal Defenders*, the court has sought to grapple with the 'conflicting realities' (a term used in *Delfi v Estonia*) to which the internet and new technologies give rise. It has recognised, on the one hand, that user-generated expressive activity on the internet provides an unprecedented platform for the exercise of freedom of expression. On the other hand, the internet can act as a forum for the speedy dissemination of unlawful forms of speech which may remain persistently online.[51]

A Russian case from 2020, *Engels*, concerned the removal by a website owner of information concerning filter bypassing tools to avoid his website being blocked by the Russian authorities. This case demonstrates how the 'conflicting realities' are playing out in the case law. The court found a violation of Article 10 in that case. The interference complained of was not prescribed by law as the Russian legal framework failed to establish safeguards capable of protecting individuals from the excessive and arbitrary effects of

49 Note that ballot selfies, a different expressive form which reveals the identity of the voter, have been the subject of differing rules and court judgments in the US. The leading US case seems to be *Rideout v Gardner* (838 F; 3d 65 (1st Cir 2016)) in which the First Circuit held that a New Hampshire law prohibiting voters from sharing ballot selfies was unconstitutional under the First Amendment. The New Hampshire Code, which since 1911 had forbidden voters to show others their marked ballots, had been amended to extend the prohibition to 'include taking a digital image or photograph of his or her marked ballot and distributing or sharing the image via social media or by any other means'. The statute was considered overbroad as it restricted a form of speech regardless of where, when and how that imagery was publicised.

50 In *OOO Informatsionnoye* (n 47 above) § 88, the court observed, when assessing the quality of the Russian regulatory framework that 'online publications … tend to be accessible to a greater number of people and [are] viewed as a major source of information and ideas'.

51 See *Delfi* (n 40 above) § 110: 'The Court notes at the outset that user-generated expressive activity on the Internet provides an unprecedented platform for the exercise of freedom of expression. … However, alongside these benefits, certain dangers may also arise. Defamatory and other types of clearly unlawful speech, including hate speech and speech inciting violence, can be disseminated like never before, worldwide, in a matter of seconds, and sometimes remain persistently available online. These two conflicting realities lie at the heart of this case. … while the Court acknowledges that important benefits can be derived from the Internet in the exercise of freedom of expression, it is also mindful that the possibility of imposing liability for defamatory or other types of unlawful speech must, in principle, be retained, constituting an effective remedy for violations of personality rights.'

sweeping block measures. The breadth of the legal provision on which the interference was based was described as 'exceptional and unparalleled'. However, while a Chamber of the court recognised that 'any information technology can be subverted to carry out activities which are incompatible with the principles of a democratic society', it considered that:

> *all information technologies*, from the printing press to the internet, have been developed to store, retrieve and process information [and] ... *are content-neutral*. They are a means of storing and accessing content and cannot be equated with the content itself, whatever its legal status happens to be.[52]

It is worth pausing to reflect whether this assimilation of new information technologies with Gutenberg's fifteenth-century invention is really tenable. At the very least, there seems to be a tension between data protection cases under Article 8 – where it is the non-neutral impact of new technologies which is causing concern – and the presumption of content neutrality we find in this Article 10 case. As the world is fast but belatedly discovering, there appears to be nothing neutral about news curated and personalised by algorithms.

If one looks at one of the fault lines which divided the Strasbourg court 9:8 in the *Animal Defenders* case in 2013, we see the dissenters concentrating solely on the risk of political or electoral distortion coming from economic pressure being placed by wealthy individuals and groups directly on media organisations. However, would the focus nowadays not be also, if not more so, on the risk pinpointed by Lord Bingham in the House of Lords in that case. As always, he is worth citing at length:

> It must be assumed that, given time, the public will make a sound choice when, in the course of the democratic process, it has the right to choose. But it is highly desirable that the playing field of debate should be so far as practicable level. ... [This] is [not] achieved if well-endowed interests which are not political parties are able to use the power of the purse to give enhanced prominence to views which may be true or false, attractive to progressive minds or unattractive, beneficial or injurious. *The risk is that objects which are essentially political may come to be accepted by the public not because they are shown in public debate to be right but because, by dint of constant repetition, the public has been conditioned to accept them*. The rights of others which a restriction on the exercise of the right to free expression may properly be designed to protect must, in my judgment, include a right to be protected against the potential mischief of partial political advertising.[53]

52 *Engels v Russia*, no 619/16, 23 June 2020, §§ 39–40 (emphasis added).

53 Lord Bingham in *R (on the Application of Animal Defenders International) v Secretary of State for Culture, Media and Sport* (2008) UKHL 15, 28 (emphasis added).

This sort of 'one-sided information overload' was treated with some scepticism by the Strasbourg dissenters in *Animal Defenders* in 2013.[54] It is something about which, in 2022, we need to think more seriously.

5 The court's case law has recognised that in the period preceding an election, opinions and information 'of all kinds' must be permitted to circulate freely. In *Salov v Ukraine*, for example, decided in 2005, the court held that: 'Article 10 of the Convention as such does not prohibit discussion or dissemination of information received even if it is strongly suspected that this information might not be truthful.'[55]

Where does this inclusive, indeed permissive, approach in relation to political speech leave us in terms of disinformation and the speed with which the latter can spread in our digital world? The balance increasingly reflected in recent case law is between the interest of all participants in election campaigns in being able to use every means possible to influence voters and the right of candidates (and voters) to be protected from 'disinformation'.[56] The court has always emphasised that:

> ... all persons, including journalists, who exercise their freedom of expression undertake 'duties and responsibilities', the scope of which depends on their situation and the technical means they use ... .
>
> Hence, the safeguard afforded by Article 10 to journalists ... is subject to the proviso that they are acting in good faith and on an accurate factual basis and provide 'reliable and precise' information in accordance with the ethics of journalism ... .
>
> These considerations play a particularly important role nowadays, given the influence wielded by the media in contemporary society: not only do they inform, they can also suggest by the way in which they present the information how it is to be assessed.[57]

We are seeing more emphasis in recent cases on the duties and responsibilities expressly referred to in Article 10 § 2 and, particularly, on the duties of the press to report in a diligent manner and on the basis of facts.[58] In recent Polish cases the court has emphasised the

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54 See *Animal Defenders* (n 25 above) §§ 12 and 14 of the joint opinion of Judge Zeimele et al.

55 *Salov v Ukraine*, no 65518/01, judgment of 6 September 2005.

56 For definitions of 'disinformation' and what constitutes the now less accepted term 'fake news', see the preamble to the *EU Code of Practice on Disinformation*, 2018 and the report of the independent High Level Group on fake news and online disinformation commissioned by the EU Commission of the same year.

57 See *Stoll v Switzerland*, no 69698/01, 10 December 2007, §§ 102–106.

58 See, for example, *Staniszewski v Poland*, no 20422/15, judgment of 14 October 2021, § 52.

need to combat the dissemination of false information in relation to candidates in order to preserve the quality of public debate in the pre-electoral period. The factual basis for information should be precise and credible and journalists are required to act with due diligence.[59]

My colleague, Tim Eicke, the judge elected in respect of the UK, in a recent speech at Durham University, also pointed to another possibly relevant provision in the Strasbourg toolbox, namely Article 17.[60] That provision is aimed at ensuring that a person or a group of persons cannot attempt to rely on the rights enshrined in the Convention in relation to activities aimed at destroying those very rights'.[61] However, Article 17 is relied on only on an exceptional basis and in extreme cases. Judge Eicke points to cases like *Refah Partisi v Turkey*, where the court has recognised the very clear link between the Convention and democracy and stated that 'no one must be authorised to rely on the Convention's provisions in order to weaken or destroy the ideals and values of a democratic society'.[62] A role for Article 17 of the Convention, alone or in conjunction with Article 10 § 2 of the Convention, cannot be excluded in certain circumstances in future in electoral/democracy cases.

I return to the issue highlighted previously – the need for clear and accessible regulations which are suited to these 'conflicting realities' of our digital age. The challenge for lawmakers is not an easy one. Examining legislation from France and Italy which seeks to counteract disinformation campaigns, the United Nations (UN) Special Rapporteur has warned that:

> Vague prohibitions of disinformation [can] effectively empower government officials with the ability to determine the truthfulness or falsity of content in the public and political domain, in conflict with the requirements of necessity and proportionality … .[63]

Since the *Handyside* case in 1976, the court has defended one of the essential characteristics of free speech as being its ability to embrace 'not only … "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also … those that offend, shock or disturb the State or any sector of the population'.[64] The established case law thus poses limits on the range of options democratic states have available to them when dealing with expressions

59 See *Brzeziński v Poland*, no 47542/07, judgment of 25 July 2019, §§ 55–57.

60 T Eicke, 'Disinformation and democracy: the role of the ECHR' Irvine Lecture, Durham University Law School, 4 March 2022.

61 See *Perinçek v Switzerland* [GC], no 27510/ 08, § 113, 15 October 2015.

62 *Refah Partisi (The Welfare Party) and Others v Turkey*, no 41340/98, § 99, 13 February 2003.

63 UN Special Rapporteur (n 7 above) 9.

64 *Handyside* (n 31 above), Series A no 24.

which might be described as 'disinformation'.[65] One wonders whether the invasion of Ukraine and restrictive measures adopted at EU and national level might entail a leap in how we approach, on the one hand, the interrelated nature of democracy and expression and, on the other, what we may be willing to accept in terms of restrictions of certain forms of expression and content. On the first point, as the Strasbourg court retains residual jurisdiction in relation to Russia until September 2022 in relation to cases dealing with events which occurred before that date, I will not delve into the details of recently adopted Russian legislation criminalising what is treated as 'fake news' in relation to the invasion of Ukraine. However remarkable the new legislation may appear, those familiar with Strasbourg case law on Russian regulatory restrictions on speech and elections may not have been too surprised.[66]

On the second point, the terms of the EU regulation and decision from 1 March 2022 adopting restrictive measures in view of Russia's actions destabilising the situation in Ukraine are stark. The restrictive measures seek to counter hybrid threats, including disinformation. The Council does not mince its words:

> The Russian Federation has engaged in a systematic, international campaign of media manipulation and distortion of facts in order to enhance its strategy of destabilisation of its neighbouring countries of the Union and its Member States. In particular, propaganda has repeatedly and consistently targeted European political parties, especially during election periods ...[67]

The regulation and accompanying decision suspended the broadcasting activities of certain media outlets in the EU. In May 2022, the Strasbourg court found no violation of Article 10 following the revocation of a broadcasting licence in Moldova – the most serious form of interference – due to the media outlet's repeated refusal to abide by rules seeking to preserve political pluralism.[68] If nothing

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65 See also Eicke (n 60 above).

66 See, for example, *Teslenko and Others v Russia*, no 49588/12, judgment of 5 April 2022, where the court found a violation of Article 10 because, in the words of the concurring Judge Pavli: 'in the name of ensuring "the free expression of the opinion of the people in the choice of the legislature" or the head of State, the Russian Federation has effectively outlawed the public expression of electoral opinions and preferences by ordinary people in the crucial pre-election period'. One of the applicants had been prosecuted for unlawful pre-election campaigning in relation to a presidential election for placing the following statement in the rear window of his car: 'United Russia is a party of crooks and thieves.'

67 See Council Regulation (EU) 2022/350, of 1 March 2022, OJ L 65, 1, and previous discussion of restrictive measures against the head of the Russian Federal State news agency in *Kiselev v Council*, T-262/15, EU:T:2017:392.

68 *NIT srl and Others v Moldova* [GC], no 28470/12, judgment of 5 April 2022.

else, this recent judgment suggests that complete broadcasting bans will always be very difficult to defend but they cannot, in certain circumstances, be ruled out as indefensible. As the European political landscape changes, lawmakers and courts will be required to respond to those changes while safeguarding both electoral rights and rights of expression. The challenge will be to ensure that measures seeking to counter disinformation do not themselves have a prejudicial impact on human rights and democracy.

CONCLUSION

Given the events unfolding on our doorstep since the end of February, we are also reminded of Lord MacDermott's warning in 1972 to the effect that:

> The veneer of civilisation is thicker in some places than others but, by and large, it is still woefully thin.

Have we become complacent about democracy, about the value of our vote and the duties casting it entails, about the rule of law, about individual rights and the need in certain circumstances to sacrifice or curtail those rights in the general interest?

Democracy, as the Strasbourg Grand Chamber reiterated in July 2020:

> constitutes a fundamental element of the 'European public order'. The rights guaranteed under Article 3 of Protocol no. 1 are crucial to establishing and maintaining the foundations of an effective and meaningful democracy governed by the rule of law and are accordingly of prime importance in the Convention system.[69]

In addition, the court has repeatedly emphasised that 'one of the principal characteristics of democracy [is] the possibility it offers of resolving a country's problems through dialogue, without recourse to violence, even when they are irksome';[70] a point better understood in this community than almost any other in Europe.

It is important in my conclusion to restate the fundamental principle which has run through Strasbourg case law on Article 10 for decades – freedom of political expression is a core value in any democratic state and any restrictions upon it need to be justified carefully and fully. None of the questions (or the alarm bells) I have raised this evening should be read as calling the importance of that principle into question.

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69 See *Mugemangango* (n 17 above) § 67. See also the Preamble to the Convention according to which fundamental human rights and freedoms are best maintained in an effective political democracy.

70 *United Communist Party of Turkey and Others v Turkey*, no 19392/92, 30 January 1998, § 44, Reports of Judgments and Decisions 1998 I.

Nevertheless, the digital world is changing the nature and economy of political campaigns, of politics and even of democracy as we know or knew it. If political democracy is the main virtue whose preservation has bestowed on freedom of expression its great value, it must surely follow that the preservation of democracy itself must be of equal, if not greater, importance than freedom of expression.[71] I put it to you that our legislation and our case law, whether national or European, still have to adapt further to accommodate the reality of twenty-first-century elections, new forms of expressive activity and the digital world. Those who believe in democracy and the rule of law – the subject of Lord MacDermott's speech 50 years ago – need to pay more heed to democratic institutions being weakened, to hard-won human rights being undermined and to international law being ignored.

As promised, I leave you on a personal note. Though now the judge elected in respect of Ireland I am, as a result of law, life and marriage, European to my very core. I am also the granddaughter of Antrim folk, headmaster and headmistress at Glenshesk school in the Glens of Antrim. As those roots are a source of considerable pride, I accepted your invitation with the greatest personal pleasure, conscious also of the honour bestowed.

71 See P Cumper, 'Balancing freedom of political expression against equality of political opportunity: the courts and the UK's broadcasting ban on political advertising' (2009) Public Law 89–111.